

Private Gain – Public Loss

Mailbox companies, tax avoidance and human rights



Roos van Os, Katrin McGauran and Indra Römgens
July 2013

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The Centre for Research on Multinational Corporations (SOMO) is an independent, not for profit research and network organisation working on social, ecological and economic issues related to sustainable development. Since 1973, the organisation investigates multinational corporations and the consequences of their activities for people and the environment around the world.

Colophon

Private Gain – Public Loss
Mailbox Companies, Tax Avoidance and Human Rights
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Acronyms

\$	United States dollar
AML/CFT	Anti-money laundering / Combating the financing of terrorism
APA	Advance pricing agreement
ATR	Advance tax ruling
BEPS	Base erosion and profit shifting
BIT	Bilateral Investment Treaty
CBS	<i>Centraal Bureau voor de Statistiek</i> (Central Statistics Bureau of the Netherlands)
CBCR	Country-by-country reporting
CDD	Customer due diligence
CEDHA	Centre for Human Rights and Environment
CIT	Corporate income tax
CNODC	China National Oil and Gas Exploration and Development Corporation
CNPC	China National Petroleum Corporation
CPMT	Civilian Protection Monitoring Team
CTPD	Centre for Trade Policy and Development
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DNB	<i>De Nederlandsche Bank</i> (Dutch Central Bank)
DTT	Double taxation treaty
ECCJ	European Coalition for Corporate Justice
ESCR	Economic, Social and Cultural Rights
ETO	Extraterritorial obligations
EU	European Union
FATF	Financial Action Task Force
FDI	Foreign direct investment
FPIC	Free, prior and informed consent
FSB	Financial Stability Board
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GFI	Global Financial Integrity
GNPOC	Greater Nile Petroleum Operating Company
ICA	International Crimes Act
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
ILO	International Labour Organization
IP	Intellectual property
IPO	Initial public offering
ITE	Ivorian Energy Technicians
JURI	European Parliament Committee on Legal Affairs
LDC	Least developed country
MCM	Mopani Copper Mines Plc.
MNC	Multinational Corporation
MOGE	Myanmar Oil and Gas Enterprise
NCP	National Contact Point
NGO	Non-governmental organisation
ODA	Official Development Assistance

OECD	Organisation for Economic Co-operation and Development
ONGC	Oil and Natural Gas Corporation Limited
PCD	Policy coherence for development
PRC	People's Republic of China
PTFI	PT Freeport Indonesia
PWYP	Publish What You Pay
SFI	Special Financial Institution
SME	Small and medium-sized enterprises
SOMO	<i>Stichting Onderzoek Multinationale Ondernemingen</i> (Centre for Research on Multinational Corporations)
SPLM/A	Sudan People's Liberation Movement/Army
TJN	Tax Justice Network
TSYO	Ta'ang Students and Youth Organisation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNGP	United Nations Guiding Principles on Business and Human Rights
UNPFII	United Nations Permanent Forum on Indigenous Issues
WHT	Withholding tax
WTO	World Trade Organization
WWFT	<i>Wet ter voorkoming witwassen en financiering van terrorisme</i> (see: AML/CFT)

Executive summary

Introduction

The Dutch government recognises that Multinational Corporations (MNCs) impact on human rights in many different ways. This is especially the case for companies that are active in high-risk sectors such as the extractive industry. Oil, gas and mining corporations often operate in fragile states in which human rights are under pressure. Depletion of natural resources, pressure on local communities, security risks for workers and capital flight related to the industry are common problems. This research focuses on human rights, eight large extractive companies and the lack of adequate accountability mechanisms. All eight MNCs are incorporated in the Netherlands with a parent company or important subsidiary.¹ The research focuses on two important and inter-related human rights dimensions, namely, the direct human rights violations and the impact of tax avoidance in host states. Furthermore, this report analyses and highlights the responsibility of the Dutch state therein.

The first human rights issue concerns direct consequences of extractive industry operations on human rights and the current regime of impunity that prevails. The research finds that subsidiaries of Dutch extractive industry companies are responsible for or associated with serious human rights violations, ranging from environmental pollution damaging the health of local communities to militia violence, killings and displacements.

The second issue dealt with in this report is the link between tax avoidance and human rights; a relatively new issue where the relationship between the fiscal aspect of operational activities, namely revenue losses in host states, and human rights is more indirect than human rights violations directly generated by operational activities. Especially poor countries suffer through massive revenue losses by tax avoidance, and the extractive industry is shown to play a central role in these losses. Capital flight and tax avoidance, as the UN has recently recognised, seriously undermine the ability (and the duty) of governments to mobilise the necessary resources to realise citizens' economic and social human rights. The eight MNCs reviewed here are incorporated in the Netherlands because of the attractive Dutch fiscal climate and their company structures point to the use of tax avoidance techniques in countries of operation. The Netherlands plays a central role in international tax competition between jurisdictions. At the same time, Dutch fiscal policy that facilitates tax avoidance by large multinationals has a negative impact on human rights in countries where extractive industry operations take place.

In both cases, concerning negative human rights impacts as a result of operational activities and as a result of tax avoidance, the Dutch state is bound by international law to take regulatory action to stop companies incorporated in its jurisdiction to violate human rights (see Chapter 2). According to international agreements, the Dutch authorities are also required to provide access to justice for victims of these violations and tackle the prevailing impunity for MNCs.

Governance gap and state duties to protect and fulfill human rights

One of the reasons for businesses-related human rights violations to take place is the so-called governance gap. This regulatory gap results from corporations operating globally, whilst binding

¹ Barrick Gold, China National Petroleum Corporation (CNPC), Freeport-McMoran Copper & Gold, Glencore, Oil and Natural Gas Corporation Limited (ONGC), Oilinvest, Pluspetrol, Trafigura.

regulation is often only applicable at national level. The globalisation of business operations with complex and opaque business structures in recent decades was insufficiently accompanied by an effective domestic and international regulatory human rights framework. There is a growing recognition by civil society, academia and international institutions - such as the OECD², the IMF³ and the United Nations⁴ - that some degree of control over the extraterritorial impacts of activities of businesses is necessary. These should complement more effective and binding international regulation (see Chapter 2). While the implementation of extraterritorial jurisdiction is controversially debated, there are numerous uncontroversial and accepted measures states could take that would benefit the human rights conduct of domestically incorporated companies operating abroad. These measures should apply not only to the parent company of a globally operating business but self-evidently to all legal entities that are related with controversial operations through ownership or financing links.

Tax and human rights

Next to direct human rights violations generated by operational business activities, this report also discusses a research area that is currently developing, namely, the relation between tax (avoidance) and human rights. To be able to realise economic and social human rights, states obviously need sufficient financial and administrative resources. The majority of countries home to extractive industry operations are characterised by poverty and an unequal distribution of wealth. Furthermore, research shows that progressive tax systems contribute to good administration, democratic development and poverty reduction, whilst large-scale tax avoidance by MNCs undermines these goals.

The responsibility for this tax avoidance lies with companies themselves. Aggressive tax planning techniques are deliberately applied and violate not only the spirit of international and domestic tax laws but also principles of economic justice and solidarity. Companies exploit legal loopholes by incorporating subsidiaries in different jurisdictions to lower their tax bill. They shift profits from operating subsidiaries - making them appear to make losses - resulting in no or very low corporate income tax being paid in those countries (see the case of Zambia in Chapter 3).

But responsibility also lies with the countries that facilitate tax avoidance by having harmful tax regimes, such as the Netherlands. Thus, states that facilitate international tax avoidance hinder other states (where the tax is being avoided) to use their maximum available resources to realise the human rights of their citizens.

The role of the Netherlands

The Netherlands plays a crucial role in international tax avoidance. The country hosts some 23.000 mailbox companies, which are companies managed by trust offices that provide substance to foreign companies wishing to benefit from incorporation in the Netherlands (see Chapter 3.6). Around 12.000 of these companies are s-called Special Financial Institutions that fulfil conduit financing functions, channelling royalty, loans and interest payments or dividends between subsidiaries of a group. By way of this sector, the Netherlands is the biggest foreign investor worldwide in absolute terms: in 2009, for instance, the total of incoming investment was as much as 3.000 billion US dollars, while outgoing investment amounted to 3.700 billion US dollars. This is an equivalent of 377% and 465% of Dutch GNP, respectively. In comparison, the United States foreign investment flows amounted to 16% and 25% of the country's GNP in 2009. Thus, the ratio of foreign direct investment to total GNP in the

² Report on implementing the OECD Anti-Bribery Convention in the Netherlands, OECD, December 2012, p. 19.

³ Kingdom of the Netherlands – Netherlands: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, IMF Country Report No. 11/92, (Washington, DC: International Monetary Fund, April 2011).

⁴ *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. UN doc. A/HRC/17/31, available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

Netherlands is 20 times larger than in the US. Much of this investment originates from within the extractive sector; indeed, most of the world's extractive industry companies are based in the country. After the US state of Delaware, the Netherlands is the second favourite home of incorporation of subsidiaries for ten of the largest corporations in this sector.

The large number of incorporations in the Netherlands is the result of the country's active pursuit of a business-friendly fiscal and investment policy. The Netherlands has long been recognised by investors and tax and investment consultancy firms as a legitimate home for tax treaty shopping.⁵ The country has faced criticism by the OECD⁶, the European Union⁷ and the United States⁸ for a fiscal climate that allows for an erosion of other countries' tax bases through harmful tax competition and conduit structures. This report argues that the active and successful enticement for foreign business incorporations and related investment flows by the Dutch government carries with it the responsibility to monitor the impact of these companies abroad.

The role of the Netherlands in the regulation of businesses operating abroad is two-fold. On the one hand, as a home state for internationally operating businesses the country should regulate the human rights policies and conduct of these businesses. This can take the form of financial and non-financial reporting but also by guaranteeing access to justice for victims. The current practice amounts to the exact opposite: not only is there no oversight worth mentioning, the Dutch state goes to great pains to provide arguments that present effective and binding regulation as unfeasible or undesirable. The Netherlands should make sure that companies do not avoid tax with the result that other states are unable or less able to realise their citizens' human rights.

Business impact on human rights

Eight multinational extractive companies with either their parent company or important subsidiaries incorporated in the Netherlands were reviewed for this report. First, it was researched whether these companies were involved in human rights controversies in countries of operation and whether their Dutch subsidiaries had included meaningful corporate social responsibility provisions in their annual reports. Secondly, the Dutch company structure was analysed with regard to its substance in the Netherlands and the potential Dutch tax and investment benefits resulting from this incorporation. The structures of Oil and Natural Gas Corporation Limited (ONGC), Barrick Gold, Trafigura and Glencore illustrate the (financial) holding structures commonly used by MNCs in the Netherlands to benefit from the country's tax and investment climate (Chapter 3).

⁵ "Treaty shopping" generally refers to a situation where a person, who is resident in one country (say the "home" country) and who earns income or capital gains from another country (say the "source" country), is able to benefit from a tax treaty between the source country and yet another country (say the "third" country). This situation often arises where a person is resident in the home country but the home country does not have a tax treaty with the source country. See http://intltax.typepad.com/intltax_blog/2008/05/treaty-shopping.html

⁶ The OECD ranked the Netherlands as one of the top five industrialised countries that supported harmful tax competition. It identified 9 potentially harmful tax practices in Dutch law, excluding holding company regimes and similar provisions: because of the "complexities raised by such regimes, including their possible interaction with tax treaties", the Forum decided further research was needed to assess the effect of holding company structures (OECD 2000).

⁷ The EU Code of Conduct Group on Business Taxation (Primarolo Group) was designed to detect measures constituting harmful tax competition, i.e. measures which "unduly affect the location of business activity in the Community by being targeted merely at non-residents and by providing them with a more favourable tax treatment than that which is generally available in the Member State". In a 1999 report the Group identified 66 tax measures with harmful features, of which 40 in EU Member States, 15 in Dutch Law and 7 in the Netherlands Antilles.

⁸ US Commerce data show that US businesses kept \$118bn of income in Dutch holding companies between 2006 and 2009 ('Tax wars: the accidental billion-dollar break', Financial Times, 27.9.2011, <http://www.ft.com/cms/s/0/69703dfe-e82e-11e0-9fc7-00144feab49a.html#axzz1fTOPnukW>) and U.S. President Barack Obama famously named the Netherlands a tax haven in May 2009 ('Netherlands surprised at Obama tax haven slur', NRC.nl, 5.5.2009, <http://vorige.nrc.nl/international/article2232958.ece>)

Next to these financial constructions, five cases (China National Petroleum Corporation (CNPC), Oilinvest, Freeport-McMoran Copper & Gold, Barrick Gold and Pluspetrol) provide insight into common direct human rights violations occurring in the context of operational extractive activities. The link between the operations of this sector abroad and the Netherlands is discussed. CNPC and Oilinvest illustrate the politically volatile situations in which extractive companies operate in conflict-affected or repressive states (Chapter 4). Two companies, Trafigura and ONGC, are outlined in more detail as separate case studies to provide deeper insight into human rights issues in the extractive industry. Finally, an analysis of Dutch policy and legislation pertaining to business and human rights highlight weaknesses of the current system, such as lack of reporting obligations of very limited and expensive access to company information. The report provides specific examples of the failure of the Dutch state and lack of political will to provide victims of business-related human rights abuses with access to justice.

In the context of tax and human rights, the company structures identified point to fiscal planning and therefore tax avoidance:

- ❑ all the companies in this report use the Netherlands for intermediate holding activities using conduit entities that have no material substance (such as sales, workforce or fixed assets) in the Netherlands;
- ❑ all companies researched invest in subsidiaries abroad in which material activities take place or finance these activities, which allows for returns on these investments or interest income to remain untaxed or taxed at a very low rate;
- ❑ the Dutch holdings all have links with tax haven subsidiaries, either through financing activities or by being directly owned by subsidiaries located in tax havens.

This structure allows for profit shifting to low-tax jurisdictions, indicating that the eight companies researched use the Netherlands for tax planning purposes. By actively facilitating and attracting these companies, the Dutch state contributes to the loss of revenue that is economically destructive to poor countries and undermines obligations of these states in protecting and fulfilling human rights.

In the context of human rights impacts resulting from operation activities, all researched MNCs have been associated with human rights controversies in countries of operation, ranging from Peru and Argentina to Indonesia and Côte d'Ivoire. To name a few examples:

- ❑ CNPC develops a gas pipeline in Burma, a country known for its human rights violations, whilst no human rights reporting takes place on this project.
- ❑ Freeport operates in a remote region in Indonesia characterised by conflict. The company harbours close relationships with military, police and other security forces that are regularly accused of human rights violations.
- ❑ Pluspetrol's operations in Peru illustrate how the livelihoods and health of local communities are negatively affected by a company's oil operations: after decennia of oil spills exacerbated by corroding pipelines and lack of clean-up operations, the region has been declared an environmental state of emergency by the Peruvian government in March 2013 due to high levels of barium, lead, chrome and petroleum-related compounds.
- ❑ The case of Oilinvest, the oil and gas company of the late Libyan leader Muammar Gaddafi, is a striking example of how multinationals encounter no scrutiny for compatibility with foreign policy objectives or human rights considerations before or after registering in the Netherlands for tax purposes.

An analysis of the annual reports deposited at the Dutch Chamber of Commerce shows that a human rights policy is absent in most cases and when human rights commitments are made, they are by and large not specifically defined and non-enforceable, because based on voluntary commitment.

High human rights risks, yet no effective regulatory framework

All these cases show that the Dutch government takes enormous human rights risks by actively attracting global corporations to incorporate in its jurisdiction. This is because the Netherlands offers companies fiscal benefits without linking these benefits to any form of regulation or responsibilities. The Netherlands thereby contributes to a culture of impunity. As a home state that offers many advantages to multinational corporations, the Netherlands has a responsibility to address human rights violations. It should do this by taking appropriate measures to solve this structural problem and provide access to justice for its victims. In the words of Human Rights Watch:

“At a minimum, governments should take it upon themselves to proactively monitor the conduct of their companies when they work in other countries and to investigate credible allegations of human rights abuse linked to those operations. Doing so would still leave hard questions on the table - like how governments should articulate and enforce extraterritorial human rights obligations for companies. But it would at least end an indefensible status quo where governments refuse to find out whether their corporate citizens are credibly implicated in serious human rights abuses abroad.”⁹

This research shows that the Dutch state facilitates tax avoidance whilst neglecting the potential negative impact this avoidance has on human rights. The Netherlands also fails to effectively regulate multinational companies that contribute to human rights violations abroad. For example:

- ❑ Supervision of compliance with key CSR standards is absent.
- ❑ Lack of transparency surrounding the operations of MNCs is hardly addressed. This creates ample scope to manipulate ownership and financial structures and thereby avoid accountability and escape states' regulatory efforts.
- ❑ When human rights abuses take place in a host state several obstacles hinder effective access to justice to judicial and non-judicial mechanisms.

Conclusion

The report concludes that the Netherlands, despite being bound by international human rights obligations, fails or shows insufficient political will to regulate the human rights impact of MNCs incorporated in its territory. There is urgency for the government of the Netherlands to proactively introduce (legal) measures to prevent and reduce the negative footprint of these companies abroad, and provide remedy to victims of corporate-related abuses. Whilst states eschew regulation of businesses with regard to their human rights conduct, they often grant investors extensive extraterritorial tax and investment rights and entitlements. It is unacceptable that corporations profit from far-reaching privileges whilst these being balanced with responsibilities.

The active fiscal policy of the Dutch state should go hand in hand with the effective protection and regulation of human rights. The report concludes with a number of concrete recommendations to the Dutch government. These include:

- ❑ Conduct a human rights impact assessment of the current fiscal and investment policies in countries where extractive industry operations of subsidiaries of Dutch incorporated businesses take place.
- ❑ Policies and laws that allows companies to avoid tax should be abolished, for instance by introducing stricter substance rules and the inclusion of (more effective) anti-abuse clauses and human rights in tax and investment treaties.

⁹ See Human Rights Watch, 'Without Rules: A Failed Approach to Corporate Accountability' in World Report 2013, available at <http://www.hrw.org/world-report/2013/essays/112459?page=3>.

- Take a pro-active stance and transparently and publicly communicate Dutch positions in internationally initiatives of the G20, the OECD and the EU to tackle tax avoidance and evasion.
- Introduce and make explicit human rights obligations for internationally operating businesses incorporated in the Netherlands. At a minimum, this should include reporting obligations with regard to human rights conduct abroad, full disclosure of corporate structures, shareholders and beneficial owners of all subsidiaries. The Netherlands should also implement country-by-country-reporting, starting with extractive industry companies.
- Improve access to judicial and non-judicial remedies for victims of business-related human rights abuses, amongst others, by providing financial means to victims to take legal action, by improving access to information and by defining the accountability of mailbox companies of businesses incorporated in the Netherlands. Further, the mandate of the National Contact Point of the OECD should be extended to allow it to initiate independent investigations and monitor business activities.

1 Introduction

“There are few if any internationally recognized rights business cannot impact – or be perceived to impact – in some manner”.

Former UN Special Representative on Business and Human Rights¹⁰

It is widely recognised that the business activities of large corporations can have a negative impact on human rights. Their operations can lead to environmental pollution and labour rights violations, damage local economic development, deplete natural and financial resources, severely affect the health and safety of local populations and threaten livelihoods of local and indigenous communities. This is especially so in high-risk sectors, such as the extractive industry, whose operations are by nature environmentally polluting, often take place in weak states and repressive regimes and can involve the confiscation of land from local communities without proper compensation or consultation.

This report examines the human rights record of eight extractive industry companies incorporated in the Netherlands and discusses the Dutch state’s responsibility regarding the human rights of the people affected by these business enterprises. A discussion of the role of Dutch mailbox companies in the Netherlands in human rights violations abroad necessarily raises the question of the potential tax avoidance in countries of operation that is likely to result from using the Netherlands as a conduit country for investments. This report therefore also examines the possible motivation of extractive industry companies to incorporate themselves in the Netherlands and identifies important areas of further research with regard to the link between tax avoidance and human rights.

1.1 Mailbox companies: from financial stability to human rights

This report is published at a time when mailbox companies are being hotly debated in international and national media in the context of tax evasion and avoidance by large corporations and wealthy individuals. The main context in which Dutch mailbox companies have recently been scrutinised is the negative impact of the Dutch tax system on other countries’ tax revenues, because channelling their investment and financing operations through Dutch conduit entities allows MNCs to avoid paying taxes in their countries of operation. Mailbox companies are therefore legal constructs rather than materially operating businesses that are used for tax avoidance purposes and as such are always linked through financing activities or ownership relations to tax havens and secrecy jurisdictions that have lax financial regulation, low or no corporate income tax and bank secrecy, thereby obscuring ownership relations. They channel vast amounts of money from the countries in which they operate to the ultimate beneficial owners, which often remain unknown because of inadequate transparency regulations.

The accountability gap that exists with regard to the use of mailbox companies by large corporations is relevant to a number of important policy areas. Conduit entities in tax havens have recently been debated by media and international institutions in the context of:

- international tax avoidance and its negative impact on public resources and development, especially in developing countries (EU,¹¹ World Bank¹²)

¹⁰ John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, UN Doc. A/HRC/8/5, paragraph 52, April 2008, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

- money laundering, corruption and terrorism (OECD,¹³ IMF¹⁴), and
- global financial stability (FSB¹⁵).

In each of these policy areas, the Netherlands has been criticised by major international institutions concerned with governance and financial stability.¹⁶

This report brings an additional perspective to the current debate and argues that the Dutch investment climate and resulting tax planning through the use of mailbox companies raises a number of regulatory questions with regard to the human rights impact of these companies. The link between mailbox companies and human rights raises two distinct but related issues.

Firstly, there is the issue of human rights violations directly resulting from operational activities of subsidiaries of mailbox companies. Is there a link between mailbox companies and related subsidiaries that are accused of human rights violations? If financing or ownership relations exists between mailbox companies and controversial subsidiaries, are they adequately regulated in the sense that they have to adhere to financial and non-financial reporting of their activities abroad or offer access to justice to victims of human rights violations generated by the activities of the subsidiaries they finance or own?

Secondly, any research on the link between mailbox companies and human rights necessarily raises the question of revenue losses in poor countries, the right to development and a state's duty to "mobilise maximum resources"¹⁷ to realise human rights. Although it is difficult to estimate precisely how much revenue is lost through tax avoidance, a recent study commissioned by the United Nations Development Programme has estimated that illicit flows from Least Developed Countries (LDCs), largely generated by tax evasion, amounted on average to 4.8% of their GDP.¹⁸

¹¹ European Commission, Commission recommendation of 6.12.2012 on aggressive tax planning, December 2012, available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/c_2012_8806_en.pdf.

¹² P. Reuter, Draining Development? Controlling Flows of Illicit Funds from Developing Countries, 2012, World Bank available at <https://openknowledge.worldbank.org/handle/10986/2242>

¹³ OECD, Phase 3 report on implementing the OECD anti-bribery convention in the Netherlands, 2012, available at <http://www.oecd.org/daf/anti-bribery/Netherlandsphase3reportEN.pdf>

¹⁴ IMF, Kingdom of the Netherlands – Netherlands: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, April 2012, available at <http://www.imf.org/external/pubs/ft/scr/2011/cr1192.pdf>

¹⁵ Financial Stability Board, Resolution of Systemically Important, Financial Institutions, Progress Report, November 2012, available at http://www.financialstabilityboard.org/publications/r_121031aa.pdf.

¹⁶ In 2011, for instance, the IMF found that "substantial proceeds of crime are generated in the country, mostly stemming from fraud (including tax fraud) and illicit narcotics. Presently, the proceeds of domestic crime are estimated at approximately \$14 billion, or 1.8 percent of the GDP. In addition, work done by academics suggests a significant amount of criminal proceeds originating from foreign countries flows into the Netherlands for laundering". See IMF, Kingdom of the Netherlands – Netherlands: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, April 2012, page 8, available at <http://www.imf.org/external/pubs/ft/scr/2011/cr1192.pdf>

¹⁷ Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." The Maastricht Guidelines on violations of economic, social and cultural rights clarify that a state is in violation of the Covenant if it fails to allocate the maximum of its available resources to realizing human rights. For an analysis of what the concept of maximum available resources means and how states can apply it in practice, see Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani, Maximum Available Resources & Human Rights: Analytical Report 2011, available at http://www.cwgl.rutgers.edu/component/docman/doc_view/362-maximumavailableresourcespdf, (accessed 20 February 2012).

¹⁸ Figures over the period 1990–2008. This means, that for every US dollar received in ODA, on average, 60 cents exit these countries in illicit flows. See United Nations Human Rights Council, 'The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights', 21 February 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/113/83/PDF/G1311383.pdf?OpenElement>. The OECD recently confirmed that tax avoidance and evasion leads to "massive revenue losses" (OECD, 'Addressing Base Erosion & Profit Shifting', 2013, <http://www.oecd.org/tax/beps.htm>).

Corporations evade and avoid taxes with the help of the jurisdictions they use for fiscal planning. Whilst a number of international human rights tools bear the potential to promote the mobilisation of maximum available resources to protect human rights, domestic fiscal policies and tax treaties have the potential to undermine these efforts.¹⁹ Following the principles of international cooperation in the human rights field but also of policy coherence for development, these jurisdictions are therefore responsible for the negative impact of the policies they put in place to actively attract mailbox companies.

1.2 Accountability gap and extraterritorial regulation

One of the reasons that businesses-related human rights violations continue to take place is the global accountability gap. This gap is generated by the fact that the globalisation of business operations is not accompanied by an effective international regulatory framework that increases the human rights obligations for business and home states. The current territorial model of regulating corporate human rights abuses is inadequate to deal effectively with violations of human rights by companies that operate at a transnational level. MNCs are not, legally speaking, single enterprises but conglomerations of separate legal entities, incorporated in many different states and linked together by relationships of ownership and control.²⁰

This is why there is a growing recognition - by civil society, academia and international institutions such as the OECD,²¹ the IMF²² and the United Nations²³ - that some degree of control over the extraterritorial impacts of activities of businesses is necessary. Several UN Treaty Bodies, for instance, encourage home states to take steps to prevent abuse abroad by businesses incorporated within their jurisdiction.²⁴ Domestic laws or treaties that have extraterritorial impact are particularly relevant in jurisdictions that host a large number of multinational corporations and their subsidiaries, especially if they are active in high risk sectors such as the extractive industry. The scale and nature of these incorporations also warrants extraterritorial regulation to apply not only to parent companies (therefore to home states), but also to companies that have direct links with controversial operations (and therefore states other than home of host states).

The use of extraterritorial jurisdiction by states to regulate companies is often controversial. Critics argue extraterritorial regulation violates well-established principles of international law, such as national sovereignty. Indeed, extraterritorial jurisdiction can create tensions between states, but in fact, the use of direct extraterritorial jurisdiction in relation to companies is already fairly commonplace in a

¹⁹ The UN Guiding Principles on Extreme Poverty and Human Rights, for instance, have recently laid down that, "States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfilment of human rights." See Info Steuergerechtigkeit, Taxes and human rights, Policy brief of the Tax Justice Network Germany, Issue no 8, February 2013, available at <http://www.globalpolicy.org/images/pdfs/GPFEurope/infosteuegerechtigkeit008e.pdf>

²⁰ P. Muchlinski, *Multinational Enterprises and the Law*, (Oxford: Oxford University Press, 2007, second edition), pp. 5-8.

²¹ Report on implementing the OECD Anti-Bribery Convention in the Netherlands, OECD, December 2012, p. 19.

²² Kingdom of the Netherlands – Netherlands: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, IMF Country Report No. 11/92, (Washington, DC: International Monetary Fund, April 2011).

²³ UN Guiding Principles for Business and Human Rights.

²⁴ UN Committee On The Elimination Of Racial Discrimination, Consideration Of Reports Submitted By States Parties Under Article 9 Of The Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, United States Of America, UN doc CERD/C/USA/CO/6, 2008, para. 30, available at <http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf> UN Committee On Economic, Social And Cultural Rights General Comment No. 19. The right to social security, (art. 9), UN doc E/C.12/GC/19, 2007, para. 54, available at <http://www.unhcr.org/refworld/docid/47b17b5b39c.html>

variety of policy areas, ranging from anti-corruption and criminal law to civil cases generally and the environment.²⁵

1.3 Why focus on Dutch extractive industry companies?

Extractive industry companies often operate in poorly governed environments characterised by human rights violations. They consequently run greater risks of becoming involved in human rights violations, warranting strict observance of robust human rights policies. Most of the world's largest extractive companies maintain financial holding companies in the Netherlands that have ownership of, or control relationships with, operations in these high-risk environments. There is thus a responsibility of, and huge potential in, the Netherlands for regulating the human rights conduct of extractive industry companies and significantly contribute to closing the current accountability gap regarding human rights violations generated by the operational activities of these companies abroad.

In addition, it is widely known that there are fiscal reasons for using the Netherlands to channel investments from home to host states.²⁶ Incorporating registered head offices or chief financial holdings in the Netherlands enables companies to enjoy major tax benefits and investment protection enshrined in Dutch bilateral treaties and domestic laws. However, these benefits are currently not balanced with a corresponding human rights obligations for businesses or accountability mechanisms provided to potential victims by home states. Currently, the Netherlands hosts roughly 23 500 of these "conduit" entities.²⁷ Given that a large share of FDI attributable to these entities originates from within the extractive industry, the impact of these incorporations on the right to development and state's duty to "mobilise maximum resources"²⁸ to realise human rights should be scrutinised.

1.4 Methodology and terminology

This report looks at links that exist between Dutch mailbox companies and human rights violations of related subsidiaries abroad. This research topic touches on a number of research and policy areas, ranging from Dutch fiscal policies to hard and soft law extraterritorial regulation of business operations. Firstly, a literature review was conducted with regard to human rights controversies of eight selected company cases. Secondly, links and ownership relations that exist between Dutch mailbox companies and operating subsidiaries accused of human rights violations in countries of operation were analysed. Company structures were analysed to look for indications of possible tax planning motivations for incorporation in the Netherlands (such as tax haven presence and treaty protection for relevant operations). No in-depth analysis was made at the financial transactional level with regard to tax

²⁵ For an in-depth discussion, see Jennifer A. Zerk, Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas, Corporate Social Responsibility Initiative Working Paper 2010, No. 59, p.12, available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

²⁶ "Netherlands leads the field in direct investment", Dutch Central Bank, 9 August 2011, available at <http://www.dnb.nl/en/news/news-and-archive/dnbulletin-2011/dnb256487.jsp>

²⁷ T. Mulder, "Brievenbusfirma onder vuur in Kamer", Het Financieele Dagblad, 24 January 2013.

²⁸ Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." The Maastricht Guidelines on violations of economic, social and cultural rights clarify that a state is in violation of the Covenant if it fails to allocate the maximum of its available resources to realizing human rights. For an analysis of what the concept of maximum available resources means and how states can apply it in practice, see Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani, Maximum Available Resources & Human Rights: Analytical Report 2011, available at http://www.cwgl.rutgers.edu/component/docman/doc_view/362-maximumavailableresourcespdf, (accessed 20 February 2012).

avoidance. Finally, the report identifies existing accountability gaps regarding preventive and remedial measures and formulates specific (policy) recommendations to close these gaps.

1.4.1 Methodology

Eight extractive industry companies were selected on the basis of various criteria, namely, geographical spread regarding home states and countries of operation, a broad selection of human rights issues, different links with subsidiaries related to human rights controversies and a selection of junior and established extractive companies. These criteria aim to ensure a representative sample of company cases with regard to the different types of incorporations of extractive companies in the Netherlands and the possible links that might exist in the industry with operating subsidiaries linked to human rights controversies. The human rights controversies related to operational activities identified in this report are based on research studies and reports of non-governmental organisations (NGOs), investigative journalists and scientists who conducted field and desk research into allegations by local communities and civil society organisations. Where human rights violations were identified, these are linked throughout the report to soft and hard law in the international framework for business and human rights principles.

Two companies, Trafigura and Oil and Natural Gas Corporation Limited (ONGC), are outlined in more detail as separate case studies in this report. Five cases (Oilinvest, Freeport-McMoran Copper & Gold, Barrick Gold, and Pluspetrol) are presented in Chapter 4 in the context of common human rights concerns in the extractive sector, and as an illustration of the link between operations of this sector abroad and the Netherlands. This chapter also includes the two cases of China National Petroleum Corporation (CNPC) and Oilinvest that illustrate the politically volatile situations in which extractive companies operate in conflict-affected or repressive states. The company structures of Trafigura, Glencore, ONGC and Barrick Gold are also used as cases in Chapter 3 to illustrate the (financial) holding structures commonly used by MNCs in the Netherlands to benefit from the country's tax and investment climate.

The ownership relations, economic role and corporate social responsibility (CSR) reporting practices of the relevant Dutch subsidiaries were analysed on the basis of annual company accounts (financial and narrative) retrieved from the Dutch Chamber of Commerce and business databases. Furthermore, various civil society, media, academic, governmental and supranational online sources were accessed to analyse the Dutch investment climate, the human rights policy and performance of mailbox companies, and the international human rights framework. All sources are cited in footnotes in the text.

All companies reviewed in this report were informed about the research in advance and given a standard period to review a draft of the report and provide comments and corrections of any factual errors in the draft version prior to publication. Freeport, Glencore, Pluspetrol, and Trafigura replied with additional information and reactions to the report. All written information provided by the companies is published on SOMO's website.²⁹ Where relevant, company responses have been included in the text.

1.4.2 Terminology

This report often refers to technical and umbrella definitions that require some explanation or further elaboration.

²⁹ See <http://somo.nl/>.

Mailbox companies, holdings and conduit entities

The Netherlands host roughly 23 500 conduit entities (commonly known as mailbox companies) that fulfil important financing and tax planning roles in corporate groups. This report uses the terms mailbox companies or conduit entities as umbrella terms for legal entities incorporated in the Netherlands that have no material operations in the country (no staff, sales or physical assets), fulfil financing and/or holding operations for the corporate group and are typically managed by trust offices. A holding company does not have any operational activities but rather owns assets. These can be shares of stock in other corporations, limited partnerships, private equity or hedge funds, publicly traded stocks, bonds, patents, trademarks, or anything else that has value. The holding companies reviewed in this report are all but one financial holding companies that finance other group entities through loans and shares. ONGC's Dutch conduit entity is classified as a service entity by the Dutch Chamber of Commerce. Chapter 3 describes in more detail the different types of conduit entities that can be used to route investments or payments through the Netherlands.

Conduit entities might also be managed by a multinational itself, for instance if the company is large and has other material activities and therefore a physical presence in the Netherlands (as is the case with Glencore). The Dutch Central Bank, Chamber of Commerce, Central Statistics Bureau and the Ministry of Finance use varying classifications for mailbox companies.³⁰

Tax havens

There is no internationally agreed definition of tax havens. In this report, the term secrecy jurisdiction refers to states that have bank secrecy, allow for the creation of entities whose ownership, functioning and/or purpose is kept secret, or put up barriers to co-operation and information exchange between tax and other authorities to identify tax payments and other money transfers.³¹ A tax haven in this report refers to any jurisdiction that allows companies or individuals to avoid or evade tax, either with low or no corporate tax rates for conduit structures that allow international payments to remain untaxed, or taxed at a very low level.³²

Tax evasion and tax avoidance

A distinction is often made in tax literature between (legal) tax avoidance and (illegal) tax evasion. The former is the use of loopholes in the international tax system to reduce the amount of tax payable whilst not technically violating the letter of the law. The latter refers to tax planning methods that violate laws by falsely declaring less income, profits or gains than actually earned or overstating deductions. In practice, however, the line between the two is not always clear: practices are only found to be illegal when identified as fraudulent by tax authorities, which in turn require sufficient resources to identify and prosecute aggressive tax planning methods. Furthermore, tax planning methods that significantly reduce tax payments are in violation of the spirit of the law, which courts may find unlawful if cases are brought forward but remain legal if unchallenged.

For the purpose of this report, the distinction between tax avoidance and evasion is not relevant as the focus lies on the negative impact of both activities (i.e. not paying tax on profits as *intended* according to domestic tax laws, that is in contravention to the *spirit* of the law) on human rights and development.

³⁰ F.H.H. Weekers, 'Kamerbrief betreft Uitvoering motie leden Braakhuis en Groot', Doc. IFZ/2012/85, 25 June 2012, available at <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2012/06/25/kamerbrief-inzake-uitvoering-substance-motie-braakhuis-en-groot/kamerbrief-inzake-uitvoering-substance-motie-braakhuis-en-groot.pdf> (accessed 4 January 2013). SFIs are defined as: "Netherlands-based companies or institutions whose shares are held directly or indirectly by non-residents, which specialize in raising funds outside the Netherlands and on-lending or investing them outside the Netherlands. The funds raised by these institutions are on-lent or invested almost entirely within the group of which they form part. These institutions [...] called mailbox companies, are based in the Netherlands partly for fiscal reasons, enjoying tax advantages either in the Netherlands, or in the country where the parent company is established."

³¹ See website: <http://www.financialsecrecyindex.com/index.html#secrecy>

³² See SOMO, The Netherlands: a Tax Haven?, 2006, available at http://somo.nl/publications-en/Publication_1397

Tax avoidance is therefore used throughout this report, but these practices could also entail tax evasion if tested in court.

Home and host state

Much of the discussion about extraterritorial regulation of the human rights performance of multinational enterprises focuses on the role of the home state (where the parent company of a multinational group is incorporated or managed). Given the complexity and variety of multinational organisation structures, the home state is not always easy to identify. In some enterprises – e.g. those with devolved management structures or those linked by contractual rather than equity relationships – it may be possible to identify any number of operational subgroups, each with its own “parent.”

The UN Guiding Principles and the role of home states

The United Nations Guiding Principles on Business and Human Rights do not attempt to define what is meant by home state, nor do they seek to provide any guidance on the difficult issue of what is meant by a “business enterprise”, and how the limits of that enterprise (and hence the limit of home state responsibilities) are to be ascertained. These issues are left to individual states to resolve. Nevertheless, the wording of the Guiding Principles implies that each state which acts as a “base” for a business enterprise – no matter how big or small, and whether a single economic unit in its own right or whether part of a wider enterprise – does indeed have a role to play in relation to the extraterritorial human rights impacts of that enterprise’s activities. In this respect, all states should adopt preventative as well as remedial measures.

In this report, we use the term home state to refer to a state in which a legal entity that invests in another country is incorporated. The definition of home state here does not claim to identify legal culpability, liability or lines of management and control within the eight extractive companies used as case studies in this report. Rather, it identifies the direction of investment flows and related advantages attached to incorporating in conduit havens such as the Netherlands.

1.4.3 Limitations and follow-up research

This report links tax avoidance and human rights by indicating the potential revenue losses poor countries incur as a result of tax avoidance. No in-depth research was conducted, however, with regard to country-specific impacts that these foregone revenues have on the potential for host states to mobilise maximum available resources to protect human rights. This warrants country-specific analyses linking fiscal policies with human rights, which are only starting to be generated and to which reference is made where they exist. The link between tax avoidance and the state’s duty to mobilise maximum available resources to protect human rights is therefore an area that warrants further research.

Furthermore, the research for this report did not involve the identification of specific financial transactions amounting to tax avoidance. This is because publicly available financial data is usually insufficient to determine with certainty whether a corporation is avoiding taxes, and if so, how intragroup transactions are structured precisely to achieve this effect. Holding and financing structures of a multinational group are very complex and research to assess the taxation consequences of these structures would be very expensive, and often lead to a dead-end because of lack of transparency. However, because tax planning techniques require setting up legal entities in conduit or tax haven jurisdictions, certain elements identified in company structures and their financing activities can suggest that a company is avoiding taxes in the countries in which it operates. The mapping of Dutch holding companies in the Netherlands with a link to subsidiaries connected to human rights controversies was therefore extended to identify possible links with tax havens, and analysed against existing national laws and treaties that might provide companies with tax advantages. Further

research, however, would be required to identify with certainty the existence of tax avoidance and possible evasion and the resulting revenue loss for developing countries.

Finally, the report does not claim to identify legal liability of Dutch mailbox companies with regard to human rights violations in their ownership or financing chain. Extraterritorial regulation is an evolving field where liability and precedents are created in courts and by the testing of soft law instruments. It is therefore desirable that extraterritorial regulation is not only progressively interpreted by governments but also claimed by civil society through test cases.

1.5 Structure

This report is structured as follows:

The present chapter (**chapter 1**) provides the motivation, context and research outline of the report. The report provides a human rights angle to the current debate on (Dutch) mailbox companies and identifies accountability gaps regarding the conduct of multinational corporations incorporated in the Netherlands. To this aim, the chapter outlines some research questions pertaining to the large number of extractive industry companies and their assets in the Netherlands and the potential for human rights violations in the ownership and financing chain of these companies. Questions are raised with regard to the regulatory consequences this context should have in the Netherlands with regard to human rights due diligence requirements and business regulation through domestic and treaty measures with extraterritorial impact.

Chapter 2 discusses the international accountability gap that exists regarding the negative human rights impact of globally operating businesses and potential measures that states can introduce to close these gaps. As this report posits that fiscal policy has a potentially negative impact on human rights and is therefore relevant to state responsibilities regarding human rights, the emerging field of domestic and international fiscal policies and human rights is discussed. The chapter links tax avoidance to a host states' duty to "mobilise maximum resources" to realise human rights and a home state's duty to cooperate internationally to protect human rights. With view to formulating policy recommendations, the chapter also describes the current legal framework that exists for addressing the problem of business-related harm to human rights, including ongoing debates on the need for extraterritorial regulation to close the gaps in the form of preventative and remedial measures.

→ Description of Trafigura company case.

Chapter 3 explains in more detail the specific tax and investment benefits businesses can enjoy by structuring their investment and financing operations through the Netherlands. The Dutch mailbox companies reviewed for this report have different ownership and financing relationships with the subsidiaries in operating countries where human rights violations have been reported; these are explained in this chapter. The presented company structures and policy advantages reveal in what ways the reviewed companies might avoid tax and transparency requirements in countries of operation. The nature and large scale of this incorporation, the chapter concludes, should have regulatory consequences for the Netherlands in relation to the incorporated businesses' (potential) human rights impact, both from operational as well as fiscal activities.

→ Description of ONGC company case

Chapter 4 describes human rights controversies with which companies reviewed for this report (Freeport McMoran, Barrick Gold, Pluspetrol and Glencore) have been linked in countries of operation.

Two company cases (Oilinvest and CNPC) are included as an illustration of how lack of transparency in the Netherlands exists with regard to extractive companies operating in weak states associated with gross human rights violations. All company cases illustrate the common problems associated with extractive industry activities worldwide, as well as the problems of holding multinational companies to account for these negative impacts. The chapter makes references to relevant international human rights principles that are potentially violated by the reviewed companies' business operations.

With view to formulating specific policy recommendations, **chapter 5** focuses on how the accountability gap exposed in this report is created and could be closed at the Dutch national level. The chapter describes the current state of affairs regarding Dutch policies and legislation aimed at ensuring MNCs operate abroad in a socially responsible manner and do not negatively impact on human rights. It points out weaknesses in the current system, providing specific examples of the failure of the Dutch state to provide victims of business-related human rights abuses with access to justice. These shortcomings, in the face of the findings outlined in Chapters 3 and 4, highlight both the responsibility and opportunity the Dutch government has to pro-actively introduce measures to prevent human rights abuses and provide remedy to the victims. The chapter concludes that the Dutch state needs to address this accountability gap by interpreting the state duty to protect in a progressive manner, and not eschew implementing domestic and treaty measures with extraterritorial effect related to mailbox companies.

The conclusion in **chapter 6** reflects on the findings of the report, namely, that the Netherlands has created an attractive investment climate for businesses resulting in a large number of incorporations in the country. This report shows that a large majority of MNCs active in oil, gas and mining locate their financial holding companies in the Netherlands, and these are part of a high-risk sector with regard to human rights violations. The incorporated companies often fulfil crucial financing roles in the corporate group and have direct financing and ownership links with controversial subsidiaries in operating countries. The Dutch state, however, does not balance the benefits these businesses enjoy by investing through the country with appropriate regulatory mechanisms. Nor does the state sufficiently provide victims of human rights violations with access to justice. The Dutch state has an active duty to protect the human rights of people affected by business enterprises (throughout their operations) that are domiciled in the Netherlands. New international human rights regulation and obligations are currently being developed with regard to the extra-territorial dimension of incorporated businesses' human rights conduct. The Netherlands therefore has the duty and the opportunity to introduce domestic and treaty measures with extraterritorial impact to adequately regulate MNCs incorporated in its jurisdiction.

2 Human rights and the corporate accountability gap

2.1 Introduction

The Netherlands offers investment and tax benefits for large MNCs to entice these companies to incorporate their head offices or chief financial holdings in the country. Dutch investment data shows that many of these MNCs are active in the extractive sector and, based on a number of limited criteria, the companies highlighted in this report are most probably incorporated in the Netherlands for aggressive tax planning purposes. This report argues that the nature and large scale of this incorporation should have regulatory consequences for the Netherlands in relation to the incorporated businesses' tax and human rights conduct on two distinct but related areas.

1. The direct negative human rights impact on workers, communities and the environment of MNCs domiciled in the Netherlands in their operational extractive activities broad.
2. Companies avoiding paying a fair share of taxes and royalties and the destructive loss of revenue that could have been used for development, health, education, housing, access to water and other human rights.³³

This chapter examines the corporate accountability gap, and the developing international legal framework that exists for addressing the problem of business-related harm to human rights, via tax avoidance and directly in their operational conduct on the ground. In exploring the extraterritorial dimension of the duty to protect human rights, the chapter describes existing challenges for host states (where the business operations take place) to protect human rights and looks at the responsibilities of the home state (which invests in these operations through parent companies or conduit entities).

2.2 Business, human rights and state duties

Each state has a duty under international law to protect against human rights abuses within their own territory. These duties also apply to areas outside a state's territorial boundaries, over which that state has "jurisdiction".³⁴ This duty entails not just standards for treatment of individuals by the state itself, but also certain regulatory responsibilities on the part of the state as regards non-state actors, including individuals and businesses. The paragraphs below describe the current legal framework that exists for addressing the problem of business-related harm to human rights. In addition to state duties regarding human rights, the emerging field of domestic and international fiscal policies is discussed, as it is intrinsically related to states' duty to "mobilise maximum resources"³⁵ to realise human rights.

³³ The link between tax avoidance is increasingly recognised by human rights organisations and tax justice groups alike. The Human Rights Resource Centre, for instance, has launched a special website on tax avoidance (<http://business-humanrights.org/Documents/Taxavoidance>). In October 2009, the UN held a consultation on business and human rights where a side-panel discussed the issue, entitled "Follow the money – How companies are impacting human rights: corruption, payments to rebels, inequitable contracts, tax avoidance, transfer pricing". See 'Business & human rights in Anglophone Africa – A round-up of recent developments', February 2011, <http://www.business-humanrights.org/media/documents/anglophone-africa-briefing-feb-2011.pdf>.

³⁴ States may be treated as having "jurisdiction" over activities in other states in exceptional and limited circumstances, e.g. in the context of an armed conflict. See *Bankovic and Others v Belgium and Others* (2001) 11 BHRC 435; (2001) 41 ILM 517.

³⁵ Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially

2.2.1 State duty to respect, protect and fulfil human rights

Human rights identify the minimum conditions for living with dignity. Under international human rights law, states have a three-part obligation to respect, protect and fulfil human rights. The obligation to protect is an obligation of due diligence, which obliges states to take measures to prevent, regulate, investigate and prosecute actions by private actors, including business entities that violate the rights of individuals subject to that state's jurisdiction.³⁶ Under the UN Guiding Principles (see Box 1), the responsibility of business enterprises to respect human rights encompasses all internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights (the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

In the human rights field, international law obligations may be assigned to non-state actors, too.³⁷ The extent to which human rights obligations already apply directly to companies has been the subject of a good deal of discussion in recent years, particularly in the context of the work of the UN Special Representative on Business and Human Rights.³⁸

There is some support in international human rights instruments for the idea that business enterprises may already have some legal duties in relation to the realisation of human rights. However, the responsibilities of business enterprises to respect human rights in their operations are addressed in a series of international “soft law” instruments, such as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises, and, most recently, the UN Guiding Principles on Business and Human Rights. While none of these is backed by formal (i.e. “legal”) enforcement measures, they are proving influential in shaping governmental responses to business and human rights problems at national and extraterritorial level, which is the focus of this report.

economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The Maastricht Guidelines on violations of economic, social and cultural rights clarify that a state is in violation of the Covenant if it fails to allocate the maximum of its available resources to realizing human rights. For an analysis of what the concept of maximum available resources means and how states can apply it in practice, see Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani, Maximum Available Resources & Human Rights: Analytical Report 2011, available at http://www.cwgl.rutgers.edu/component/docman/doc_view/362-maximumavailableresourcespdf, (accessed 20 February 2012).

³⁶ See for example, A Clapham, *Revisiting Human Rights in the Private Sphere: Using the ECHR to Protect the Right of Access to the Civil Court* in C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford, Hart Publishing, 2001) at 513.

³⁷ For instance, international law obligations have long been addressed directly to individuals in relation to crimes such as piracy and slavery. And the international criminal responsibility of individuals for war crimes, crimes against humanity and genocide has been recognised in a series of international treaties and judicial statements. See Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press, 2006), pp. 75-76. Human rights obligations also extend to armed opposition groups, private security companies and international organisations. See Clapham ‘Human Rights Obligations of Non-State Actors in Conflicts Situations’, September 2006, *International Review of the Red Cross*, Vol. 88, No. 863. See, more generally, Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press, 2005).

³⁸ For an explanation of the background to the UN Special Representative's mandate and to access key documentation arising from that mandate see <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.

UN Guiding Principles on Business and Human Rights

There is currently no globally binding instrument for corporate accountability for human rights violations. In the 1970s, with the increased role of businesses internationally, the issue of their impact on the enjoyment of human rights became subject to debate in the United Nations and other international organisations, and calls were made for their regulation. However, the political will to create a globally binding framework under UN auspices was – and still is – lacking.

In 2005, the UN Commission on Human Rights requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations, and other business enterprises. The resolution mandated the Special Representative, amongst other means, to identify and clarify standards of corporate responsibility and accountability, and to elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights.

On 18 June 2008, the Human Rights Council unanimously “welcomed” the ‘Protect, Respect and Remedy’ Framework proposed by the Special Representative in his final report under the 2005 mandate. This policy framework comprises three core principles: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and the need for greater access by victims to effective remedies, judicial and non-judicial. The mandate of the Special Representative was extended for a period of three years in order to operationalise the framework. On 16 June 2011, the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights for implementing the UN ‘Protect, Respect and Remedy’ Framework, providing – for the first time – a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.³⁹

The OECD Guidelines for Multinational Enterprises

In 1976, OECD member states (except Turkey) adopted the Guidelines as part of a package that consisted of the Declaration on International Investment and Multinational Enterprises, for the facilitation of direct investment among OECD member countries, together with four instruments related to the Declaration. The Guidelines are government-backed recommendations to enterprises regarding responsible business conduct in their global operations, covering a range of topics, including human rights, employment, environment, disclosure, corruption and taxation. The Guidelines are based on the UN Universal Declaration of Human Rights (1948), ILO labour standards (1919–2007), the UN Rio Declaration on Environment and Development (1992) and, since 2011, the UN Guiding Principles on Business and Human Rights (UNGPs). The following concepts and principles formulated in the OECD Guidelines are relevant to the expectations on the Dutch state to ensure their companies respect human rights in their operations abroad:

- **Due diligence:** Due diligence is a process in which enterprises actively identify, prevent, mitigate and account for how they address actual and potential adverse impacts. The due diligence process entails assessing actual and potential impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed. The OECD Guidelines require enterprises to conduct due diligence on issues covered by the Guidelines, including human rights, employment, environment, corruption and consumer interests.
- **Supply chain responsibility:** The Guidelines apply to all entities of an enterprise, including subsidiaries, franchisees and all business relations such as suppliers and sub-contractors. Not only should they seek to avoid causing or contributing to adverse impacts, they should further seek to prevent adverse impacts with which they are associated through their products or services. Enterprises are encouraged to report publicly on their relationships with all business partners, and those partners’ impacts.
- **Human rights and stakeholder engagement:** The Guidelines insist that wherever they operate, enterprises should respect all human rights. They should also avoid causing or contributing to human rights abuses and engage in meaningful stakeholder engagement with individuals and communities that have been affected.

³⁹ Human Rights Council, ‘Protect, Respect and Remedy’ Framework, 2011, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E>.

2.2.2 Taxes and the role of the state in providing public goods

While the exploitation of natural resources may generate revenues that provide states with the opportunity to foster growth, reduce poverty and thereby help ensure the realisation of human rights, it can, adversely, also negatively contribute to poverty, with all the associated negative impacts on individuals' human rights.⁴⁰ There is a recent trend in academic literature and civil society debates linking domestic and international fiscal policies (such as those defining the Dutch conduit structure), states' duty to mobilise maximum resources to realise human rights, and international human rights tools that may bear the potential to promote a mobilisation of the maximum available resources. A recent briefing by the German Tax Justice Network explores these inter-relations in more detail:

“Fiscal policy can generally make a threefold contribution to realising human rights. It can raise revenue to finance public goods and services required for the realisation of human rights; it can contribute to a redistribution of income and assets from the richer to the poorer strata of society, thus promoting the realisation of their human rights; and with certain goods and services, it can contribute to an internalisation of their ecological and social costs and thus counteract conduct detrimental to human rights.”⁴¹

There are several human rights provisions, implicitly and more explicitly related to poverty and taxation. International law prescribes that states are under a duty to ensure respect for minimum subsistence rights for all. The International Covenant on Economic, Social and Cultural Rights⁴² obliges states to take the necessary steps “to the maximum of its available resources” to ensure the progressive realisation of the rights enshrined in the Covenant. In addition, the right to development, formulated by the United Nations in 1986 made an explicit link between this right and the resources required to fund it. Also, the UN Declaration on the Rights of Indigenous Peoples emphasises indigenous people's rights to benefit from exploitation of natural resources. In September 2012, the UN Council on Human Rights adopted the Guidelines on Extreme Poverty and Human Rights. The Guidelines state in detail that:

“States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfilment of human rights.”⁴³

Tax avoidance undermines the ability of governments to mobilise the maximum available resources and conduct non-discriminatory fiscal policy in accordance with the obligation to progressively realise

⁴⁰ OECD, Setting an Agenda for Collective Action, Policy Paper and Principles on Anti-Corruption, 2007 <<http://www.oecd.org/development/governance-development/39618679.pdf>.

⁴¹ Tax and Human Rights, Policy brief of the Tax Justice Network Germany, February 2013, <http://www.socialwatch.org/sites/default/files/infosteurgerechtigkeit008e.pdf>.

⁴² Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The Maastricht Guidelines on violations of economic, social and cultural rights clarify that a state is in violation of the Covenant if it fails to allocate the maximum of its available resources to realizing human rights. For an analysis of what the concept of maximum available resources means and how states can apply it in practice, see Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani, Maximum Available Resources & Human Rights: Analytical Report 2011, available at http://www.cwgl.rutgers.edu/component/docman/doc_view/362-maximumavailableresourcespdf, (accessed 20 February 2012).

⁴³ UN Council on Human Rights, Guidelines on Extreme Poverty and Human Rights, S. 24 <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIIntroduction.aspx>.

economic and social rights. Next to eroding the capacity of states to exercise its sovereignty in levying the tax it deems appropriate and necessary, tax avoidance hinders access to information, participation and accountability of private actors and public institutions.⁴⁴

Recognising the link between human rights, tax avoidance and evasion, and the wider problem of illicit financial flow, the Human Rights Council adopted a resolution (19/38) on 19 April 2012 requesting the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights to present a comprehensive study on “the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the application by States of the maximum available resources to the full realization of all human rights, in particular economic, social and cultural rights, with special attention paid to developing countries and countries with economies in transition burdened by foreign debt”.

The UN Independent Expert, Cephias Lumina, recently concluded in his interim report⁴⁵:

“It is widely recognized that illicit funds (including the proceeds of crime, corruption, money-laundering and tax evasion) divert resources intended for development, thereby undermining Government efforts to provide basic services and their ability to comply with their human rights obligations. The diversion of resources due to illicit financial flows and the non-repatriation of these funds reduce the “maximum resources” available to the countries of origin for the full realization of economic, social and cultural rights. The impact is disproportionately felt by the poor.”

The report also notes that the distinction between tax avoidance and evasion is blurry and notes that illicit outflows “come on top of outflows from legal corporate tax avoidance, mainly through abusive transfer pricing in the mining sector.”⁴⁶

Fiscal policies are key in putting a state’s human rights commitment into effect, particularly those on economic, social and cultural rights,⁴⁷ as it gives the state leeway to generate and redirect resources towards the progressive realisation of these rights.⁴⁸ Taxes build state capacity (to provide security, meet basic needs or foster economic development) and they build legitimacy and consent (helping to create consensual, accountable and representative government).

The above paragraphs describe the legal framework that exists for addressing the problems of business-related harm to human rights. The paragraphs below set out the current regulatory difficulties that exist in enforcing these state responsibilities.

⁴⁴ ETO consortium, Financial Regulation Focal Group, <http://www.etoconsortium.org/en/thematic-focal-groups/finance-regulation-tax/>.

⁴⁵ UN Human Rights Council, ‘The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights. Interim report by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina, 21.2.2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-42_en.pdf.

⁴⁶ *ibid*, page 17, fn 57.

⁴⁷ Gupta and Tareq 2008 Of course, revenues will not automatically be used for the provision of social goods. But when governments get revenue from tax, citizens are in a far stronger position to exert pressure that it be spent on the services to which they are entitled. An IMF report argued that: “Tax increases incentives for public participation in the political process and creates pressure for more accountability, better governance, and improved efficiency of government spending. Domestic revenue mobilization can help strengthen fiscal institutions.

⁴⁸ Rights or Privileges, Fiscal Commitment to the Rights of Health, Education and Food in Guatemala.

2.3 The governance gaps

It is widely recognised that the international organisation of businesses has not been met with effective control and regulation at the international level, leading to the negative impact of business conduct being left unpunished. In some cases, this is a result of a lack of political will to regulate an issue effectively. In other cases, this is because the regulatory authorities at the national level lack the necessary resources or know-how, and corruption can also play a part. While no regulatory system is fool-proof, less developed countries face particular challenges in fulfilling their regulatory responsibilities with regard to business and human rights.

The regulatory problems at national level in relation to MNCs are also aggravated by their global mobility and complex corporate structure. First of all, host states can find themselves at a bargaining disadvantage in relation to large and powerful MNCs, especially where the MNC has the potential flexibility to move its operations, or source its products, elsewhere. The result is a ‘race to the bottom’ not only with regard to tax rates and resource mobilisation, but also in relation to environmental and human rights standards.⁴⁹ Secondly, MNCs are not, legally speaking, single enterprises but a conglomeration of separate legal entities, incorporated in many different states and linked together by relationships of “control”.⁵⁰ In this context, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations presented a report to the Human Rights Council stating that:

“The root cause of the business and human rights predicament lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”⁵¹

The governance gap also negatively affects international taxation. The internationalisation of business has created loopholes that MNCs use to avoid tax payments in countries of operation, thereby hindering effective resource mobilisation for development. The IMF has noted the negative role double taxation treaties can play in this regard, which are a central feature of the Dutch conduit structure and a reason for MNCs to establish themselves in the Netherlands (see Chapter 3):

“Multinational companies have opportunities for profit-shifting through intra-group transactions, financial arrangements and corporate structuring. Even the most advanced tax administrations struggle with this, and – although the extent of the revenue impact remains unclear – the challenges are greater where capacity is weak. Some argue, moreover, that present norms are tilted against developing countries; the low withholding taxes common in double tax treaties (DTTs), for instance, can weaken a last line of protection for weak administrations.”⁵²

⁴⁹ See, in relation to labour standards, Javorcik and Spatareanu, ‘Do Foreign Investors Care About Labour Market Regulations?’, in *Review of World Economics*, 2005, Vol. 141, No. 3, pp. 375-403; Dewit, Görg and Montagna, ‘Should I Stay or Should I Go?’ Foreign direct investment, employment protection and domestic anchorage”, in *Review of World Economics*, 2009, Vol. 145, pp. 93-110; Davies and Vadlamannati, ‘A Race to the Bottom in Labour Standards: An Empirical Investigation’, 2011, IIS discussion paper no. 385, available at <http://www.tcd.ie/iis/documents/discussion/abstracts/IISDP385.php>

⁵⁰ See P. Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2nd ed, 2007), pp. 5-8.

⁵¹ John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, UN Doc. A/HRC/8/5, April 2008, paragraph 12, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

⁵² IMF, *Revenue Mobilization in Developing Countries*, 2011, <http://www.imf.org/external/np/pp/eng/2011/030811.pdf>.

The UN Guiding Principles on Business and Human Rights also specifically mention Bilateral Investment Treaties as an area of concern as they can negatively impact on a host state's policy space, as "*host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration*".⁵³ The UNGPs also stipulate that states should "[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically assess the adequacy of such laws and address any gaps".⁵⁴

The lack of effectively distributing responsibilities between different actors (e.g. home and host states, MNCs and multilateral institutions) for combating illicit financial flows has severe consequences for the state duty to protect and fulfil human rights. It is clear that governance gaps between the human rights impacts of MNCs and the capacity of governments to prevent and remedy these impacts contribute to the continuing human rights abuses by business. The traditional "territory-based" approach to the prescription and enforcement of business and human rights standards yields a fragmented system of regulation that fails to take account of the realities of MNCs.

2.4 Regulation of extraterritorial impact

The extent to which a state's duty to protect human rights has an extraterritorial dimension is an on-going debate in civil society, policy, business and academic circles. However, some UN Treaty Bodies are encouraging home states to take steps to prevent abuse abroad by corporations incorporated within their jurisdiction.⁵⁵ The General Comments of the Committee on Economic, Social and Cultural Rights clarify the obligation of states to protect the human rights of people based outside their territories and jurisdiction. In General Comment 14,⁵⁶ for example, concerning the right to health, the Committee asserts that:

"To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law."

The Committee made similar observations on the right to water in General Comment 15,⁵⁷ and the right to social security in General Comment 19.⁵⁸ Similarly, the Committee on the Elimination of Racial

⁵³ John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (April 2008) 'Protect, Respect and Remedy: A Framework for Business and Human Rights', UN Doc. A/HRC/8/5, paragraph 12, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

⁵⁴ Principle 3 of the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. UN doc. A/HRC/17/31, available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

⁵⁵ UN Committee On The Elimination Of Racial Discrimination, Consideration Of Reports Submitted By States Parties Under Article 9 Of The Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America, 2008, UN doc CERD/C/USA/CO/6, paragraph 30, available at <http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf> UN Committee On Economic, Social And Cultural Rights, General Comment No. 19. The right to social security, 2007, (art. 9), UN doc E/C.12/GC/19, paragraph 54, available at <http://www.unhcr.org/refworld/docid/47b17b5b39c.html>

⁵⁶ UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights, August 2000, No. E/C.12/2000/4 paragraph 39.

⁵⁷ "Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law", see UN Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), February 2003, No. E/C.12/2002/11, paragraph 33.

Discrimination has also recommended that state parties take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in their country that negatively impact on the enjoyment of rights of indigenous peoples in territories outside the country. The Committee has called on state parties to explore ways, including regulatory measures, to hold transnational corporations accountable.⁵⁹ The UN Guidelines on Extreme Poverty and Human Rights,⁶⁰ adopted in 2012, explicitly mention the home state's responsibility regarding policy coherence and international assistance and cooperation:

“As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practice.”

On many issues, executing extraterritorial jurisdiction is still highly controversial and the extent of a state's territory or jurisdiction may mark the geographical limits of a state's international law obligations in relation to business and human rights. However, it should be noted that whilst states eschew extraterritorial regulation of businesses with regard to human rights, they are not reluctant to grant investors extensive extraterritorial rights and entitlements, for example, as laid down in bilateral tax and investment treaties. This applies in particular to tax havens such as the Netherlands.

It is clear that in order to close governance gaps, the traditionally dominant concept of independent and territorially exclusive responsibility – including correlated concepts such as sovereignty and jurisdiction – is being, and must increasingly be, challenged.⁶¹ Progressively, it is recognised that the development of laws with an extraterritorial dimension is essential to effectively prevent companies from abusing human rights in other countries. Home states have many policy options to domestically respond to human rights impacts of their locally incorporated companies abroad, including in the form of fiscal and other investment policies.

International human rights organisations have been critical of the UN Guiding Principles for not sufficiently addressing the extraterritorial dimension of the state duty to protect, and issues such as the need for effective regulation and accountability.⁶² However, UN Guiding Principle 2 on Business and Human Rights does lay down that “States should **set out clearly the expectation** [emphasis added] that all business enterprises domiciled in their territory and/or jurisdiction respect human rights

⁵⁸ “States parties should extra-territorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law”, see UN Committee on Economic, Social and Cultural Rights General Comment No. 19: The right to social security (Art. 9 of the Covenant), February 2008. No. E/C.12/GC/19, paragraph 54.

⁵⁹ Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on Elimination of Racial Discrimination on Australia, September 2010, No. CERD/C/AUS/CO/15-17, paragraph 13. See also Concluding Observations of the Committee on Elimination of Racial Discrimination on Canada, May 2007, No. CERD/C/CAN/CO/18, paragraph 17; Concluding Observations of the Committee on Elimination of Racial Discrimination on the United States of America, May 2008, No. CERD/C/USA/CO/6, paragraph 30.

⁶⁰ Idem UN Council on Human Rights, Guidelines on Extreme Poverty and Human Rights, 2012
<http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>

⁶¹ For an in-depth discussion, see Jennifer A. Zerk, Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas, Corporate Social Responsibility Initiative Working Paper 2010, No. 59, p.11, available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

⁶² Amnesty International, ESCR-Net, The International Network for Economic, Social, and Cultural Rights, Human Rights Watch, International Commission of Jurists, FIDH, International Federation for Human Rights, RAID, Rights and Accountability in Development, May 30, 2011 Joint Civil Society Statement to the 17th Session of the Human Rights Council, <http://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council>

throughout their operations [emphasis added]”. On the question of state responsibility, the commentary continues:

*“The State duty to protect is a standard of conduct. Therefore States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse.”*⁶³

The specification of home and host state responsibilities and extraterritorial regulation are essential to effectively prevent companies from abusing human rights in countries other than their state of incorporation, and from preventing states to mobilise their maximum available resources to protect human rights. The development of laws with an extraterritorial dimension is therefore crucial to effectively prevent companies from abusing human rights in other countries.⁶⁴ The following section discusses necessary steps that should be taken to close the current accountability gaps for corporate-related human rights violations.

2.5 Home state measures to close the governance gap

As stated above, states have some (albeit limited) powers to regulate extraterritorial business activities directly, but they also have considerable scope to act in relation to MNCs’ impact on human rights, based on their jurisdiction over the company or companies that are incorporated and located in their jurisdiction. This also applies to the roughly 23 500 mailbox companies incorporated in the Netherlands. Examples of legal measures with extraterritorial dimensions in relation to the human rights impacts of business are:

- ❑ General requirements placed by states on companies to take actions such as carrying out human rights due diligence throughout their operations, or publicly reporting on certain aspects of performance.
- ❑ Laws that address a specific and foreseeable risk to human rights as a result of specific corporate activity. For example, prohibitions on the export of certain materials such as hazardous waste, prohibitions on certain specific conduct, prohibitions on supplying certain goods or services, etc.
- ❑ Laws that enable accountability of parent companies or beneficial owners for the conduct of their foreign constituency parts.
- ❑ Conducting human rights assessments of the extraterritorial impacts of fiscal or investment laws, policies and practices.

In the following paragraphs, preventive and remedial legal measures with an extraterritorial effect that can contribute to closing current global governance gaps are discussed

⁶³ Ibid, p.7.

⁶⁴ See Amnesty International’s comments on the UNGPs: Comments in response to the UN Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises’ Guiding Principles – Proposed Outline, October 2010, Doc no. IOR 50/001/2010, p. 6, available at <http://www.aMNCsty.org/fr/library/asset/IOR50/001/2010/en/71401e1e-7e9c-44a4-88a7-de3618b2983b/ior500012010en.pdf>.

2.5.1 Preventive measures: due diligence, transparency and policy coherence

Due diligence

In an attempt to fight the persisting governance gap in relation to corporations' negative impact on human rights and the lack of justice for victims, the UN Guiding Principles and the OECD Guidelines included the concept of human rights due diligence as a potential tool for meeting these challenges and preventing violations. Human rights due diligence implies among other things the execution of a human rights impact assessment to identify actual and potential adverse impacts of the corporate activities on human rights, and take steps to prevent, mitigate and account for these impacts. The due diligence process also implies consultation with (potentially) affected stakeholders on the impact of the corporate activities on their human rights, and communicating how negative impacts will be addressed. Due diligence is *"a means by which business enterprises can identify, prevent, mitigate and account for the harms they may cause, and through which judicial and regulatory bodies can assess an enterprise's respect for human rights"*.⁶⁵ States should exercise influence to MNCs operating in their territory by impose human rights due diligence requirement, especially when companies receive some form of public support.⁶⁶

Transparency and access to information

Transparency and freedom of information are also central to ensuring responsible human rights conduct of companies and access to justice for victims of human rights violations. By 1946, the UN General Assembly had already recognised that, *"freedom of information is a fundamental human right and the touchstone to all freedoms to which the United Nations is consecrated"*.⁶⁷ Article 19 of the Universal Declaration of Human Rights establishes the right to receive and impart information regardless of frontiers. The right to information has long been recognised as underpinning all other human rights – because without information people cannot effectively protect and promote their own rights.⁶⁸ The European Coalition for Corporate Justice (ECCJ) states that *"[i]f the right information is not collected, analysed and duly disclosed, it is difficult for affected people, the general public, consumers, investors, or even the very management of these companies, to understand the scope and impact of their corporate operations on society."*⁶⁹

For civil society actors and more specifically citizens whose human rights are negatively affected by corporate activities, transparency on the impacts of the activities and the corporate structure are a first step in demanding financial and human rights accountability and access to justice. In order to address the right (legal) person, lines of control and management and related responsibilities in global operations, MNCs need to be transparent.⁷⁰ States can require and encourage transparency from companies located in its jurisdiction, by way of transparency requirements on due diligence policies and practices, for instance. Disclosure regulations play a vital role in the effectiveness and legitimacy

⁶⁵ The European Coalition for Corporate Justice (ECCJ), together with the International Corporate Accountability Roundtable (ICAR) and the Canadian Network on Corporate Accountability (CNCA) commissioned an expert team to clarify and build consensus around the concept of HRDD and to develop legal and policy recommendations to governments on ways to translate it in national legislations. See De Schutter et al., 'Human Rights Due Diligence: The Role of States', 2012, available at <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>

⁶⁶ De Schutter et al., Human Rights Due Diligence: The Role of States, 2012, p. 43, available at

<http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>

⁶⁷ UN General Assembly, Resolution 59(I) 'Calling on an international conference on Freedom of Information', adopted 14 December 1946.

⁶⁸ UNDP 'Democratic Governance', available at <http://www.undppc.org.fj/pages.cfm/our-work/democratic-governance/accountability-transparency-frameworks/freedom-of-information/>.

⁶⁹ European Coalition for Corporate Justice, 'Position paper on non-financial reporting by companies', 2012, available at <http://www.corporatejustice.org/Greater-corporate-transparency-at.html?lang=en>.

⁷⁰ Molengraaff Instituut voor Privaatrecht Multinationale en Transparantie (Utrecht: Universiteit Utrecht, 2012, unpublished) p. 38.

of the overall due diligence regime.⁷¹ However, as the case studies in this report show, the beneficial owner(s) and director(s) is (are) often hidden behind layers of companies and trusts. These fragmented corporate structures also make it very difficult to uncover the nature of transactions and trace beneficial ownership, and the origin of funds.⁷²

Policy coherence and international cooperation and assistance

As the previous chapter has shown, tax avoidance can also have a detrimental impact on the host state's ability to provide sufficient resources to protect and fulfil human rights. In the context of extraterritorial regulation, policy coherence and international cooperation and assistance are key principles in combating the negative human rights impact of illicit financial flows and tax avoidance. International cooperation for development, as well as for the realisation of economic, social and cultural rights (ESCRs), is a well-established obligation of all states.⁷³ However, its explicit application to tax has so far been limited to soft law instruments. The Maastricht Principles on Extra-Territorial Obligations (ETOs) of States in the area of Economic, Social and Cultural Rights⁷⁴ identify international tax cooperation as a duty of states.⁷⁵ The Maastricht Principles reiterate the obligations of states to take deliberate, concrete and targeted steps, separately and jointly, through international cooperation, to create an international enabling environment conducive to the universal fulfilment of ESCRs, including in matters relating to finance and taxation.⁷⁶ Moreover, the obligation to international cooperation and assistance implies that states must cooperate with – and not undermine – efforts to mobilise the maximum available resources for the universal fulfilment of economic, social and cultural rights.⁷⁷

An influential 2011 study on CSR and European corporations notes: *“Understanding how regulation of trade and investment affects the human rights and environmental impacts of European corporations operating outside the European Union is crucial for States to implement their duty to protect. However, because State measures in these areas are primarily geared towards liberalising trade and promoting investment, States often do not (fully) realise or utilise their potential to protect human rights and the environment through trade law, investment rules, and related legal measures. This can lead to substantial legal and policy incoherence and gaps in protecting human rights and the environment, which often entails significant negative consequences for victims, corporations and States themselves.”*⁷⁸ In November 2012, the UN Working Group on Business and Human Rights held a meeting with the United Nations Conference on Trade and Development (UNCTAD) to discuss areas of possible cooperation on the issue of investment policy, and to promote the incorporation of references to the Guiding Principles and the duties and responsibilities of states and business

⁷¹ De Schutter et al., 'Human Rights Due Diligence: The Role of States', 2012, p. 43, available at <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf> (accessed 08-01-2013).

⁷² Task Force for Financial Integrity and Economic Development, 'Beneficial Ownership', available at <http://www.financialtaskforce.org/issues/beneficial-ownership/>.

⁷³ The principle of international assistance and cooperation is underscored in the Universal Declaration of Human Rights (art. 28); the Declaration on the Right to Development (art. 3, para. 3); the International Covenant on Economic, Social and Cultural Rights (arts. 2, para. 1, 22 and 23) and the Convention on the Rights of the Child (art. 4).

⁷⁴ These are international legal principles that clarify the human rights obligations of states beyond their own borders. The Maastricht Principles are the outcome of the work of a group of 40 experts in international law and human rights from all regions of the world, including present and former members of international human rights treaty bodies and leading academic and civil society legal experts.

⁷⁵ De Schutter, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Etop 31, <http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2012/HRQMaastricht.pdf>

⁷⁶ Idem, Etop 29.

⁷⁷ Idem, Etop 31

⁷⁸ D. Augenstein & A. Boyle, University of Edinburgh, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the EU, 2010, http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf

enterprises with regard to human rights in investment agreements, including through the UNCTAD Investment Policy Framework for Sustainable Development.

The UN Guiding Principles on Extreme Poverty and Human Rights recently laid down that, “States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfilment of human rights.”⁷⁹ Regarding policy coherence, it is stated that: “The international community’s commitments to poverty reduction cannot be seen in isolation from international and national policies and decisions, some of which may result in conditions that create, sustain or increase poverty, domestically or extraterritorially. Before adopting any international agreement, or implementing any policy measure, States should assess whether it is compatible with their international human rights obligations.”⁸⁰ Clearly this also addresses home state responsibilities regarding the extraterritorial duty to protect human rights.

2.5.2 Remedial measures: accountability of companies for human rights abuses

International human rights and environmental law impose duties on states to put into place effective criminal and civil remedy mechanisms to redress corporate abuses. With regard to human rights violations committed by businesses, all states are under an obligation to protect individuals from infringements of their human rights by third parties. The state duty to protect human rights includes a duty to provide an appropriate forum for legitimate claims to be brought against business for its involvement in human rights abuse. As part of this duty, states are also required to take adequate steps to investigate and provide effective remedies against human rights abuses.⁸¹

The UNGPs refer to this obligation,⁸² and also the Covenant on Economic, Social and Cultural Rights highlighted that, “It is of utmost importance that State Parties ensure access to effective remedies to victims of corporate abuses of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means.”⁸³ There can be various kinds of redress, judicial or non-judicial.

Current practice shows that due to political, legal and financial obstacles, the use of extraterritorial jurisdiction and domestic measures with extraterritorial implications varies considerably in the areas of criminal law and tort (libel) law.⁸⁴ Host states of MNCs may lack the capacity to provide adequate

⁷⁹ The UN Guiding Principles on Extreme Poverty and Human Rights, for instance, have recently laid down that, “States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfilment of human rights.” See Info Steuergerechtigkeit, Taxes and human rights, Policy brief of the Tax Justice Network Germany, Issue no 8, February 2013, available at <http://www.globalpolicy.org/images/pdfs/GPFEurope/infosteurgerechtigkeit008e.pdf>, (accessed 20 February 2012).

⁸⁰ Insert reference

⁸¹ See Amnesty International & Greenpeace, ‘The Toxic Truth, About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d’Ivoire’, 2012, p.123.

⁸² John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, June 2011, UN doc. A/HRC/17/3.

⁸³ UN Economic and Social Council, Statement on the Obligations of States Parties regarding the corporate sector and economic, social and cultural rights, July 2011, paragraph 5, available at <http://www2.ohchr.org/english/bodies/cescr/statements.htm> (accessed 9 January 2013).

⁸⁴ M. B. Taylor et al., ‘Overcoming Obstacles to Justice, Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses’, Fafo-report 2010:21, available at <http://www.fafo.no/pub/rapp/20165/index.html> (accessed 9 January 2013). Tort law is defined by the Free Online Dictionary as “a body of rights, obligations, and remedies that is

access to justice, be unwilling constrain MNCs' operations due to economic competitive considerations, or sometimes themselves may be involved in the perpetration of harm. As a consequence, people who suffer human rights violations as a result of MNCs' activities are often denied access to justice and do not obtain adequate compensation.

As such, the home state jurisdiction has become an increasingly important alternative for civil litigation and criminal prosecution of the corporate entity. Under international law, states may assert extraterritorial jurisdiction (i.e. seek to apply their laws to people or activities in the territory of other states) provided that it can be justified by one or more recognised grounds for asserting it (e.g. the offender's nationality, or the fact that the foreign activities are producing serious adverse effects in the regulating state, or to punish gross human rights breaches under the "universality" principle), and that the assertion of extraterritorial jurisdiction is reasonable in the circumstances. The UNGPs state that, "*States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.*"⁸⁵ Such legal barriers can include "*where claimants face a denial of justice in a host state and cannot access home state courts regardless of the merits of the claim.*"⁸⁶ This principle follows that internationally recognised human rights – such as those included in the Universal Declaration of Human Rights – impose limits on state sovereignty, and that such matters cannot be said to belong to the exclusive national jurisdiction of the territorial state.⁸⁷ Making legal entities other than parent companies and operating subsidiaries also liable for the human rights conduct of subsidiaries which they finance or own, or even when they fulfil central financing roles for the corporate group as a whole, would therefore be an important step in closing the corporate governance gap.

Human rights organisations have therefore called for the application of extraterritorial jurisdiction. "*States should ensure that their criminal and civil laws cover human rights abuses committed abroad by their own nationals, including business entities that are registered, domiciled or otherwise significantly present in their territories, and that both their criminal and civil courts have personal jurisdiction over such persons, taking into account international principles of comity.*"⁸⁸ However, increasing concern has been expressed that governments are generally failing to provide effective remedies for the extraterritorial human rights impacts of their companies in a manner consistent with international human rights standards.

2.6 Conclusions

International human rights obligations originate from treaties that continue to rely primarily on state action at domestic level for their implementation. States have a duty to protect against human rights abuses by third parties, including business. This chapter looked at soft and hard law standards and instruments applicable to the global operations of MNCs that aim, among other things, to prevent and address the risk of adverse impacts on human rights linked to business activity. The international human rights framework lays down states' duties to protect, respect and fulfil human rights. Increasingly there is legal opinion that these duties have an extraterritorial dimension. This extends to

applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others". See <http://legal-dictionary.thefreedictionary.com/Tort+Law> (accessed 25 February 2013).

⁸⁵ UN Guiding Principle 24.

⁸⁶ Commentary to UN Guiding Principle 24.

⁸⁷ De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', Human Rights Quarterly 34, 2012, 1084–1169, available at <http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2012/HRQMaastricht.pdf> (accessed 09-01-2013).

⁸⁸ M. B. Taylor et al. 'Overcoming Obstacles to Justice, Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses', Fafo-report 2010:21, available at <http://www.fafo.no/pub/rapp/20165/index.html> (accessed 9 January 2013).

principles of international cooperation that posit that states should not undermine other states' duty to "mobilise maximum resources" to realise human rights. Harmful tax regimes facilitate international tax avoidance and thereby negatively impact on a host state's duty to mobilise its maximum available resources to protect the human rights of its citizens. As such, jurisdictions such as the Netherlands, that actively pursue fiscal policies that are harmful for other states violate the principle of international cooperation.

To what extent the duty to protect has an extraterritorial dimension is an ongoing debate in civil society, policy, business and academic circles. However, there are no barriers to states taking domestic measures with an extraterritorial impact that benefit the human rights conduct of locally incorporated companies operating abroad. Home states have powers to regulate extraterritorial business activities directly and they have considerable scope to act in relation to MNCs' human rights impacts, based on their jurisdiction over the company. Both preventive (in terms of transparency, due diligence requirements and international cooperation) and remedial (legal) measures (access to judicial and non-judicial grievance mechanism) with an extraterritorial effect are therefore urgently needed to contribute to closing the current global governance gaps and increase the possibilities for victims to gain justice and compensation for damages suffered.

Case 1: Trafigura

Trafigura is one of the world's largest physical commodities trading and logistics groups, with operations worldwide. Almost three quarters of its profits are derived from its oil trade. Until 2012, the corporate group's legal parent company was the Dutch entity Trafigura Beheer bv, which also fulfils tax planning functions (see box on Trafigura in Chapter 2). Although Trafigura Beheer bv is referred to in the company's annual report as the group's main holding and registered head office (until 2012), it is not the ultimate parent. The holding structure above Trafigura Beheer bv is not entirely clear, but involves companies in Malta and Curaçao.

The link between the Netherlands and human rights controversies

- ❑ **Probo Koala scandal:** Trafigura Beheer bv chartered the vessel *Probo Koala*, on which toxic waste was created. This waste ended up being dumped in the Côte d'Ivoire, followed by environmental damage and severe health problems for the people of Abidjan.⁸⁹
- ❑ **Probo Emu scandal:** Trafigura Beheer bv chartered the vessel *Probo Emu*, which transported toxic waste to Norway for (further) processing, resulting in a chemical explosion at the Norwegian processing company Vest Tank.⁹⁰

Human rights controversy: Probo Koala toxic waste scandal⁹¹

On 19 August 2006, Trafigura's Panama-registered vessel the *Probo Koala* delivered toxic waste – the residue of an industrial process called caustic washing – to Abidjan, capital of Côte d'Ivoire. The *Probo Koala* had been chartered by the Dutch company Trafigura Beheer bv. The waste was originally brought to the Netherlands, but Trafigura turned down the option to have it properly treated there because it considered the quoted price too high. In Côte d'Ivoire, Puma Energy contracted a small, local company to take the waste to a municipal dump in Akouédo, a poor residential area of Abidjan. The waste was then dumped there and in other places around the city. In the wake of the event, tens of thousands of people fell ill and had to seek medical help. The Ivorian authorities reported 15 to 17 deaths, which they attributed to exposure to the toxic waste. One doctor told Amnesty International it was "the biggest health catastrophe that Côte d'Ivoire has ever known".⁹²

Money for impunity

On 18 September 2006, after reports of casualties resulting from the dumping of the toxic waste started emerging, two senior Trafigura executives, Claude Dauphin and Jean-Pierre Valentini, and Captain N'Zi Kablan (Trafigura's local manager of Puma Energy Côte d'Ivoire - Trafigura's subsidiary company in Abidjan) were arrested by Ivorian authorities and subsequently imprisoned by way of pre-trial detention for five months in Abidjan's Maca prison.

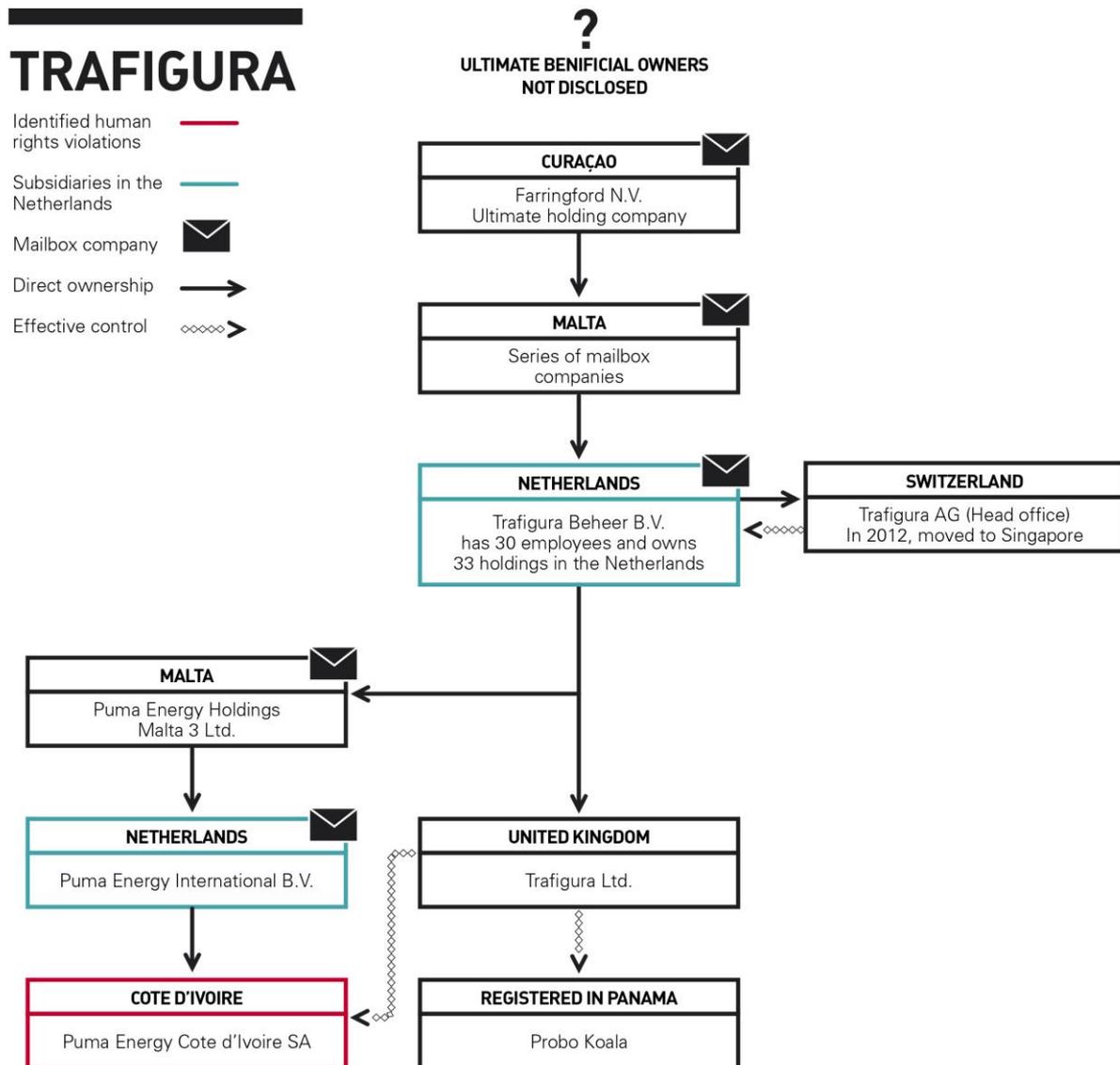
⁸⁹ Amnesty International and Greenpeace Netherlands, 'The Toxic Truth. About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire', September 2012, available at <http://www.greenpeace.org/international/en/publications/Campaign-reports/Toxics-reports/The-Toxic-Truth/>

⁹⁰ Ibid, p. 94.

⁹¹ Unless otherwise stated, information on the *Probo Koala* case is derived from the report by Amnesty International and Greenpeace Netherlands, 'The Toxic Truth. About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire', September 2012, available at <http://www.greenpeace.org/international/en/publications/Campaign-reports/Toxics-reports/The-Toxic-Truth/>

⁹² Amnesty International WIRE magazine, September/October 2012, Vol 42/5.

Figure 1: The relationship between Trafigura’s Dutch entities and Côte d’Ivoire



They were charged with a range of offences, but prosecution was halted after a monetary deal was struck. On 14 February 2007 the state of Côte d’Ivoire and Trafigura reached a settlement under which Trafigura agreed to pay the state the sum of CFA 95 billion (approximately \$ 198 million⁹³). As a term of the Ivorian settlement, and in exchange for compensation, the government agreed that it “waives once and for all its right to prosecute, claim, or mount any action or proceedings in the present or in the future” against Trafigura parties.⁹⁴ The two executives were released on bail and the charges were ultimately dropped. Although the settlement “also included a promise by the Ivorian Government

⁹³ According to Trafigura’s account, see <http://www.trafigura.com/media-centre/probo-koala/timeline/2007/february/12560/?view=Standard>

⁹⁴ Protocol of agreement (Protocole d’accord) between the State of Côte d’Ivoire and the Trafigura Parties, 13 February 2007, Article 4(2).

to guarantee that it would look after all claims arising from the event⁹⁵, there appears to be no monitoring of these promises to ensure victims are adequately compensated. Although a large portion of the settlement amount paid to the state of Côte d'Ivoire was supposed to be allocated as compensation to the victims and for clean-up, the status of the compensation fund remains unclear. Furthermore, public statements by the Ivorian public prosecutor after the settlement exposed the high degree of involvement of then President, Laurent Gbagbo, in securing the release of Claude Dauphin and Jean-Pierre Valentini, raising concerns about due democratic process and accountability.

Human rights violated

In 1995, the then United Nations Commission on Human Rights (now Human Rights Council) noted that the illicit dumping of toxic and dangerous wastes and products has an adverse effect on the enjoyment of several human rights, and decided to appoint, for a period of three years, a Special Rapporteur with a mandate to examine the human rights aspects of this issue. The UN recognises that hazardous waste management impacts on the right to life, to health, to food, adequate housing, and water.⁹⁶ The illegal dumping of toxic waste in Côte d'Ivoire by Trafigura's sub-contracted firm Compagnie Tommy violated the right to health and to life⁹⁷ of the people of Abidjan, as tens of thousands of people reportedly fell ill after the waste was dumped, and 15 to 17 people – relying on the statements by the Ivorian authorities – died as a result of exposure to the waste.

Dumping waste when the company knew better

Both Trafigura and the Dutch state had responsibilities in the illegal waste dump. The export of hazardous waste from the EU to African, Caribbean and Pacific states is prohibited under EU law, yet the Dutch authorities allowed the *Probo Koala* to leave Amsterdam with the destination of the waste unknown, and Trafigura decided to discharge the waste at Abidjan, Côte d'Ivoire.

Evidence suggests that Trafigura knowingly used a sub-contractor in Côte d'Ivoire that was not equipped to handle hazardous waste, and that Trafigura was, or at least should have been, aware that the waste would be disposed of at a public domestic waste site. At first, Trafigura's local subsidiary Puma Energy telephoned a port agent to request the telephone number of Ivorian Energy Technicians (ITE), an established waste processing company in Abidjan. A representative of Puma Energy called again and asked for contact details for another company, as he could not reach the relevant people at ITE by telephone; the port agent gave Puma the contact details of a newly licensed company (Compagnie Tommy).

The handwritten contract that the head of this company gave to a representative of Puma Energy states that Compagnie Tommy will "discharge" the waste in a place called "Akouédo". Both the Ivorian authorities and a later UN mission to Côte d'Ivoire concluded that Compagnie Tommy was not equipped to deal with hazardous waste. Compagnie Tommy was created only shortly before the arrival of the *Probo Koala* and had neither the experience nor the adequate facilities, equipment or expertise to treat hazardous waste. The UN Special Rapporteur on Toxic Wastes concluded that "*these shortcomings do not appear to have been taken into consideration by Trafigura*".⁹⁸

⁹⁵ See Trafigura's account of the *Probo Koala* case at <http://www.trafigura.com/media-centre/probo-koala/timeline/2007/february/12560/?view=Standard>

⁹⁶ UNHR, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, available at <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx>

⁹⁷ Laid down in Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights (Right to Life), Article 25 (a) of the Universal Declaration of Human Rights, and Article 12 of the International Covenant on Economic, Social and Cultural Rights (Right to Health).

⁹⁸ Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu. Addendum. Mission to Côte d'Ivoire (4 to 8 August 2008) and

Amnesty International states that it can be concluded from the facts of the case that Trafigura was aware that the local contractor was not adequately equipped to deal with the waste.⁹⁹ These facts are: The contract was handwritten, the charged price was too low for the responsible processing of hazardous waste and the local company informed Trafigura it would discharge the waste at a municipal dump clearly not equipped to process hazardous waste. Trafigura also knew the waste was potentially hazardous to human health at the time of dumping. Internal emails, sent in December 2005, show that Trafigura's UK-based executive Naeem Ahmed was aware of the caustic nature of the waste, and that caustic washing is not allowed in the EU, US and Singapore.¹⁰⁰ The company had also been informed by the supplier of the caustic substance that the waste was hazardous.¹⁰¹ A Dutch police call in August 2006 warned Trafigura of the dangers of the waste as well, but the company was apparently already aware that the waste was hazardous and needed appropriate disposal.¹⁰² Furthermore, at least four locations in Europe refused to dispose of the waste.

No lessons learned: Trafigura continues caustic washing

Despite the catastrophic impact that the waste dumping had for Abidjan's citizens, Trafigura continued the practice of caustic washing. Between January 2006 and May 2007, Trafigura transferred approximately 15 shipments of a chemical called coker naphtha to onshore facilities in several countries (United Arab Emirates, Tunisia and Norway) and to two ships (*Probo Koala* and *Probo Emu*), for the purpose of desulphurising it by caustic washing.¹⁰³ On board the *Probo Emu*, three shipments of naphtha were reportedly washed. In addition, during 2006 Trafigura reached an agreement with a Norwegian company, Vest Tank, to undertake caustic washing on further shipments of the coker naphtha onshore at a Vest Tank facility. On 24 May 2007 one of the tanks exploded, and the contents of another tank leaked and caught fire. The explosion led to chemical emissions. Approximately 200 people were reported ill as a result of exposure to the fumes. A criminal case was brought against Trafigura for its involvement in the Vest Tank scandal. However, this was dismissed on the basis that Trafigura could only be prosecuted if hazardous waste had been exported to or imported from another state to Norway. The delivery of hazardous waste created on board of a ship on the high seas was viewed as not being export or import under the terms of Norwegian law, giving effect to international law.¹⁰⁴

Lack of due diligence in the Probo Koala case

The UN Special Rapporteur on Toxic Wastes considers that the outcome of a due diligence test in the *Probo Koala* case rests on whether Trafigura took all the necessary precautions to prevent any possible adverse impact of the discharge of its waste on human rights, and on whether it could have reasonably known that its actions or omissions would contribute to a human rights violation. In the view of the Special Rapporteur, these precautions needed to be particularly stringent in the case of Côte d'Ivoire, given the prevailing climate of insecurity and weak rule of law in the country as a result of internal civil unrest, which started in 2002. He found that Trafigura failed to:

- ❑ Disclose fully and clarify on the composition of the *Probo Koala*'s slop tanks and destination for disposal prior to the unloading of the waste by providing inconsistent information about the type of waste.

the Netherlands (26 to 28 November 2008). Human Rights Council, Twelfth session Agenda item 3, A/HRC/12/26/Add.2, 3 September 2009, www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-26-Add2.pdf,

⁹⁹ Amnesty International and Greenpeace Netherlands, *The Toxic Truth. About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire*, September 2012, p. 89, available at <http://www.greenpeace.org/international/en/publications/Campaign-reports/Toxics-reports/The-Toxic-Truth/>,

¹⁰⁰ *Ibid.*, p. 26.

¹⁰¹ *Ibid.*, p. 82, 83.

¹⁰² *Ibid.*, p. 83.

¹⁰³ *Ibid.*, p. 73

¹⁰⁴ *Ibid.*, p. 94.

- Undertake a full evaluation of reception capacities in the port of Abidjan and waste disposal facilities, aimed at ensuring environmentally sound waste treatment prior to the unloading of the waste.

“At the very least, due diligence should have triggered additional inquiries into Tommy Ltd’s [author’s note: Compagnie Tommy] capacity to treat waste in an environmentally sound manner, particularly in the light of the fact that Tommy Ltd informed Trafigura that it would discharge the waste from the Probo Koala “in a place out of the city, called Akouédo, which is properly equipped to receive any type of chemical product”. The Special Rapporteur had the opportunity during his visit to Abidjan to visit Akouédo. It is a municipal waste dump existing alongside poor communities living on subsistence farming and in extremely precarious conditions. Nearby residents live on recycling garbage for personal use or reselling. Akouédo was not in any way equipped to treat the waste from the Probo Koala.” UN Special Rapporteur on Toxic Wastes¹⁰⁵

Trafigura’s response

Trafigura claims the dumping and its aftermath were not its fault. In response to the current report, the company replied it contained numerous factual inaccuracies. However, Trafigura failed to identify specific corrections to this report and instead referred to its website outlining Trafigura’s version of events.¹⁰⁶ No specific information is provided on Trafigura’s website with regard to the company’s communication with Compagnie Tommy. Amnesty International reports that a handwritten contract that the head of Compagnie Tommy gave to a representative of Puma Energy informed Trafigura’s subsidiary that Compagnie Tommy will “discharge” the waste in a place called “Akouédo”, for instance. Trafigura claims that “Trafigura and the captain and crew of the Probo Koala were led to believe the slops were being treated safely”,¹⁰⁷ without detailing how this impression was generated.

Conclusion

Trafigura created the toxic waste on board the *Probo Koala* and knew the waste would be dangerous and require careful treatment and disposal, but it refused to pay for proper disposal when this option was offered in the Netherlands. Trafigura knew, or should have known, that the waste should not be shipped out of Europe and that the company it handed the waste over to was incapable of dealing with it properly. Trafigura knew, or should have known, that the waste was to be disposed of in a city dump equipped only for domestic waste. And Trafigura gave false or misleading information about the waste to the state authorities and waste processing companies in several countries. Although Trafigura was convicted in a Dutch court of illegally exporting the waste from the Netherlands, the company was not prosecuted for the waste dump in the Côte d’Ivoire and its social and environmental consequences, and was effectively given immunity from prosecution in Côte d’Ivoire.

The role played by Trafigura in relation to the dumping of toxic waste in Abidjan has never been subject to full court proceedings. Given that the Dutch state has committed itself to ensuring the application of OECD Guidelines to businesses incorporated in its jurisdiction, and with view to the liability of Trafigura Beheer bv in the *Probo Koala* case, there should have been consequences for the company in the Netherlands.

¹⁰⁵ ‘Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights’, Okechukwu Ibeanu. Addendum. Mission to Côte d’Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008). Human Rights Council, Twelfth session Agenda item 3, A/HRC/12/26/Add.2, 3 September 2009, www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-26-Add2.pdf, p. 18

¹⁰⁶ Published at <http://www.trafigura.com/media-centre/probo-koala/?view=Standard>

¹⁰⁷ Published at <http://www.trafigura.com/media-centre/probo-koala/timeline/2006/august/12495/?view=Standard>

Figure 2: Extractive Industry Companies in the Netherlands

EXTRACTIVE INDUSTRY COMPANIES IN THE NETHERLANDS

This infographic is based on annual accounts retrieved from the Dutch Chamber of Commerce, Bloomberg, and annual reports of the companies.

GLENCORE

Switzerland
Air and water pollution in Zambia



Employees in main Dutch holding
Finges Investment B.V. (Glencore)

17.912 \$ million assets in NL
186.6 \$ billion global revenue
4.21 \$ billion global profit



54 subsidiaries in tax havens

TRAFIGURA

The Netherlands
Toxic waste in Ivory Coast



Employees in main Dutch holding
Trafigura Beheer B.V.

2.647 \$ million assets in NL
121.6 \$ billion global revenue
2.34 \$ billion global profit



89 subsidiaries in tax havens

ONGC

India
Displacement in South-Sudan



Employees in main Dutch holding
ONGC Nile Ganga B.V.

2.752 \$ million assets in NL
25.8 \$ billion global revenue
5.8 \$ billion global profit



23 subsidiaries in tax havens

FREEPORT

U.S.A.
Labour rights in Indonesia



Employees in main Dutch holding
Freeport Finance Company B.V.

480 \$ million assets in NL
20.9 \$ billion global revenue
9.1 \$ billion global profit



56 subsidiaries in tax havens

BARRICK

Canada
Land rights in Argentina



Employees in main Dutch holding
Barrick Finance B.V.

314 \$ million assets in NL
14.3 \$ billion global revenue
4484 \$ billion global profit



29 subsidiaries in tax havens

CNPC

China
Military regime in Myanmar



Employees in main Dutch holding
CNPC International Holding
Cooperative U.A.

278 \$ million assets in NL
381 \$ billion global revenue
20.8 \$ billion global profit

subsidiaries in tax havens unknown

OILINVEST

The Netherlands
Repressive regime in Libya



Employees of the Oilinvest Group
working in the Netherlands

1.025 \$ million assets in NL
unknown \$ billion global revenue
unknown \$ billion global profit



21 subsidiaries in tax havens

PLUSPETROL

Argentina
Indigenous rights in Peru



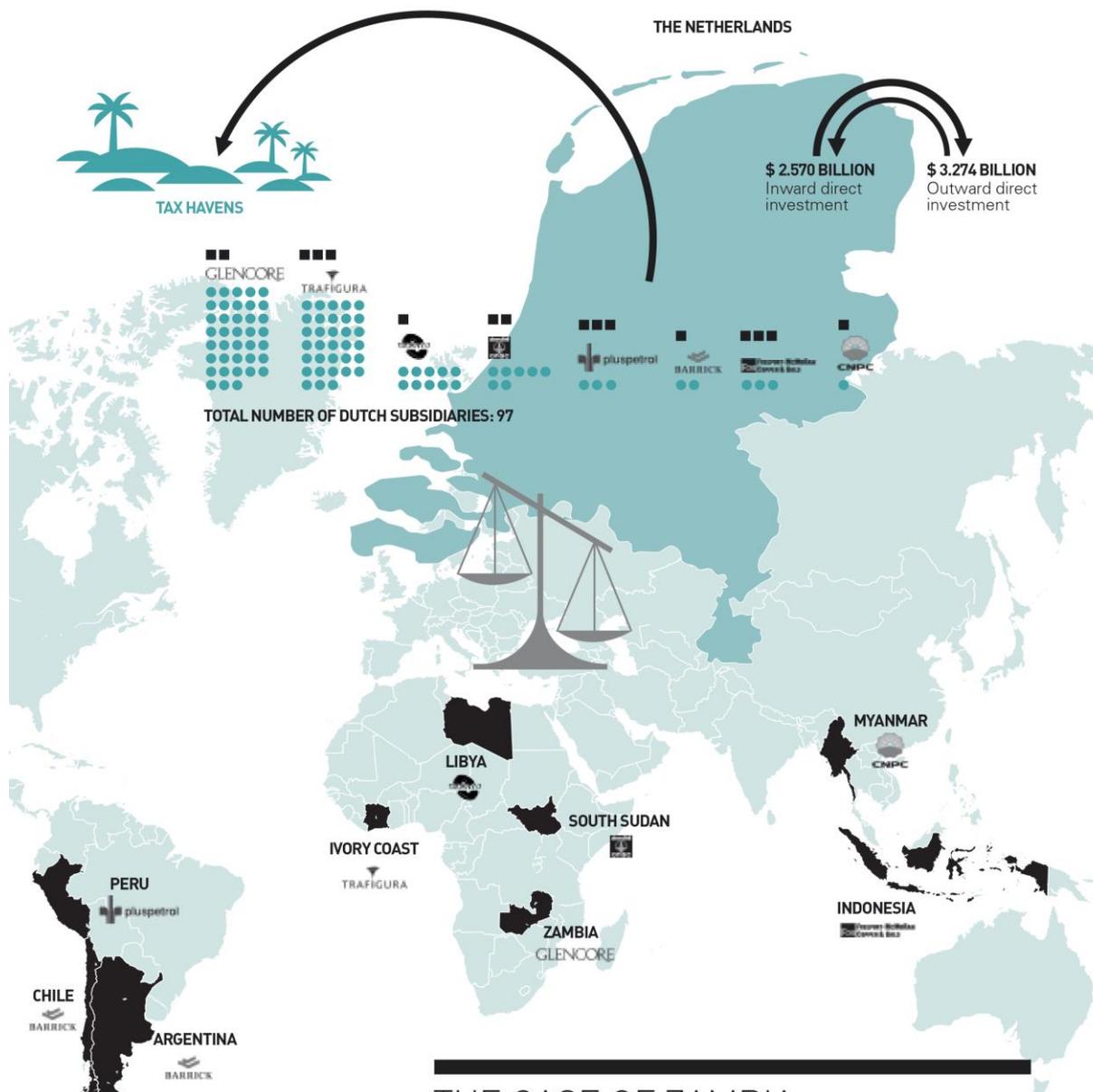
Employees in main Dutch holding
Pluspetrol Resources Corporation N.V.

3.950 \$ million assets in NL
1.87 \$ billion global revenue
0.23 \$ billion global profit



13 subsidiaries in tax havens

PRIVATE GAIN, PUBLIC LOSS



- Identified human rights violations with link to Dutch mailbox companies
- Dutch subsidiaries
- Tax haven subsidiaries in the ownership structure above Dutch mailbox company
- ⚖️ Accountability gap

THE CASE OF ZAMBIA



Sources: Annual accounts of Glencore's subsidiaries retrieved from the Dutch Chamber of Commerce; GDP Zambia is 19.2 billion USD, source: Global Financial Integrity, 'Zambia Lost \$3.8 Billion in Illicit Outflows from 2001-2010', 13 December 2012; Annual revenue loss through tax avoidance in Zambia is 2 billion USD, source: Bloomberg, 'Zambia Says Tax Avoidance Led by Miners Costs \$2 Billion a Year', 25 November 2012; 2.6 million USD (€2 million) is the amount the Dutch government spends on improving health conditions in Zambia, source: Dutch Government, 'Zambia resultaten ontwikkelingsamenwerking 2009-2010'

3 The Netherlands: a conduit haven for extractive industry companies

3.1 Introduction

“The profits are made right here in the Treasurer’s office, wherever I decide.”

Jack Bennet, Chief Financial Officer of the Standard Oil Company of New Jersey (later Exxon) replying to the question of where the oil company made its profits: in production, refining, or the sale of petrol at garages.¹⁰⁸

Most of the world’s extractive industry companies are incorporated in the Netherlands, either in the form of head offices or (chief) financial holdings. Indeed, a recent report by the non-governmental organisation *Publish What You Pay Norway*¹⁰⁹ singled out the Netherlands as the second favourite home for subsidiaries of the world’s ten largest extractive industry companies, following the US tax haven state of Delaware. The report finds that more than a third of the researched subsidiaries are based in secrecy jurisdictions and tax havens, and 358 of them are based in the Netherlands.¹¹⁰

This chapter examines the motivation of these large number of incorporations in the Netherlands, namely, the role of the Netherlands as a tax and investment haven within the global context of competition for foreign direct investment (FDI). The different structures mailbox companies can adopt and the specific tax and investment benefits they result in are described. Given this report’s focus on extraterritorial regulation of human rights impacts, the chapter also looks at the negative impact tax avoidance has particularly on developing countries.¹¹¹ Although no in-depth fiscal analysis was conducted for this report that identifies tax avoidance at the transactional level, an analysis of their corporate structure indicates the existence of tax planning using the Netherlands as a conduit country. The chapter looks more specifically at the structures of ONGC, Barrick Gold, Trafigura and Glencore, and at the companies’ possible tax avoidance motivations for incorporating in the Netherlands.

3.2 Context: global competition for foreign direct investment

Since the late 1970s, capital and investments have become increasingly mobile and corporations globally integrated. This expansion was enabled by governments and international institutions abolishing currency controls and liberalising international rules on trade and investment,¹¹² and facilitated by advances in technology and communications. Nation states have thereby come into increased competition with each other to attract cross-border capital flows, or foreign direct investment (FDI).¹¹³

There are several bilateral and regional instruments that states use to attract FDI, notably bilateral investment treaties (BITs) and double taxation treaties (DTTs), as well as national policies (such as

¹⁰⁸ Cited in: Berne Declaration, ‘Commodities. Switzerland’s most dangerous business’, 2012, p. 258, <http://www.evb.ch/en/p19492.html>

¹⁰⁹ Publish What You Pay Norway, Piping Profits. ‘Mapping the 6 038 subsidiaries owned by ten of the world’s most powerful Extractive Industry giants and the quest by Latin American journalists to find out more’, 2011, p. 8, available at <http://www.publishwhatyoupay.org/sites/publishwhatyoupay.org/files/FINAL%20pp%20norway.pdf>

¹¹⁰ Ibid.

¹¹¹ For a detailed explanation of why the Netherlands can be considered a tax haven, see SOMO, ‘The Netherlands: a Tax Haven?’, (2006), http://somo.nl/publications-en/Publication_1397

¹¹² Under the General Agreement on Tariffs and Trade (GATT) and later through the World Trade Organization (WTO).

¹¹³ OECD, ‘Addressing Base Erosion & Profit Shifting’, 2013, page 28, <http://www.oecd.org/tax/beps.htm>

tax exemptions or holidays). The rationale behind signing treaties and lowering corporate taxes is that they are perceived to increase FDI by offering investors enhanced profits and security through guaranteeing additional protection (against investor-unfriendly policies or double taxation) beyond the national laws of the host state.¹¹⁴ Even though tax treaties and tax incentives are known to erode the tax base of, in particular, capital-importing countries (see below), developing countries' need for FDI has compelled their governments to view this revenue loss as a necessary evil when competing to attract FDI.¹¹⁵

As a result of this international tax competition the world has seen a total decline in corporate income tax rates and trade tariffs, and in global revenue. In emerging and developing economies, statutory corporate tax rates (simple averages across countries) have declined since the mid-1990s from about 31% to 26%.¹¹⁶ The decline has a disproportionately negative impact in resource-rich developing economies, as corporate taxes form a large part of their total tax revenues.¹¹⁷

3.2.1 Tax avoidance and evasion

In addition to tax competition driving down corporate tax rates across the world, the lack of international coordination on tax policy has led to MNCs being able to use gaps created by the interaction of domestic tax systems (including double taxation treaties) to avoid and evade taxes in states where they have active operations. Whilst tax evasion is illegal in that it breaks tax laws, tax avoidance is often defined in literature technically legal but remains inconsistent with the policy objectives of domestic tax rules and international standards.¹¹⁸ Thus whilst some aggressive tax planning practices are clearly illegal, such as false invoicing and trade mispricing, "in many cases these are difficult to prove, given the lack of adequate instruments to effectively regulate them. Other means of shifting profits intra-group are legal or semi-legal yet ethically highly questionable."¹¹⁹ Indeed, the former UK Chancellor of the Exchequer was once quoted describing the difference between tax avoidance and tax evasion being "the thickness of a prison wall".¹²⁰

For the purpose of this report, the distinction between tax avoidance and evasion is not relevant as the focus lies on the negative impact of both activities (i.e. not paying tax on profits as *intended* according

¹¹⁴ The main argument in support of the system of BITS and DTTs is that they generate investment flows, in particular between the contracting parties of the agreement. A related argument is that inward investment stimulates the economic development of countries, a causal relationship, however, that cannot be taken for granted. The relationship between trade, investment, economic growth and (sustainable) development is far from clear cut. In addition, empirical evidence is equally ambiguous on the relationship between DTT and BITS. In recent years, there has been a large amount of (mostly quantitative) research on this subject. S. Rose-Ackerman and J. Tobin, 'Foreign direct investment and the business environment in developing countries: the impact of bilateral investment treaties', (2005), Yale Law & Economics Research Paper, No. 293; F. Barthel, M. Busse & E. Neumayer, 'The Impact of Double Taxation Treaties on Foreign Direct Investment: Evidence from Large Dyadic Panel Data', *Contemporary Economic Policy*, (2010b), 28(3), 366-377; T. Coupé, I. Orlova & A. Skiba, 'The Effect of Tax and Investment Treaties on Bilateral FDI Flows to Transition Countries', 9th Annual Global Development Conference, Brisbane, (2008); E. Neumayer, 'Do Double Taxation Treaties Increase Foreign Direct Investment to Developing Countries?', *Journal of Development Studies*, (2007), Vol. 43, No. 8, 1501-1519. See also M. van Dijk and M. Vander Stichele, 'Is foreign investment good for development?', (2008); SOMO, 'Dutch Bilateral Investment Treaties: A Gateway to 'Treaty Shopping' for Investment Protection by Multinational Companies', March 2008, available at www.somo.nl/publications-n/Publication_2478

¹¹⁵ In *Union of India v Azadi Bachao Andolan*, for example, the Indian Supreme Court, in a treaty shopping case, ruled in favour of the tax payer, arguing that "Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. [...] The developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide to them. The loss of revenue could be insignificant compared to the other non-tax benefits to their economy." Cited from Baistrocchi, Eduardo (2008) The use and interpretation of tax treaties in the emerging world: Theory and implications, in *British Tax Review*, Issue 4, 352-391.

¹¹⁶ S. M. Ali Abbas & A. Klemm 'A Partial Race to the Bottom: Corporate Tax Developments in Emerging and Developing Economies', IMF Working Paper WP/12/28, 2012, p. 7, available at <http://www.imf.org/external/pubs/ft/wp/2012/wp1228.pdf>

¹¹⁷ See SOMO, 'Is Foreign Investment Good for Development? A Literature Review for a literature overview and case studies', 2008, available at http://somo.nl/publications-en/Publication_2478.

¹¹⁸ OECD, 'Addressing Base Erosion & Profit Shifting', 2013, <http://www.oecd.org/tax/beps.htm>

¹¹⁹ Øygunn Sundsbø Brynildsen, "Exposing the lost billions", *Third World Resurgence*, No. 268 (December 2012), p. 22

¹²⁰ Denis Healey, *The Economist*, Volume 354, Issues 8152-8163 (2000), p. 186.

to domestic tax laws, that is in contravention to the *spirit* of the law) on human rights and development. Tax avoidance is therefore used throughout this report, where these practices could also entail tax evasion if tested in court.

Tax avoidance, rather than being solely the responsibility of companies, is facilitated by states that have harmful tax regimes in place. This was recognised by the OECD in 1998 with its report on harmful tax competition¹²¹ and the EU's Code of Conduct Group on business taxation (Primarolo Group) in its 1999 report.¹²² In the drive to compete for FDI, some jurisdictions have specialised in offering certain services used by MNCs for international tax avoidance.¹²³ Rather than solely aiming to attract FDI (involving material economic activity) into their countries, economies such as the Netherlands have developed niche markets as tax havens or 'conduit' havens.

There are many different ways in which companies can evade or avoid paying taxes, but a common technique is using conduit entities that channel profits from high to low-tax jurisdictions. A conduit structure means rather than investing directly into a country, a company interposes a conduit entity in a third country through which it channels its investments. This structure enables large corporations to siphon-off profits from countries of operation into tax havens and protect their investments by enjoying treaty benefits without having a material presence in the conduit country. Conduit structures can be used for various avoidance techniques. Some of these, which are not mutually exclusive, are:¹²⁴

- ❑ Treaty shopping and related avoidance of withholding tax in countries of operation.
- ❑ Group financing resulting in profit shifting through, for instance, evading tax on interest income.
- ❑ Transfer pricing (trading between subsidiaries of one MNC), in particular in relation to the shifting of risks and intangibles, the artificial splitting of ownership of assets between legal entities within a group, and transactions between such entities that would rarely take place between independent companies.
- ❑ 'Hybrid mismatch arrangements' which exploit differences in the tax treatment of instruments, entities or transfers between two or more countries, leading double non-taxation. There are several layers of complexity of these arrangements. For example, MNCs can exploit the fact that instruments are treated differently for tax purposes in the countries involved, most prominently as debt in one country and as equity in another country. Arrangements that are treated as transfer of ownership of an asset for one country's tax purposes but not for tax purposes of another country (which generally sees a collateralised loan) can also be used to avoid taxation.¹²⁵

As will be shown below, the Netherlands is an ideal location for MNCs to interpose conduit entities to make use of (some of) these tax planning techniques.

¹²¹ OECD "Harmful Tax Competition: An Emerging Global Issue". This and other reports are published on the OECD's website: <http://www.oecd.org/ctp/harmfultaxpractices/>

¹²² The Code of Conduct group identified a series of harmful measures of Members States in its 1999 report, published at http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf. The EU's work on harmful tax practices is outlined in more detailed here: http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/

¹²³ For a historical overview of how tax havens and harmful tax regimes developed see N. Shaxson, 'Treasure Islands: Tax Havens and the Men who Stole the World' (London, 2011).

¹²⁴ For more detailed explanation of these techniques, see OECD, 'Addressing Base Erosion & Profit Shifting', 2013, <http://www.oecd.org/tax/beps.htm>

¹²⁵ For a detailed discussion see OECD (March 2012) 'Hybrid Mismatch Arrangements. Tax Policy and Compliance Issues', http://www.oecd.org/ctp/aggressive/HYBRIDS_ENG_Final_October2012.pdf

Transfer mispricing

Approximately 60% of global trade is conducted by multinational corporations and half that amount is between subsidiaries of a parent company. If two unrelated companies trade with each other, a market price for the transaction will generally be used, known as “arms-length” trading, because it is the product of negotiation in a market. This arm’s length price is usually considered to be acceptable for tax purposes. But when two related companies trade with each other, they may wish to artificially distort the price at which the trade is recorded, to minimise the overall tax bill by shifting profit from high to low-tax jurisdictions. This is called transfer mispricing.¹²⁶ The OECD notes that since “intra-group transactions are not subject to the same market forces as transactions between unrelated parties operating on the free market, there is a huge potential for profit shifting via under- or overpricing of intra-group transactions”.¹²⁷ Indeed, it is possible that in practice a developing country will derive little or no revenue from the FDI attracted to its territory.¹²⁸ Terminologies such as transfer mispricing, profit/income shifting or splitting, and tax-base erosion all refer to various acts of manipulating financial transactions in multinational corporations with the aim of reducing corporate income tax. While most of the activities involved in transfer mispricing are not illegal, they are unethical and have been criticised as irresponsible corporate practices sustaining poverty and economically exploiting developing countries.¹²⁹

3.3 Negative impact of tax and investment competition in poor countries

Due to lack of available or comparable data, not many studies exist that calculate the loss of tax revenue from international tax avoidance. There are, however, a number of studies that calculate illicit financial flows, which to a large extent consist of tax evasion, and some also calculate tax revenue loss resulting from specific forms of tax avoidance and evasion. As outlined in Chapter 2, the UN Human Rights Council has recently recognised the negative impact of tax evasion and avoidance on human right, specifically the negative impact of illicit capital flight “on the application by States of the maximum available resources to the full realization of all human rights, in particular economic, social and cultural rights.” The UN Independent Expert, Cephias Lumina, recently concluded in his interim report¹³⁰ that illicit flows, including tax evasion, divert resources intended for development, thereby undermining government efforts to provide basic services and their ability to comply with their human rights obligations. This impact, he added, is disproportionately felt by the poor.

His report also noted that illicit outflows “come on top of outflows from legal corporate tax avoidance, mainly through abusive transfer pricing in the mining sector.”¹³¹ Thus, even if no precise figure can be calculated that represents losses encompassing all forms of tax avoidance and evasion, there is ample evidence that shows tax fraud (evasion and avoidance) leading to massive revenue losses worldwide. This has disastrous effects for poor countries’ revenues.

¹²⁶ Tax Justice Network, ‘Transfer Pricing’, http://www.taxjustice.net/cms/front_content.php?idcat=139

¹²⁷ OECD Policy Workshop ‘Institutional Approaches to Policy Coherence for Development’, May 2004, <http://www.oecd.org/development/pcd/31659358.pdf>

¹²⁸ Task Force for Financial Integrity and Economic Development, ‘Trade Mispricing’, <http://www.financialtaskforce.org/issues/trade-mispricing>

¹²⁹ Action Aid Ghana, ‘Effects of transfer pricing beyond tax revenue loss: a threat to economic development’, http://www.actionaid.org/sites/files/actionaid/effects_of_transfer_pricing_beyond_tax_revenue_loss-5-12-11.pdf

¹³⁰ UN Human Rights Council, ‘The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights. Interim report by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina, 21.2.2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-42_en.pdf.

¹³¹ *ibid*, page 17, fn 57.

Countries of origin of illicit financial flows¹³²

A UNGP-commissioned study carried out by US-based research organisation Global Financial Integrity (GFI) finds that 61.2% of all illicit financial flows from developing countries come from Asia, mostly due to massive outflows from China and India, the largest developing economies in the region. Tax fraud through transfer mispricing and false invoicing are estimated to account for over 90% of the illicit financial flows from this region. Latin America and the Caribbean follow at 15.6%, with the Middle East and North Africa at 9.9%. Poorer European countries follow with 7% of illicit flows, while Africa accounts for 6.3% of all illicit outflows. The following countries accounted for 76% of all illicit financial outflows worldwide during the period 2001–2010: China, Mexico, Malaysia, Saudi Arabia, the Russian Federation, the Philippines, Nigeria, India, Indonesia and the United Arab Emirates (cited in order of size of estimated illicit outflows).

A recent study commissioned by the United Nations Development Programme and carried out by Global Financial Integrity indicates that most illicit financial outflows are from developing countries, including Least Developed Countries (LDCs). Whilst illicit financial outflows from LDCs account only for a small portion of all illicit financial outflows worldwide, the UNDP points out that *“they have a particularly negative impact on social development and the realization of social, economic and cultural rights in these countries. Given that LDCs account for less than 2% of world gross domestic product (GDP) and only about 1% of global trade in goods, illicit financial flows from these countries are in relative terms, compared to their small economies, very large”*.¹³³

It is estimated that for every US dollar received in Official Development Aid (ODA), on average, 60 cents exit LDCs in illicit flows. In 11 LDCs, capital loss related to illicit financial flows was estimated to have exceeded the total ODA received. The UN Guiding Principles explicitly frame tax avoidance and evasion as a human rights issue, as the illicit flows *“represent a major drain on the resources of developing countries, reducing tax revenues and investment inflows, hindering development, exacerbating poverty and undermining the enjoyment of human rights”*.¹³⁴

3.3.1 Revenue losses through intra-group transactions (transfer mispricing)

One of the most important tax avoidance mechanisms MNCs use to shift profits from high-tax to low-tax jurisdictions is transfer mispricing (see box above). In 2008, Christian Aid calculated that the loss of corporate taxes to the developing world by transfer mispricing and false invoicing was running at \$ 160 billion a year. At the time, this was *“more than one-and-a-half times the combined aid budgets of the whole rich world”* (\$ 103.7 billion in 2007).¹³⁵

This figure was recently confirmed by GFI, which calculated that between 2002 and 2006, developing countries suffered an annual tax revenue loss between \$ 98 billion and \$ 106 billion as a result of just one form of transfer mispricing, namely re-invoicing.¹³⁶ Furthermore, the GFI study did not analyse other common forms of tax avoidance mechanisms such as mispricing in the same invoice or using royalties and other intangibles to shift profits, which would make the annual loss much higher. To put

¹³² This text is reproduced from United Nations Human Rights Council, ‘The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights’, 21 February 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/113/83/PDF/G1311383.pdf?OpenElement>

¹³³ United Nations Human Rights Council, ‘The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights’, 21 February 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/113/83/PDF/G1311383.pdf?OpenElement>

¹³⁴ Idem

¹³⁵ Christian Aid, ‘Death and taxes: the true toll of tax dodging’, May 2008, <http://www.christianaid.org.uk/images/deathandtaxes.pdf>

¹³⁶ Re-invoicing happens when goods leave a country under one invoice, then the invoice is redirected to a country such as a tax haven where the price is altered, then the revised invoice is sent to the importing country for the purposes of clearing and payment.

this figure into context: revenue loss by re invoicing alone represents an average loss of about 4.4% of the entire developing worlds' total tax revenue.¹³⁷

But not only companies evade tax: the Tax Justice Network has calculated that over past decades, tax evasion by individuals has led to the accumulation of \$ 21-32 trillion of untaxed offshore wealth.¹³⁸

About 25-30% of this (\$ 5.3-9.6 trillion) is from developing countries. The development organisation Eurodad estimates that developing countries probably lose as much every year from the lost tax on the interest this wealth generates as they lose to new capital flight.¹³⁹

In the spotlight: revenue losses through aggressive tax planning high on the political agenda

The issue of revenue losses in developing and OECD countries is high on the political agenda. In early 2013, the OECD published a report on Base Erosion and Profit Shifting (BEPS),¹⁴⁰ announcing more concerted international action to fight tax avoidance. The report explains principles of international taxation and the opportunities the current system holds for profit shifting by companies, exemplified by the corporate structures commonly used for BEPS. It also provides an overview of research on the scale of BEPS and of global developments that have an impact on corporate tax matters. The BEPS report, approved unanimously by all 34 OECD members, is an important milestone in the fight against international tax avoidance because it acknowledges that aggressive tax planning schemes “result in massive revenue losses”. It also considers a more fundamental reform of international profit allocation mechanisms, especially current transfer pricing mechanisms, which allow intangible products to be used to shift profits from high to low-tax jurisdictions.

Preliminary assessments of the BEPS report by civil society organisations (CSOs) find it could have gone further to reflect the needs of low and lower-middle income countries, and give more weight to source rather than residency taxation. And, given the limited country representation of the OECD, CSOs point to the UN Committee of Experts on International Cooperation in Tax Matters as the best-suited international forum for standard-setting on international tax matters. However, the report is welcomed by organisations such as the international Tax Justice Network as it acknowledges that the current system of treating global corporations as separate entities rather than one group is flawed. Solutions to BEPS will ultimately require alternative methods of allocating taxable profits across borders.

3.3.2 The case of Zambia

Zambia is a good example of how a resource-rich country fails to benefit from its natural resources as a result of corporate and individual tax avoidance. GFI research from 2012¹⁴¹ estimated that \$ 8.8 billion left Zambia in illicit financial flows between 2001 and 2010, of which \$ 4.9 billion can be attributed to false invoicing. According to Zambia's Deputy Finance Minister, Miles Sampa, \$2 billion is lost every year to legal tax avoidance by multinational corporations operating in Zambia. Indeed, of all the major multinationals that export copper and other metals out of Zambia, just “one or two” officially recorded a profit and therefore the rest pay no corporate tax. Barrick Gold Corp. (ABX), Vedanta Resources Plc, Glencore International Plc (GLEN) and First Quantum Minerals Ltd. (FM) all operate mines in the country.¹⁴²

¹³⁷ Ann Hollingshead, Global Financial Integrity, 'Implied Tax Revenue Loss From Trade Mispricing', February 2010, <http://www.gfintegrity.org/content/view/292/156/>

¹³⁸ J. Henry, 'The Price of Offshore Revisited: New Estimates for Missing Global Private Wealth, Income, Inequality, and Lost Taxes' (London: Tax Justice Network, 2012), p. 9, available at http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf, (accessed 20 February 2013).

¹³⁹ Alex Marriage, 'Secret structures, hidden crimes: Urgent steps to address hidden ownership, money laundering and tax evasion from developing countries' (Brussels: Eurodad, 2013).

¹⁴⁰ OECD, 'Addressing Base Erosion & Profit Shifting', 2013, <http://www.oecd.org/tax/beps.htm> (accessed 20 February 2013).

¹⁴¹ Global Financial Integrity, 'Illicit Financial Flows from Developing Countries 2001-2010',

<http://www.financialtaskforce.org/2012/12/13/what-billions-in-illicit-and-licit-capital-flight-means-for-the-people-of-zambia>

¹⁴² Matthew Hill, "Zambia Says Tax Avoidance Led by Miners Costs \$2 Billion a Year", Bloomberg News, 25 November 2012, available from www.bloomberg.com/news/2012-11-25/zambia-says-tax-avoidance-led-by-miners-costs-2-billion-a-year.html

To illustrate how this loss can occur, the case of Glencore's Zambian subsidiary Mopani Copper Mines is outlined in more detail below. The mine was recently found to report no profits according by an independent audit report, considerably reducing the company's income tax obligations. Minister Sampa informed that next to transfer pricing, "losses" are generated in Zambia's extractive industry by parent companies loaning money to their Zambian subsidiaries at interest rates higher than the market. Given that the Netherlands is commonly used for intra-group financing and hosts financing companies for Barrick Gold and Glencore, for instance, it is therefore likely that they are involved in reducing government revenues in Zambia.

The case of Zambia, however, is not an isolated incident. This is a systemic problem in the industry. In December 2012, it became known that a highly profitable aluminium factory in Mozambique (Mozal) is paying just 1% tax, whilst half of the company's costs were being funded by foreign governments to help 'develop' the country.¹⁴³ In February 2013, Australian newspapers reported that the extractive company Rio Tinto "*has not contributed a cent to the federal government's mining tax and does not know when it will start*".¹⁴⁴

In considering these high revenue losses – and therefore loss of potential public investments – it is worth revisiting the initial argument made in favour of tax competition, namely, that low taxes encourage FDI and therefore economic development. Academic literature and econometric studies have in fact found no conclusive evidence of this supposed increase in FDI as a result of low tax rates or greater investor protection in treaties.¹⁴⁵ Furthermore, an increase in FDI does not necessarily mean sustainable economic development for host states.¹⁴⁶ Again, Zambia is a case in point: the privatisation of the Zambian copper industry in the late 1990s was presented by the World Bank, the IMF and the industry as an opportunity for development. Yet it appears to have been only lucrative for businesses through numerous fiscal incentives. In 2000, Mopani Copper Mines, for example, signed a development agreement with the Zambian government specifying a royalty tax rate of 0.6% (versus the regular domestic rate of 3%), a corporate tax rate limited to 25%, exemptions on customs duty, and a stability clause of 20 years.¹⁴⁷ The Zambian government might have attracted Glencore to buy its formerly state-owned copper mine, but it has certainly not benefitted near enough financially from the deal. Indeed since its privatisation, the mining sector has become the least productive in the Zambian economy, contributing only 2.8% to Zambia's GDP in 2003.¹⁴⁸

¹⁴³ Jubilee Debt Campaign UK et al., 'Whose development is it? Investigating the Mozal aluminium smelter in Mozambique', December 2012, <http://www.jubileedebtcampaign.org.uk/download.php?id=1107>

¹⁴⁴ Business Spectator, 'Rio Tinto hasn't paid a cent in MRRT', 14.02.2013, <http://www-1.eurekareport.com.au/bs.nsf/Article/Rio-pays-no-mining-tax-4WBD6?OpenDocument&src=rab>

¹⁴⁵ The overall determinants of FDI are found in a broad array of variables, which include historical links between states, political contexts and other macro-economic external factors (other than the existence of treaties). See, amongst others, Barthel, F., Busse, M., & Neumayer, E. (2010). The Impact of Double Taxation Treaties on Foreign Direct Investment: Evidence from Large Dyadic Panel Data. *Contemporary Economic Policy*, 28(3), 366-377 or Coupé, T., Orlova, I., & Skiba, A. (2008). The Effect of Tax and Investment Treaties on Bilateral FDI Flows to Transition Countries. 9th Annual Global Development Conference, Brisbane.

¹⁴⁶ See SOMO, 'Is Foreign Investment Good for Development? A Literature Review for a literature overview and case studies', 2008, available at http://somo.nl/publications-en/Publication_2478.

¹⁴⁷ Specific Instance regarding Glencore International AG and First Quantum Minerals Ltd. and their alleged violations of the OECD guidelines for multinational enterprises via the activities of Mopani Copper Mines Plc. in Zambia, http://oecdwatch.org/cases/Case_208/925/at_download/file

¹⁴⁸ IMF Country Report No. 04/160 (July 2004), Zambia: Selected Issues and Statistical Appendix, <http://www.imf.org/external/pubs/ft/scr/2004/cr04160.pdf>, p25. In comparison, the restaurant and hotel business contributes 2.6% and agriculture, forestry, and fishing to 20.8% of the country's GDP.

3.4 Using Dutch conduit entities for tax avoidance and investment protection

Recent media reports about major profitable multinational corporations paying no – or very low – corporate income tax thanks to intricate tax avoidance schemes have highlighted the role of the Netherlands in international tax avoidance.¹⁴⁹ This is not a new development, as the country has long faced criticism from the OECD,¹⁵⁰ the European Union¹⁵¹ and the United States¹⁵² for a fiscal regime that allows for the erosion of other countries' tax bases through harmful tax competition and conduit structures.

Foreign MNCs often set up financing structures that route investment through the Netherlands because the country offers a profitable fiscal climate with a reduction of tax charges on dividends, interest, royalties and capital gains income.¹⁵³ The Netherlands also offers political weight guaranteeing action will be taken when host states attempt to challenge treaty protection and a well-established infrastructure for conduit entities, such as a trust sector and qualified lawyers and accountants. The Netherlands furthermore specialises in royalty structures, offering legal recognition and good protection to patents, trademarks, copyrights, industrial designs and models.¹⁵⁴ Another advantage of using a Dutch conduit entity to invest in host states is the country's large investment treaty network. Some of these elements of the Dutch fiscal regime are explained in more detail below.

3.4.1 Tax avoidance and evasion through the Netherlands

The most commonly used strategy to reduce foreign tax is the use of a conduit¹⁵⁵ or holding company in a jurisdiction that allows for profits to remain untaxed or taxed at a very low rate. A holding company is a corporation that owns shares in related companies (subsidiaries) and unrelated companies and/or finances other group entities through loans (financial holding). A Dutch holding can receive tax free dividends and capital gains from its (foreign) subsidiaries under the participation exemption. It can also

¹⁴⁹ There are many examples, but Google represents one of the highest tax savings using the Netherlands as reported in the media so far. See Jesse Drucker, 'Dutch Sandwich saves Google billions in taxes. Internet giant uses complex structure to keep its overseas tax rate at 2.4%', Bloomberg Business Week, 22 October 2010, available at http://www.msnbc.msn.com/id/39784907/ns/business-us_business/dutch-sandwich-saves-google-billions-taxes/#.UMpKMtAeSo

¹⁵⁰ The OECD ranked the Netherlands as one of the top five industrialised countries that supported harmful tax competition. It identified nine potentially harmful tax practices in Dutch law, excluding holding company regimes and similar provisions: because of the "complexities raised by such regimes, including their possible interaction with tax treaties", the Forum decided further research was needed to assess the effect of holding company structures. See OECD, 'Towards Global Tax Co-operation. Progress in Identifying and Eliminating Harmful Tax Practices', available at <http://www.oecd.org/dataoecd/9/61/2090192.pdf#search=%22towards%20global%20tax-cooperation%22>

¹⁵¹ The EU Code of Conduct Group on Business Taxation (Primarolo Group) was designed to detect measures constituting harmful tax competition, i.e. measures that "unduly affect the location of business activity in the Community by being targeted merely at non-residents and by providing them with a more favourable tax treatment than that which is generally available in the Member State". In a 1999 report the Group identified 66 tax measures with harmful features, of which 40 were occurring in EU Member States, 15 in Dutch Law and 7 in the Netherlands Antilles.

¹⁵² US Commerce data show that US businesses kept \$ 118bn of income in Dutch holding companies between 2006 and 2009 (Vanessa Houlder, Megan Murphy and Jeff Gerth, 'Tax wars: the accidental billion-dollar break', Financial Times, 27 September 2011, available at <http://www.ft.com/cms/s/0/69703dfe-e82e-11e0-9fc7-00144feab49a.html#axzz1fTOPnukW> (accessed 20 February 2013)), and US President Barack Obama famously named the Netherlands a tax haven in May 2009 ('Netherlands surprised at Obama tax haven slur', NRC Handelsblad, 5 May 2009, available at <http://vorige.nrc.nl/international/article2232958.ece>

¹⁵³ For a detailed explanation of the different types of holding structures common to the Netherlands, see SOMO, 'The Netherlands: a Tax Haven?', (2006), http://somo.nl/publications-en/Publication_1397 (accessed 25 February 2013).

¹⁵⁴ Deloitte, 'Taxation and Investment in Netherlands 2011', http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Taxation%20and%20Investment%20Guides/2011/dttl_tax_guide_2011_Netherlands.pdf

¹⁵⁵ A conduit structure means that rather than investing directly into a country, a company interposes a conduit entity or holding company in a third country through which it channels its investments.

deduct expenses, including interest on funding loans, even if these are made to tax havens, and does not have pay withholding taxes in the Netherlands on outgoing interest, royalty and most dividend payments. Combined with loose substance rules, this allows foreign companies to shift income out of countries of operation, typically to a tax haven, through the Netherlands.

The Netherlands is not a low-tax jurisdiction or a tax haven in the sense that it offers a near-to-zero corporate tax rate or bank secrecy, but in the sense that it facilitates tax avoidance by letting MNCs channel their investments through the Netherlands whilst returns on these investments remain untaxed or taxed at a very low level whilst in the Netherlands and on leaving the Netherlands.

Tax treaties

Taxation treaties allocate taxing rights between signatory states, define who is entitled to enjoy treaty benefits, and avoid double taxation on the same income by two different jurisdictions. Taxation treaties regulate which types of income the host state is entitled to tax and when home states are obliged to grant tax relief to avoid double taxation. States therefore invariably give up some taxing rights, the extent of which is subject to lengthy and complex treaty negotiations among states between which mutual investment takes place. The Netherlands has currently concluded 90 bilateral tax treaties, which reduce corporate income tax on royalties, dividends and interest in the signatory states – around 30% of which are low-income and low- to middle-income countries.¹⁵⁶

Through tax treaty shopping, companies enjoy tax advantages because of the reduction of withholding taxes on corporate income in host states. Withholding taxes are a common form of tax that is withheld or deducted from a payment, such as salaries, interests or dividends. If the recipient of the income is resident in a different jurisdiction it also applies to royalties or capital gains.

Increasingly, treaties contain anti-abuse provisions. The Dutch tax treaty network, however, only has such a (limitation of benefits) provision with the United States.

In brief this is what happens: bilateral tax treaties allow for capital to leave a home country and enter the Netherlands without being taxed (or at a very low rate). Domestic legislation makes sure the corporate income tax remains low in the Netherlands (through the participation exemption and generous rules on tax deductible items, for instance). Lack of withholding taxes in the Netherlands means the capital can leave the country, typically into a tax haven, without being taxed. Often the capital is not paid out to its parent, however. A Dutch holding company that receives low-taxed income or payments from its own subsidiary companies can effectively defer these gains for its parent company, almost indefinitely, and reinvest it in the group in a tax-efficient manner.¹⁵⁷

The tax planning methods that companies can apply using a Dutch financial holding principally contain the following three elements:

- Facilitating inflow of untaxed or low-taxed capital: Tax treaties enable firms with affiliates in countries that have a treaty with the Netherlands to move payments on interest, royalties and (certain) dividends¹⁵⁸ from a subsidiary in one country to a holding domiciled in the

¹⁵⁶ See Annex to the response from then Finance State Secretary Weekers to a parliamentary motion on substance provisions, 'Kamerbrief betreft Uitvoering motie leden Braakhuis en Groot', Doc. IFZ/2012/85, 25 June 2012, available at <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2012/06/25/kamerbrief-inzake-uitvoering-substance-motie-braakhuis-en-groot/kamerbrief-inzake-uitvoering-substance-motie-braakhuis-en-groot.pdf> (accessed 4 January 2013).

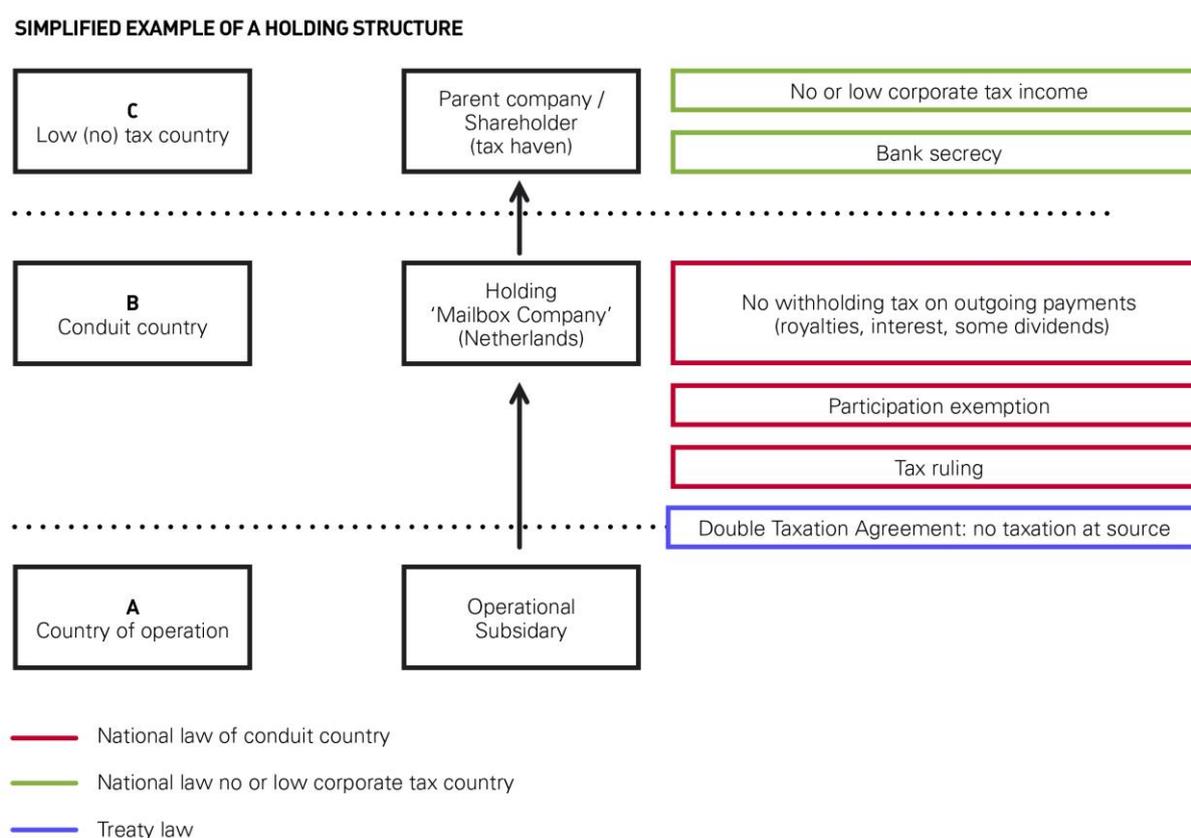
¹⁵⁷ Holding companies often retain profits as most parent companies do not themselves distribute all their profits to their shareholders by means of dividends. See SOMO, 'The Netherlands: a Tax Haven?', (2006), http://somo.nl/publications-en/Publication_1397 (accessed 25 February 2013).

¹⁵⁸ The rate for inter-company dividends (for foreign shareholders) is often reduced, in many cases even to nil percent, due to application of tax treaties or the implementation laws based on the EU Parent Subsidiary Directive. No Dutch dividend withholding tax is levied for qualifying Dutch Cooperations (Coöperaties) and there is an indirect tax credit for re-distributed dividends. Finally, a branch structure can also lead to no withholding tax on dividends. See 'Dutch withholding taxes on outbound payments' at http://tax-consultants-international.com/read/Dutch_withholding_taxes#2.

Netherlands. If no treaty exists, the Netherlands also takes unilateral measures to avoid double taxation.¹⁵⁹

- ❑ Reducing the tax rate in the Netherlands: Certain Dutch regulations allow for capital to be taxed at a low level in the Netherlands and/or allow for non-taxation of outflowing capital.¹⁶⁰
- ❑ Facilitating outflow: The Netherlands does not levy withholding taxes on interest, royalty, and most dividends, so that eventually capital can leave the Netherlands without being taxed or be taxed at a low rate (in source states and/or in the Netherlands).

Figure 3: Holding structure



The type of payments that are routed through the Netherlands for tax avoidance purposes are often royalties, Intellectual Property (IP) rights (fees paid for using licences or brand names), dividends and interest payments. The Netherlands is also used to avoid capital gains tax resulting from the sale of subsidiaries.

¹⁵⁹ This might include agreements with corporations on the percentage of profit to be taxed in source countries and in the Netherlands, or other bilateral agreements with source countries.

¹⁶⁰ For example, under the Dutch participation exemption, the dividend and capital gains income received by the holding company from subsidiaries is exempt from corporate income tax in the Netherlands (under certain conditions). Companies can also make deals with the tax authority on costs (typically interest rates) under so-called advanced rulings (typical for financial holdings). Companies can also reduce their effective tax rate in the Netherlands by using a branch office in another (low-tax) jurisdiction and applying an advance tax ruling to allocate the majority of profit to that branch (e.g. 90/10). The Netherlands also allows for payments to tax havens to be tax-deductible in the Netherlands, which many other countries forbid because it leads to non-taxation of capital.

The Netherlands: a tax haven

There are two broad categories of tax havens. The first group consists of the typical offshore financial centre that primarily exists because it offers the lowest tax rate and financial secrecy. The second group consists of financial centres that combine a regular tax regime for domestic economic activities with a favourable regime for economic activities in a foreign country. There might be internationally recognised transparency and information exchange agreements in place in those jurisdictions.

The Netherlands is a tax haven of the second type that specialises in the provision of intermediary services that facilitate inward and outward financial flows, typically from countries where real economic activities take place to low-tax offshore financial centres in order to reduce or eliminate tax payments for owners of capital.¹⁶¹ These flows are enabled by a network of double taxation treaties and specific national tax regulations. The second type of financial centre complements the first, and therefore their use for corporations seeking to avoid paying taxes lies in their combination. Combined, they permit firms to move profits from foreign subsidiaries to a foreign parent company or branch office through the Netherlands.

3.4.2 Bilateral investment treaties

Bilateral investment treaties provide for legal protection for foreign investors, with the ability to sue governments in international arbitration in the event that the treaty protections are alleged to have been breached. Increasingly, human rights law arguments have, mainly as a defence by states, arisen in investor-state arbitrations.¹⁶² MNCs incorporating in the Netherlands with head offices or mailbox companies can benefit from Dutch bilateral investment treaties (BITs) by making use of investor-state dispute settlement, typically through the World Bank's International Centre for the Settlement of Investment Disputes.

There are currently around 95 BITs in force in the Netherlands.¹⁶³ Broadly speaking, investment agreements usually comprise three elements: definitions,¹⁶⁴ substantive obligations for host countries,¹⁶⁵ and provisions on investor–state dispute resolution that provide for international arbitration. The Netherlands has very broad definitions of investor and investment in its BITs and as such they allow mailbox companies to benefit from Dutch bilateral investment treaties by making use of the investor-state dispute settlement.¹⁶⁶ SOMO research has shown that MNCs investing abroad have been using Dutch BITs to sue host-country governments for over \$ 100 billion for alleged damages to the profitability of their investments.¹⁶⁷ Several states, including South Africa, Canada and Belgium are involved in bringing investment treaties more in line with modern human rights law and environmental obligations. But most investment treaties, including the Dutch, are silent on the rights of stakeholders other than investors.

An investment structure through the Netherlands not only allows companies to use Dutch BITs to sue host-country governments but also to put pressure on governments against legislation that could compromise profitability. As such, protection under a BIT can work preventatively by stopping

¹⁶¹ 'Onshore financial centres: Not a palm tree in sight. Some onshore jurisdictions can be laxer than the offshore sort', *The Economist*, 16 February 2013, available at <http://www.economist.com/news/special-report/21571554-some-onshore-jurisdictions-can-be-laxer-offshore-sort-not-palm-tree-sight> (accessed 20 February 2013).

¹⁶² H. Mann, 'International investment agreements, business and human rights: key issues and opportunities' 13-14, IISD 2008.

¹⁶³ For an overview of BITs signed by the Netherlands see <http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html>

¹⁶⁴ Among others, of what constitutes an "investment" and who counts as an "investor", establishing the scope of the treaty.

¹⁶⁵ Which include, but are not limited to, non-discrimination principles (national and most-favoured nation treatment), protection against expropriation, fair and equitable treatment.

¹⁶⁶ International Centre for the Settlement of Investment Disputes, <https://icsid.worldbank.org/ICSID/Index.jsp> (accessed 20 February 2013).

¹⁶⁷ SOMO, 'Dutch Bilateral Investment Treaties. A gateway to 'treaty shopping' for investment protection by multinational companies', 2012, p. 29, available at http://somo.nl/publications-en/Publication_3708, (accessed 20 February 2013).

progressive legislation (from a public interest perspective) from being introduced as well as retrospectively by taking governments to court when they have implemented legislation.

3.4.3 Treaty shopping

Broad definitions in investment treaties, the existence of tax treaties and the lack of effective substance or anti-abuse provisions have led to the Netherlands being widely used for treaty shopping, which is when foreign investors route their investment through a third state (other than their home or host state) only for the purpose of acquiring the benefits under a treaty that was not intended for them. By investing through the Netherlands, MNCs may not only reduce their taxation on corporate income in host states, but they can also benefit from the investment treaty protection outlined above.

Substance requirements

A major advantage of the Dutch fiscal climate is that there are almost no substance requirements attached to tax benefits. Companies are not required to have employees. They are required to have equity, a Dutch bank account, and a registered office in the Netherlands. At least 50% of directors should be resident in the Netherlands and they should have professional knowledge. These substance requirements are, however, usually fulfilled by a trust office which provides management, administration, an address and board members resident in the Netherlands. Different purposes require a different degree of substance (for instance, to be able to apply for an advanced tax ruling or to enjoy treaty benefits).¹⁶⁸ A discussion of substance requirements is beyond the scope of this paper. However, the effectiveness of Dutch substance requirements is clearly insufficient when looking at the case studies in this report and the sheer amount of mailbox companies in the Netherlands.

Transparency requirements

Next to the aforementioned investor and tax benefits, lack of transparency is another motivation for MNCs to establish themselves in the Netherlands. The Netherlands does not require company accounts or full beneficial ownership to be publicly available. A beneficial owner is a legal term indicating a person holds specific property rights even if the legal title of that property belongs to another person (legal entity). The beneficial owner enjoys the benefits of the property and its returns. If beneficial ownership does not have to be disclosed, it is impossible to assess a company's financial conduct and tax behaviour, or to establish responsibilities and lines of control. The Netherlands has therefore repeatedly come under criticism for this lack of beneficial ownership disclosure in the context of anti-bribery and anti-money laundering laws, and the IMF has called for the implementation of existing due diligence regimes relating to the prevention and detection of these financial crimes.¹⁶⁹

3.5 The Netherlands: the biggest investor in mining?

Although the Netherlands is certainly not the only country offering the above-named tax and investment incentives, the disproportionate scale of the country's foreign direct investment compared to its GDP, which is attributable to conduit entities commonly used for tax avoidance, shows that it is one of the biggest players in the international tax avoidance industry. In 2009, the country even topped the IMF's world ranking for foreign direct investment with a total of incoming direct investment of \$ 3 000 billion and outgoing direct investment of \$ 3 700 billion – the equivalent of 377% and 465% of GNP, respectively. In comparison, the ratio of foreign direct investment to total GDP in the Netherlands is 20 times larger than in the US, one of the biggest capital exporting countries in the world. Mailbox companies account for roughly 75% of total Dutch direct investment.

¹⁶⁸ See, for instance, tax advisor website <http://www.duijntax.com/en/what-are-the-dutch-substance-requirements/>, (accessed 20 February 2013).

¹⁶⁹ De Schutter et al., 'Human Rights Due Diligence: The Role of States', 2012, <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>, p. 1 (accessed 20 February 2013).

Mailbox companies in the Netherlands

The term 'mailbox company' does not refer to one set of companies under Dutch law. Moreover, the Dutch Central Bank and Central Statistics Bureau use different classifications for financial corporations than those used by the Ministry of Finance. A ministerial reply¹⁷⁰ to recent parliamentary questions on which substance provisions Dutch mailbox companies have to adhere to showed there are at least four different, overlapping umbrella definitions. As the definitions have implications for which financial benefits a company enjoys, the monitoring of compliance to substance and other provisions in the Netherlands is far from comprehensive.¹⁷¹ There are currently four definitions in use in official communications and media reports.

Mailbox companies (number: 23 500¹⁷²) (*Brievenbusvennootschappen*). Popular name for legal entities that are managed by trust offices. In January 2013, the State Secretary of Finance introduced another general term – 'conduit entities'¹⁷³ (*Schakelvennootschappen*) – describing the incorporation of entities in jurisdictions with a high number of taxation treaties to benefit from lower withholding tax rates at source. Mailbox or conduit entities could be any of the following:

1. Special Financial Institutions (number: 14 300¹⁷⁴) (*Bijzondere Financiële Instellingen*). Statistical term used by the Dutch Central Bank to classify holding, financing and royalty companies. The Dutch National Bank (DNB) introduced a special classification for SFIs so as to separate FDI passing through the Netherlands from real investments in the Netherlands, which affect GDP.

2. Service entities (number: 5 000-10 000¹⁷⁵) (*Dienstverleningslichamen*). Term used by the Ministry of Finance for entities whose activity within a group consists of receiving and passing on royalties and/or interest to other group entities. These are the only legal entities that have to fulfil additional substance requirements¹⁷⁶ introduced in 2004.

3. Advance Tax Ruling & Advance Pricing Agreement companies (number: 12 500¹⁷⁷) (*ATR/APA vennootschappen*). This term is used by the Ministry of Finance to refer to a corporate group that is eligible to apply for a tax ruling from the tax office. These can (but do not have to) be the above named SFIs (entities that manage participations, loans and/or licences within a corporate group) or service entities (conduits for royalties and interest). They might also not be managed by trust offices.

4. Financial Corporations Sector: DNB/CBS reform of classification system

The DNB and Central Bureau of Statistics (CBS) have to apply specific classification criteria in their reports to the EU agencies EUROSTAT and the European Central Bank (ECB). These are laid down in the System of National Accounts (SNA, 2008) and the European System of Accounts (ESA, 2010), which have recently been reformed. The financial corporations sector is divided into nine subsectors, which are classified according to a decision tree.¹⁷⁸

According to the Dutch Central Bank, Dutch outward FDI is comprised mainly of mining, oil, chemicals and quarrying activities, as well as investment in banking and insurance.¹⁷⁹ This means that the world's largest mining companies have chosen to route their investments through the Netherlands

¹⁷⁰ Minister of Finance, 'Letter to Parliament', February 2013 <https://zoek.officielebekendmakingen.nl/dossier/25087/blg-174529?resultIndex=13&sorttype=1&sortorder=4> (accessed 20 February 2013).

¹⁷¹ 'Staatssecretaris Weekers laat veel vragen van Kamer over brievenbusfirma's onbeantwoord', Het Financieel Dagblad, 28 June 2012. See <http://fd.nl/ondernemen/topics/belastingroute-nederland/> for research by the FD on the Dutch role in international tax planning. For a copy of the article see <http://www.hollandfinancialcentre.nl/publications//28%20juni%20Staatssecretaris%20Weekers%20laat%20veel%20vragen%20van.pdf> (accessed 20 February 2013).

¹⁷² T. Mulder, 'Brievenbusfirma onder vuur in Kamer', in Het Financieel Dagblad, 24 January 2013.

¹⁷³ Minister of Finance, 'Letter to Parliament', February 2013 < <https://zoek.officielebekendmakingen.nl/dossier/25087/kst-25087-34?resultIndex=7&sorttype=1&sortorder=4> > (accessed 20 February 2013).

¹⁷⁴ 2010, see 'Staatssecretaris Weekers laat veel vragen van Kamer over brievenbusfirma's onbeantwoord', Het Financieel Dagblad, 28 June 2012.

¹⁷⁵ 2011, see 'Staatssecretaris Weekers laat veel vragen van Kamer over brievenbusfirma's onbeantwoord', Het Financieel Dagblad, 28 June 2012.

¹⁷⁶ Half of the board members have to be resident in the Netherlands, and the entity has to have a Dutch bank account and keep its books in the Netherlands.

¹⁷⁷ 2011, see Het Financieel Dagblad, 28 June 2012.

¹⁷⁸ United Nations ECOSOC, Economic Commission for Europe, 'Delineation of the Financial Sector in ESA 2010: Implementation in the Netherlands. Note by Statistics Netherlands', ECE/CES/GE.20/2012/18, 19 March 2012, available at http://www.unecp.org/fileadmin/DAM/stats/documents/ece/ces/ge.20/2012/18_Netherlands_Financial_Sector.pdf (accessed 20 February 2013).

¹⁷⁹ Dutch Central Bank (2010) in OECD, 'Report on implementing the OECD Anti-Bribery Convention in the Netherlands', December 2012, available at <http://www.oecd.org/daf/bribery/internationalbusiness/NetherlandsPhase3ReportEn.pdf>, p. 8 (accessed 12-01-2013).

using Dutch holding and conduit entities, largely engaging in the provision of group loans and channelling the corresponding income flows. Conduit entities are commonly referred to as mailbox companies. The Dutch Central Bank deems a larger portion of mailbox companies as Special Financial Institutions (SFIs).

3.6 Dutch mailbox companies

The Dutch Central Bank recognises that the country's massive investment flows are largely due to the fact that the Dutch economy hosts an estimated 23 500 conduit entities (hereafter referred to as mailbox companies) that have no substantial commercial or operational presence in the Netherlands because they are incorporated by MNCs in the country to benefit from fiscal and other commercial arrangements. In 2010, the DNB explained¹⁸⁰ that:

“The overall picture is determined by approximately 1,200 to 1,300 SFIs. The financial transactions for which SFIs serve as conduits consist mostly of inward and outward equity investment, whether or not in combination with the provision of group loans and the corresponding income flows (dividend and interest). Also of significance are the international revenues from intellectual property, such as royalties, copyright and licensing fees, which SFIs collect in our country and subsequently channel out of country.”

Conduit entities are most often managed by trust or company service providers (for which the umbrella term ‘trust industry’ is used in the Netherlands), which offer the minimum substance needed to maintain a Dutch corporation.¹⁸¹ Substance here refers to a managerial or physical presence in the country that justifies a company's claim to investment benefits provided by the Netherlands. They serve as financial hubs and often have direct parents in offshore financial centres¹⁸² and tax havens, indicating their tax planning purpose.

Total assets of mailbox companies have expanded rapidly in the past decade and continued to grow during the credit crisis. Total assets of mailbox companies vary widely: the largest non-financial group had more than 30 SFIs with total assets of more than € 160 billion (\$ 208 billion) in 2010.¹⁸³ As mentioned above, given that the biggest non-financial sector accounting for Dutch outward FDI is the extractive industry (mining, oil, chemicals and quarrying activities), then most of the \$ 208 billion is held by extractive industry companies. Indeed, Glencore's Dutch subsidiary Finges Investment alone held \$ 17.9 billion in assets in 2010.

3.7 The negative impact of mailbox companies reviewed for this report

The mailbox companies of extractive MNCs reviewed here are all financial holding companies and/or head offices. Each of the companies reviewed has more than one subsidiary in the Netherlands; some have more than 30. For this report, the holding structure of the companies was researched with regard to their link to subsidiaries accused by local communicators and NGOs of having been involved in

¹⁸⁰ De Nederlandsche Bank, ‘Statistical Bulletin December 2010’, available at http://www.dnb.nl/en/binaries/Statistical%20Bulletin%20DNB%20%20December%202010_tcm47-246952.pdf (accessed 20 February 2013).

¹⁸¹ This includes a registered address and majority resident directors, see OECD, ‘Report on implementing the OECD Anti-Bribery Convention in the Netherlands’, December 2012, available at <http://www.oecd.org/daf/briberyininternationalbusiness/NetherlandsPhase3ReportEn.pdf> (accessed 20 February 2013).

¹⁸² Next to offshore centres, important countries of direct origin and destination are Luxemburg, United Kingdom, Ireland and Switzerland, all jurisdictions known to offer tax planning opportunities.

¹⁸³ Financial Stability Board, ‘Global Shadow Banking Monitoring Report 2012’, available at http://www.financialstabilityboard.org/publications/r_121118c.pdf Annex 5, p. 9 (accessed 20 February 2013).

human rights violations. The research also looked at the possible tax planning functions these structures could fulfil.

3.7.1 Link to subsidiaries involved in human rights controversies

The mailbox companies reviewed in this report were found to have the following finance or ownership links with these subsidiaries.

In some cases, registered (rather than management) head offices are located in the Netherlands (Trafigura, Pluspetrol, possibly Oilinvest). These also fulfil important holding functions in the Netherlands. The Oil and Natural Gas Corporation Limited (ONGC) and Barrick Gold have Dutch holding companies with direct ownership relations with the mining or oil and gas operations associated with the human rights controversies identified in this report. ONGC even has a branch office in the operating country Sudan, legally part of the Dutch subsidiary, which should make the latter directly liable for human rights or other violations committed by its Sudanese branch office. Freeport's Dutch subsidiary directly financed subsidiaries connected to human rights violations in Indonesia. Glencore (assets of \$ 17.9 billion) and CNPC (assets of more than \$ 1 billion) have important holding companies in the Netherlands that play a central role in the group's financing and investment operations. The precise financing flows and related tax payments, however, cannot be discerned from the annual reports because they are not reported on a country-by-country basis, and because MNCs can make use of an exemption to filing financial accounts of their subsidiaries (see Chapter 5). In summary, the following types of relations were found to exist in the cases researched:

- ❑ The mailbox company is a registered head office and thereby a parent of the group (Pluspetrol and, until 2012, Trafigura).
- ❑ The mailbox company directly owns (Pluspetrol, Trafigura) or is part of a consortium (Glencore) that owns the subsidiary connected to human rights violations, or the subsidiary in question is a branch office of the Dutch mailbox company (ONGC).
- ❑ The mailbox company directly finances or has financed the subsidiary connected to human rights violations (Barrick Gold, Freeport).
- ❑ Dutch transparency laws are insufficient to establish whether the mailbox company is involved in potential human rights violations, Dutch incorporation facilitates obscuring ownership structures of businesses and these companies have bad human rights records or operate in military regimes or conflict areas (Oilinvest, CNPC).

3.7.2 Involvement in tax planning through the Netherlands

As explained in Chapter 1, the research in this report did not involve in-depth analysis of possible tax avoidance and evasion by the companies reviewed in this report. This is because publicly available financial data is usually insufficient to determine with certainty whether a corporation is avoiding taxes, and if so, how intragroup transactions are structured precisely to achieve this effect. However, although no certainty can be obtained on the basis of the available data, tax planning techniques always require setting up legal entities in conduit or tax haven jurisdictions. Certain elements identified in company structures and their financing activities can therefore suggest that a company is avoiding taxes in the countries in which it operates, and that its holding companies in the Netherlands may play an important role in this.

These structures are outlined above, and most recently, the OECD has also published examples of MNCs' tax planning structures that encapsulate a number of the corporate tax planning opportunities

described above, including financing operations through holding companies,¹⁸⁴ which are common among the extractive companies reviewed here. The structures identified in the Netherlands of the companies reviewed for this report (see company graphs, Chapter 4) point to tax planning taking place. It should be noted that these structures are legal under the tax systems of the countries in which subsidiaries are incorporated.

- ❑ All companies use the Netherlands for intermediate holding activities through conduit entities that have no material substance (such as sales, workforce or fixed assets) in the Netherlands. This indicates structuring investments through the Netherlands only for treaty shopping or other fiscal purposes.
- ❑ All of them invest in subsidiaries abroad in which material activities take place or finance these activities, which allows for returns on these investments or interest income to remain untaxed or taxed at a very low rate.
- ❑ The Dutch holdings all have links with tax haven subsidiaries, either through financing activities or they are directly owned by subsidiaries located in tax havens. This allows for profit shifting to low-tax jurisdictions.

List of tax havens

As explained in Chapter 1, there is no internationally agreed definition of tax havens. In this report, a tax haven in this report refers to any jurisdiction that allows companies or individuals to avoid or evade tax, either with low or no corporate tax rates for conduit structures that allow international payments to remain untaxed, or taxed at a very low level. Tax avoidance relies on harmful conduit regimes as well as secrecy jurisdictions. The tax haven list used for this report is based on a list drafted by the United States Government Accountability Office (GAO) report: 'Large U.S. Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions'. In addition, the Netherlands and the U.S. State of Delaware are classified here as tax havens as they are, respectively, one of the world's leading tax conduit country and low taxation and secrecy jurisdiction, in particular for the extractive industry.

Andorra, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Cyprus, Dominica, Gibraltar, Grenada, Guernsey, Hong Kong, Ireland, Isle of Man, Jersey, Jordan, Latvia, Lebanon, Liberia, Liechtenstein, Luxembourg, Macao, Maldives, Malta, Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, The Netherlands, Netherlands Antilles, Niue, Panama, Samoa, San Marino, Seychelles, Singapore, St. Kitts, and Nevis, St. Lucia, St. Vincent and the Grenadines, Switzerland, Turks and Caicos Islands, U.S. Virgin Islands, U.S. Delaware, Vanuatu.

Table 1: Ownership or financing links* between Dutch holding companies and tax haven subsidiaries

Dutch subsidiary of:	Tax haven subsidiary located in:
Barrick Gold	Barbados
CNPC	British Virgin Islands (British overseas territory)
Freeport	Delaware (USA)
Glencore	Switzerland / Jersey
Oilinvest	Curaçao (former Netherlands Antilles) /Cyprus
ONGC	Cyprus
Pluspetrol	Luxemburg
Trafigura	Malta / Curaçao (former Netherlands Antilles)

* For more details, see graphs in Chapter 4

¹⁸⁴ OECD, 'Addressing Base Erosion & Profit Shifting', 2013, page 79 ('Leveraged acquisition with debt-push down and use of intermediate holding companies') <http://www.oecd.org/tax/beps.htm> (accessed 20 February 2013).

Pluspetrol: head office in the Netherlands – beneficial owners unknown

Pluspetrol S.A. is a private Argentinean extractive company set up in 1976 and is now one of the largest oil companies in South America. In December 2000, the company shifted its registered head office to the Netherlands. Given the lack of substance of the Dutch office, the motivation for this move is most likely the beneficial Dutch fiscal climate and investment protection.

In 2011, Pluspetrol had three Dutch legal entities, but like the other companies researched for this report, no material substance in the country. None of the Dutch entities had any employees, nor were any of the directors domiciled in the country (except a Dutch trust office).¹⁸⁵ Pluspetrol Resources Corporation bv¹⁸⁶ had a total of \$ 3.9 billion in assets in 2011. The company's shareholders, however, are not specified in the annual accounts deposited with the Dutch Chamber of Commerce. The company is formally managed by board members PRC Oil en Gas bv and the Dutch trust office Intertrust.

It is assumed the direct owners are the same as those of the second Dutch entity, PRC Oil and Gas bv (which in turn owns Petroandina Resources Corporation N.V.),¹⁸⁷ namely, three Luxemburg entities. The ultimate ownership cannot be deduced from the Dutch accounts; most probably the Argentinean family that set up Pluspetrol in 1976 is the ultimate beneficial owner.¹⁸⁸

3.8 Tax planning company cases

*"[T]he typical structure of a Swiss commodity trader has three parts: trading activities and a principal residence for tax purposes in Switzerland, above that a Dutch holding company for temporarily depositing the global revenues, and one or more vehicles in tax havens as opaque end-repositories of the profits."*¹⁸⁹

Four companies are described in more detail below in relation to their possible tax planning motivation to incorporate in the Netherlands, namely, ONGC, Barrick Gold, Trafigura and Glencore. It should be noted that no in-depth research into company accounts was conducted with the aim of identifying tax planning. Further research would be required to identify the extent of this planning and resulting revenue loss for developing countries. Most likely, however, lack of country-specific data in financial accounts, lack of transparency in the Netherlands regarding beneficial ownership structures, and also the secret nature of the tax deals the Dutch tax authority makes with large MNCs on their intra-group

¹⁸⁵ Pluspetrol, together with seven other extractive companies, initiated legal action against the Bolivian government in 2005 after the new hydrocarbons law was signed in May that year, stating that this new law undermined its investors' rights outlined in the Dutch-Bolivian Bilateral Investment Treaty. The case, however, never went to court as the companies settled with Bolivia on the nationalisation and increased tax plans; 'Bechtel case sends warning to oil and gas multinationals', available at <http://uk.oneworld.net/article/view/125938/1/7468>. For details see Briefing: 'Multinational legal actions against Bolivia', available at <http://www.docstoc.com/docs/26710335/BRIEFING-MULTINATIONAL-LEGAL-ACTIONS-AGAINST-BOLIVIA> (no author and date specified). The law "reclaimed ownership of all hydrocarbons at the well head for the Bolivian State, and set a 180 days' deadline for the mandatory conversion of the Risk Sharing Contracts into the new forms of petroleum contracts. It introduced a Direct Tax on Hydrocarbons at 32% of the total production of hydrocarbons and added that the summation of the total 18% royalties plus the 32% DTH shall in no case be lower than 50% of the total value of the production of hydrocarbons. See M.V. Vargas 'Bolivia's New Contract Terms: Operating Under the Nationalization Regime', 2007, available at http://www.kslaw.com/Library/publication/MVargas_OGEL_BolivianContractTerms.pdf. Bolivia's president Evo Morales had overturned a law from 1996, which had privatised Bolivia's energy reserves, in exchange for 18% royalties and no taxes. That proportion was raised to 50% in 2005. See IPS NEWS, 'Oil Companies Decide to Stay – on Morales' Terms', 30 October 2006, available at <http://ipsnews.net/news.asp?idnews=35299>.

¹⁸⁶ The company changed its incorporation from N.V. to bv on 27 September 2012. Naamloze vennootschap (usually abbreviated NV) is the Dutch term for a public limited liability company. The company is owned by shareholders, and the company's shares are not registered to certain owners, so that they may be traded on the public stock market. The phrase literally means "innominate partnership" or "anonymous venture" and comes from the fact that the partners (the shareholders) are not directly known. This is in contrast to the term for a private limited company, which is called Besloten Vennootschap (an "exclusive" or "closed partnership", one in which stock is not for sale on open markets).

¹⁸⁷ PRC Oil and Gas bv and Petroandina Resources Corporation N.V. have few assets; it appears that PRC Oil and Gas bv fulfills a passive management function of the Petroandina entity, which was set up in June 2010, possibly related to the takeover of Petroandina Argentina in 2010 from a Canadian group.

¹⁸⁸ Also indicated by the fact that Argentinean nationals held board positions between 2003 and 2006, according to Chamber of Commerce historical data on the company.

¹⁸⁹ Berne Declaration, 'Commodities. Switzerland's most dangerous business', 2012, p. 284, <http://www.evb.ch/en/p19492.html>

transactions, would probably pose a barrier to identifying specific transactions undertaken for the sole purpose of tax avoidance.

3.8.1 ONGC Nile Ganga bv

The Dutch subsidiary of ONGC, ONGC Nile Ganga bv (\$ 3.3 billion assets in 2010), has direct and indirect subsidiaries in Sudan, South Sudan, Syria, Brazil, Venezuela, Myanmar and Nigeria. It acts as a conduit for financing and dividends for ONGC's international arm, ONGC Videsh Ltd. The only board member resident in the Netherlands is Ir A.R. Baron Mackay Holding bv, which offers holding services to companies. ONGC Nile Ganga bv is also listed as a client of Smart Staffing Solutions, a Dutch company that provides services for trust offices in managing sufficient "substance" and artificial directors, indicating a lack of substance in the Netherlands.¹⁹⁰ The group's Dutch ownership and management structure also points to fiscal planning.

Firstly, ONGC's operations enjoy tax treaty benefits and investment treaty protection for their operations in the following countries: Sudan (BIT), Nigeria (BIT and DTT), Venezuela (BIT and DTT) and Brazil (BIT and DTT). In the last two cases,¹⁹¹ ONGC can benefit from reduced withholding taxes (WHT) on royalties, dividend and interest payments from these countries of operation. Brazil's WHT on interest, for instance, is reduced from 25 to 15% under the Dutch tax treaty. Venezuela levies a 34% WHT on interest and dividends, which is reduced to 5% and 0%, respectively.

Interestingly, the Netherlands does not have a DTT with Sudan or South Sudan and, in this case only it appears, ONGC has chosen to set up a branch office rather than subsidiary there,¹⁹² most probably because both countries do not levy branch remittance tax.¹⁹³ If ONGC were to have a separate legal entity in South Sudan, payments from those operations would be taxed, because no treaty with the Netherlands exists. A branch office means this tax can be avoided, although it is not detailed in ONGC's annual report how the profit is split between the Dutch entity and its Sudanese branch.

Table 2: Sudanese domestic withholding tax rates¹⁹⁴

Jurisdiction	Dividends	Interest	Royalties
South Sudan	10%	10%	10%
Sudan	0%	7%	15%

Given that a branch office is not a separate legal entity, a branch office structure in Sudan also implies that ONGC's Dutch subsidiary is liable for any culpability of its Sudanese branch office.

Secondly, ONGC appears to structure its Dutch operations through so-called project entities, which implies setting up separate legal entities for each area of exploration or project. If unprofitable, the entity can be abandoned and the loss can be deducted from the taxable income. Profit, on the other hand, is subject to the participation exemption and remains untaxed. Whether this is case in ONGC's case cannot be ascertained from the annual accounts.

¹⁹⁰ See their website <http://www.smartstaffingsolutions.nl/lokaal-directeurschap/> (accessed 20 February 2013).

¹⁹¹ Nigeria is noteworthy exception as it negotiated *higher* withholding tax treaty rates on passive income (12.5%) than are domestically applicable (10%).

¹⁹² This appears in ONGC's 2010 annual accounts where tax is reported as one post for Dutch and Sudanese operations. It is not possible to identify from the accounts how much of the subsidiary's income tax is paid in the Netherlands and how much in Sudan, and no information is given on how the profit is split by the Dutch and Sudanese tax office over the two jurisdictions.

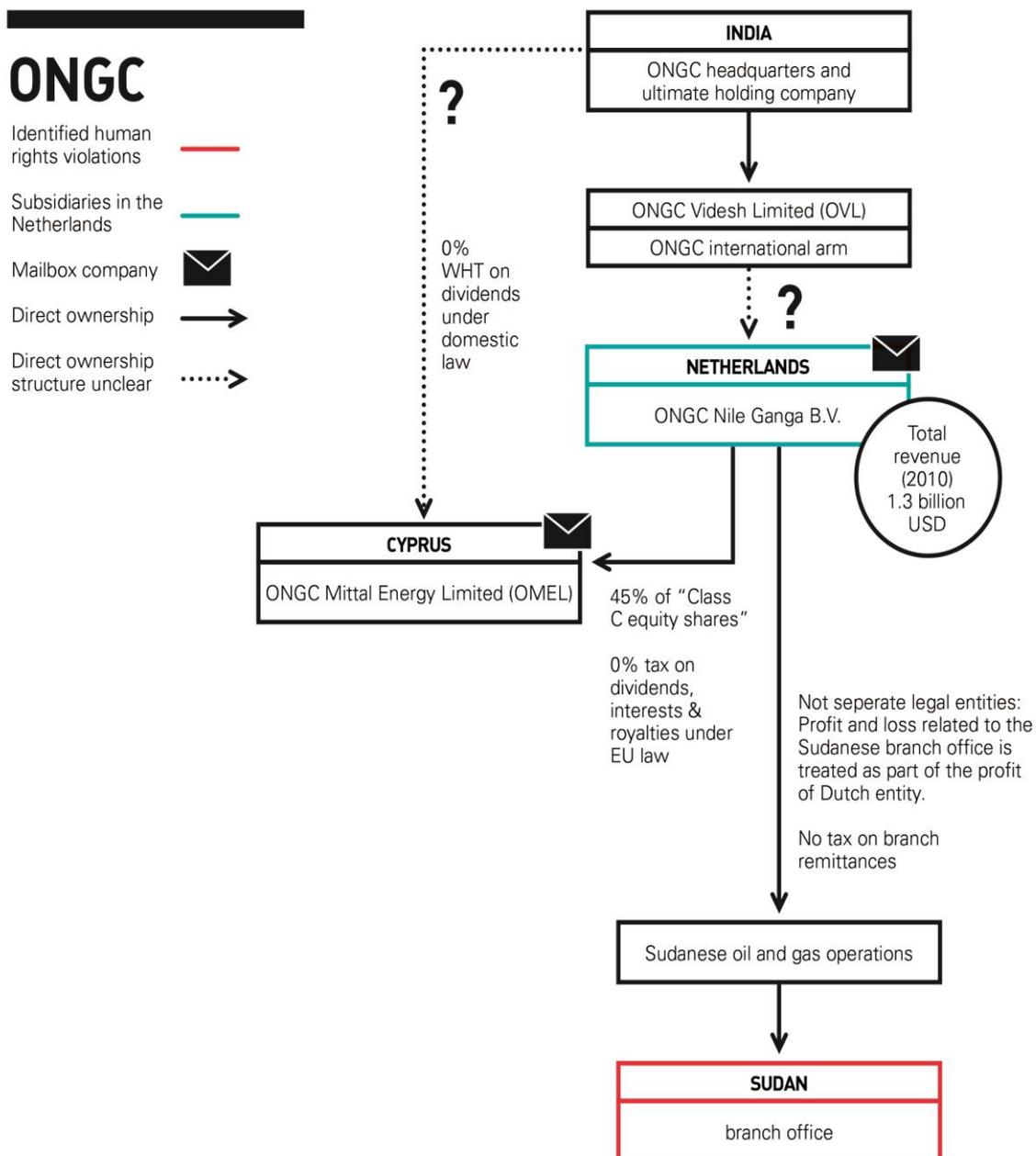
¹⁹³ Deloitte tax highlights 2012.

¹⁹⁴ Deloitte Withholding Tax Rates 2012, http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Taxation%20and%20Investment%20Guides/matrices/dttl_WHT_rates_2012.pdf.

Finally, the group structure involves a subsidiary in Cyprus, which taxes neither incoming nor outgoing dividends, which are likely to be paid out to a tax haven, thereby remaining untaxed.

Although all these indications point to typical tax avoidance planning, the lack of sufficient financial data in the Dutch company's accounts means it is impossible to tell how much, if any, tax is avoided in source countries by structuring through the Netherlands.

Figure 4: ONGC's Dutch holding structure and Sudanese branch



3.8.2 Barrick Gold Corporation

Barrick Gold Corporation is a Canadian-based multinational and has at least two subsidiaries incorporated in the Netherlands (Barrick Finance bv and Barrick Russia Holdings II Cooperatief) that together own around \$ 315 million in assets. Barrick Finance bv channels loans worth \$ 175.4 million from a subsidiary in Barbados (Barrick International Barbados Corp.) to its Argentinean subsidiary (Barrick Exploraciones Argentina S.A.).

It is likely that the company uses the Netherlands to avoid WHT on interest. According to publicly available information, if the Barbados entity were to lend money directly to its Argentinean subsidiary, a 35% WHT on interest payments would apply on all outgoing payments in Argentina¹⁹⁵ (no taxation treaty exists with Barbados¹⁹⁶). Under the Dutch-Argentinean DTT, this tax is reduced to 12%. Although the Argentina-Canada DTT also stipulates a lower WHT rate on interest (12.5%), payment directly to Canada would result in income tax paid by the Canadian parent.

This interest income is taxed very little in the Netherlands: although interest income from Argentina is subject to tax, the interest payments to Barbados are tax deductible. The company therefore pays a relatively small amount of corporate income tax in the Netherlands (\$ 14.278) after the payments to Barbados have been deducted. As the tax haven, Barbados also does not levy tax on interest between foreign corporations,¹⁹⁷ meaning the interest income probably remains largely untaxed.

Assuming an interest rate of 5%, simple extrapolation shows that Argentina probably suffers an annual revenue loss of at least \$ 2 million:

Table 3: Tax losses incurred as a result of Dutch-Argentinean treaty (\$)

\$	Type
175,400,000	Loan
8,770,000	Interest (5%)
3,069,500	WHT on interest (35%)
1,052,400	DTT WHT rate (12%)
2,017,100-	Difference (revenue loss)
10,085,500-	Revenue loss 5 years

Further research is needed to confirm these preliminary findings. Taxation of natural resources and therefore extractive industry is complex and linked with favourable income tax treatments and special contracts.¹⁹⁸ Also, not just the rate of taxation but the structure of how taxes are calculated (e.g. whether via royalties or income taxes) are relevant. However, the overall picture – namely Barrick Gold’s Barbados entity lending to an Argentinean subsidiary through a Dutch subsidiary – indicates

¹⁹⁵ There are certain exceptions, not applicable in this case. See Deloitte tax guide 2012, <http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Taxation%20and%20Investment%20Guides/2012/dtl tax guide 2012 Argentina.pdf>

¹⁹⁶ Ernst & Young (2013) ‘Argentina terminates three tax treaties’, <http://tmagazine.ey.com/insights/argentina-terminates-three-tax-treaties/>

¹⁹⁷ Tax exemption is available for foreign corporations paying dividends and interest to other foreign subsidiaries or residents outside Barbados, see <http://www.taxrates.cc/html/barbados-tax-rates.html>

¹⁹⁸ Boadway and Flatters (1993) explain that “[n]atural resources are typically subject both to taxation under the income tax system and to special resource taxes. Properly designed income taxes attempt to include capital income on a uniform basis. But in most countries the income tax treats resource industries more favorably than most other industries - through favorable treatment of such capital expenses as depletion, exploration and development, and the cost of acquiring resource properties.” See ‘The taxation of natural resources : principles and policy issues, Volume 1’, http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=477916&piPK=64165421&menuPK=64166093&entityID=000009265_3961005112849

the company enjoys a reduced interest rate under a Dutch treaty whilst it does not pay tax on outgoing interest to Barbados due to the lack of WHT rates in the Netherlands.

3.8.3 Trafigura

Research conducted for this report did not identify specific tax planning transactions involving Trafigura's Dutch registered head office Trafigura Beheer bv or its Dutch subsidiaries. The company's corporate structure and effective tax rate, however, strongly indicates fiscal planning.

The company has an opaque global structure, with at least 89 (63%) of its 141¹⁹⁹ subsidiaries worldwide located in tax havens. Trafigura, like Glencore, has Dutch entities that fulfil trading, logistics and financial holding functions. Next to the registered head office Trafigura Beheer bv, which is registered as a trading and investment company and has roughly 30 employees²⁰⁰, Trafigura has at least 26 (mainly financial holding) companies in the Netherlands, all of which are registered at the same address and none of which have any employees.²⁰¹ In combination with the following features of its corporate legal structure, this is a strong indication these incorporations fulfil tax planning functions.

- The management seat of the company is in the low-tax Swiss canton of Lucerne.²⁰²
- Trafigura bv's top ownership chain is located in tax havens: the ultimate parent is incorporated in Curaçao (formerly Netherlands Antilles), which owns the Dutch holding through Maltese subsidiaries.
- Shareholders are registered in Jersey (2011).
- The Dutch entity Trafigura Beheer bv also has Swiss branch offices, which constitutes a common tax avoidance structure.

The Financial Times²⁰³ and Reuters²⁰⁴ report in May 2012 that Trafigura would shift its trading headquarters from Switzerland to Singapore. The mining company BHP Billiton also announced to close its marketing hub in The Hague and relocate senior traders to Singapore and Anglo American also plans to open a new trading hub in Singapore. This is an apt example for global tax competition: Switzerland, which offers low corporate tax rates and proximity to major banks, competes with places like London, Dubai and Singapore for commodity trading incorporations. Singapore allows commodity firms with qualifying income under 'The Global Trader Programme' to benefit from a concessionary tax rate as low as 10 percent.²⁰⁵ In October 2012, Bloomberg reported²⁰⁶ that Geneva may cut its corporate tax rate to about 13 per cent as pressure from the EU to abolish an existing tax regime threatens to drive out more than 900 multinational companies and commodity traders. Other reported

¹⁹⁹ There are 62 wholly or partly owned subsidiaries mentioned in the annual report, 79 others were found in tax havens which were not mentioned in the annual report. Sources: Trafigura Annual Report 2011, Bureau van Dijk Mint database, available at <http://www.bydinfo.com/>, various national online company registries.

²⁰⁰ The total amount of employees reported in the company's annual account of 2011 is 3,660, 3,630 of which are reported to be working outside the Netherlands. This leaves 30 employees actually working in the Netherlands.

²⁰¹ A Chamber of Commerce search shows around 44 companies listed at the address (Gustav Mahlerplein 102).

²⁰² See the canton's website for resulting tax advantages: http://www.steuern.lu.ch/index/home/p_welcome_.htm. It reports that "The Canton of Lucerne has been continually lowering tax burdens over recent years. Indeed, Lucerne is more than keeping pace with the overall Swiss average for corporate tax relief, and has taken a top position for all of Switzerland."

²⁰³ Javier Blas and Jeremy Grant, 'Singapore's low taxes lure Trafigura', 22.5.2012, <http://www.ft.com/cms/s/0/63df6cce-a409-11e1-84b1-00144feabdc0.html#axzz2Ow6fMyho>.

²⁰⁴ 'Trafigura shifts trading centre to Singapore', 23.5.2012, <http://www.reuters.com/article/2012/05/23/trafigura-trading-move-idUSL5E8GN3U820120523>

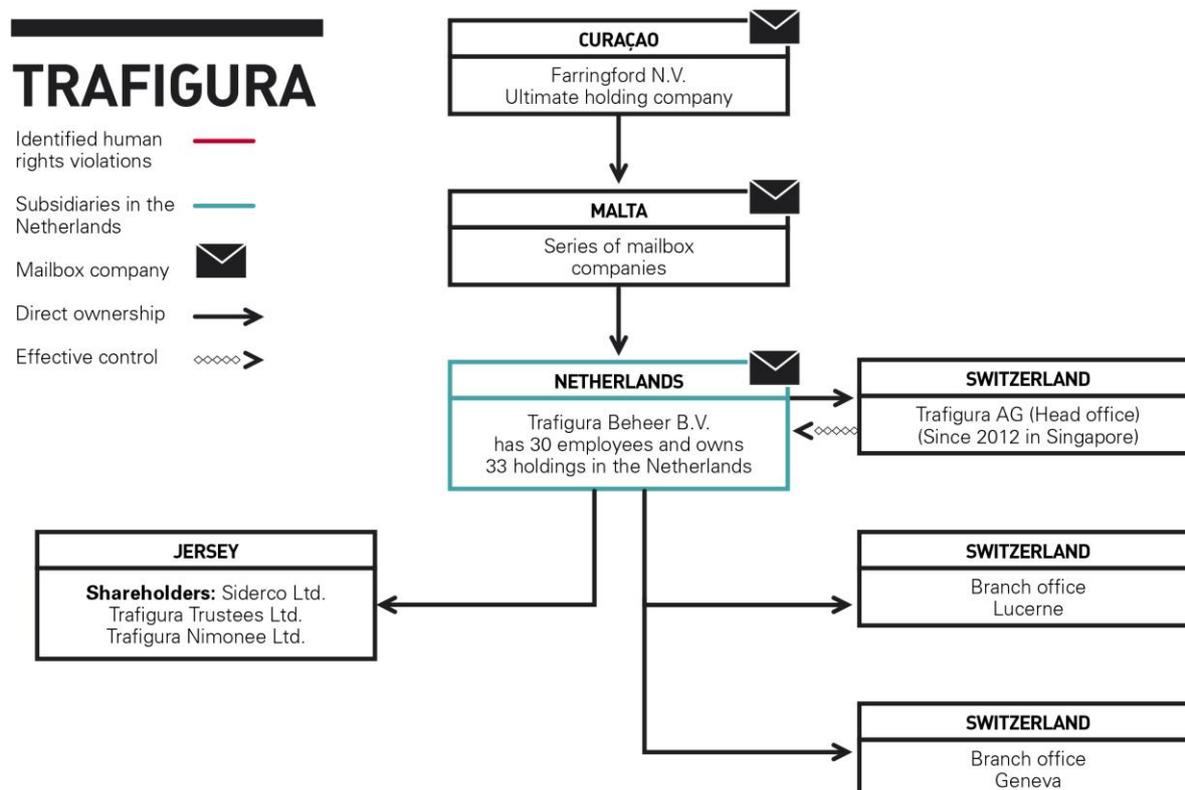
²⁰⁵ 'Trafigura shifts trading centre to Singapore', 23.5.2012, <http://www.reuters.com/article/2012/05/23/trafigura-trading-move-idUSL5E8GN3U820120523>

²⁰⁶ Geneva May Cut Company Tax Rate to Keep Traders, Multinationals, 12.10.2012, <http://www.bloomberg.com/news/2012-10-12/geneva-may-cut-company-tax-rate-to-keep-traders-multinationals.html>

motivations for choosing Singapore for business incorporation are rule of law, lower (staff) costs, the existence of qualified staff, growing commodity demand in Asia and proximity to China.

Regarding the company's Dutch-Swiss branch or holding structure, the Zurich-based NGO Berne Declaration has found²⁰⁷ that all Swiss-based commodity-trading companies use this structure, most likely for aggressive tax planning purposes: *"There is a typical structure for aggressive tax avoidance: trading activity and [a] tax home in Switzerland, a Dutch holding company for temporary storage of global income, and one or more vehicles in tax havens for the non-transparent and final destination of profits. That's how Trafigura paid only 0.6% tax in 2010. Measured at the standard rate, the trader saved roughly \$ 500 million between 2005 and 2010."*²⁰⁸

Figure 5: Trafigura's Dutch-Swiss branch structure



A Dutch-Swiss branch structure indeed allows for reduction of tax payments under an agreement with the Dutch tax authority to split profits between the Dutch entity and its Swiss branch to achieve a favourable tax spread. This means little taxable income in the Netherlands, which levies 25% corporate income tax, and more taxable income in Switzerland, which offers tax rates as of 10% for 'privileged' companies in many cantons.

²⁰⁷ Research conducted for their book 'Commodities. Switzerland's most dangerous business', 2012, <http://www.evb.ch/en/p19492.html>

²⁰⁸ Cited in Simon Goodley and Dan Milmo, 'Dutch masters of tax avoidance', The Guardian, 19 October 2011, available at <http://www.guardian.co.uk/business/2011/oct/19/tax-avoidance-in-netherlands-becomes-focus-of-campaigners> (accessed 20 February 2012).

Dutch-Swiss tax avoidance route

If a branch office of a Dutch company is located in a foreign country, the Netherlands has taxing rights and could theoretically tax 100% of the capital flow from the Dutch holding/parent to the foreign branch office. A subsidiary is a separate legal entity, where the jurisdiction of incorporation has taxing rights on the income of that subsidiary (if no other bilateral agreements exists) Dutch law allows for advance tax agreements on splitting profits between a Dutch entity and its branch office (to facilitate the capital flowing out). A popular way of reducing the effective tax rate at the intermediary level in the Netherlands is by use of a Swiss branch.

Using the Swiss route, an agreement with the Dutch revenue authority is made by which only a certain percentage of financial outflows is taxed according to the Dutch corporate income tax rate, whilst the remaining part of the outflow is taxed in Switzerland, which has a low corporate income tax rate. This lowers a companies' income tax rate considerably. For example, if a company transfers 100.000 EUR to its branch office in Switzerland, only 10% is taxed by the Dutch CIT rate of 25%. The remaining 90% are exempt in the Netherlands and will be taxed at a low rate in Switzerland, reducing the effective tax rate from 25% to 8.8%.

Example: tax deal between Dutch authorities and Swiss branch office

Taxable income	Tax rate	Tax paid	
€ 100.000			Profit paid to Swiss branch via the Netherlands
€ 10.000	25%	€ 2.500	10% of profit subject to CIT in the Netherlands
€ 90.000	10%	€ 9.000	90% of profit subject to CIT in Switzerland
€ 100.000	11,5%	€ 11.500	Effective tax rate reduced from 25% to 11,5%
€ 100.000	25%	€ 25.000	Tax paid without Swiss branch structure

Although Switzerland offers equally or even more attractive local tax regimes than the Netherlands, the latter has the advantage of the large tax treaty network and lower withholding tax rates in countries of operation and EU membership. The latter means all intra-group payments within the EU are exempt from taxes on royalty, interest and dividend payments between EU subsidiaries.

Better transparency regulations regarding the probable Advance Tax Ruling or Pricing Agreements issued to Trafigura Beheer bv by the Dutch Revenue Authority would help to identify the fiscal benefits gained thereby. However, these are secret.

In reaction to this report, Trafigura reported that in the last two financial years (2012 and 2011), the effective corporate income tax rate on the group's trading result ranged from 16 to 22%. The company further emphasised that the "Trafigura has always adhered to local and international tax laws in the countries it operates in."

3.8.4 Glencore

As with the case of Trafigura, research conducted for this report did not identify specific cases of tax avoidance involving Glencore's Dutch subsidiary Finges Investment bv But the Netherlands appears to have been chosen for incorporation for international tax planning purposes for reasons outlined below. In 2010, Glencore had an effective global tax rate of only 9.3%.²⁰⁹

Like Trafigura, Glencore has Dutch entities that fulfil trading, logistics and financial holding functions. Next to the main legal entity Finges Investment bv, which is registered as a holding company and has

²⁰⁹ Publish What You Pay (2011) Piping Profits, p8,
<http://www.publishwhatyoupay.org/sites/publishwhatyoupay.org/files/FINAL%20pp%20norway.pdf>

no employees²¹⁰, Glencore has at least 33 (mainly financial holding) companies in the Netherlands, most of which are registered at the same address²¹¹ and only five of which have any employees.²¹² In combination with the following features of its corporate legal structure, this is a strong indication Glencore Dutch holding companies fulfil tax planning functions.

- Although it cannot be said with certainty that Finges Investment bvs direct parent is Glencore AG, the management seat of the corporation is specified as the ultimate owner of the Dutch subsidiary. Glencore AG is located in the low-tax Swiss canton of Zug, which not only offered a corporate tax rate of 15.8% in 2010, it also allows for special tax regimes for holding companies and so-called mixed companies of which more than 80% of its business activities must be conducted outside of Switzerland.²¹³ Since 2007, revenues from business abroad totalling over 200 million Swiss francs are only taxed at ten per cent (instead of 25 per cent), a rules which is labelled the Glencore clause by the Swiss Berne Declaration because of the company's tax position in Switzerland.²¹⁴
- Since its initial public offering in 2011, the company's ultimate parent is registered in the tax haven of Jersey.

Similar to Trafigura, Glencore uses a Dutch-Swiss structure that points to tax avoidance using agreements with the Dutch and Swiss revenue authorities. Lack of transparency means no specific figures or agreements can be discerned from the annual accounts. After researching Swiss commodity trading companies, however, the Berne Declaration has found that:

*"A Dutch holding company is never right at the top of such a rambling company pyramid. The ultimate owner is invariably a shell company in an offshore centre, such as Curaçao, Cyprus, Jersey or the British Virgin Islands. It is out of the Dutch holding company that the profits are then channelled to wherever they can be distributed tax-free to the real owners. In addition, these tax havens offer maximum opacity so that not even all Gunvor's owners, for example, are known. Thus the typical structure of a Swiss commodity trader has three parts: trading activities and a principal residence for tax purposes in Switzerland, above that a Dutch holding company for temporarily depositing the global revenues, and one or more vehicles in tax havens as opaque end-repositories of the profits."*²¹⁵

According to a Foreign Policy article, the main financial holding, Finges Investment bv is therefore described by a Dutch financial expert as "nothing more than a piece of financial engineering".²¹⁶

Relevant to this report is also the accusation that Glencore evades taxes that should have been paid by its Zambian subsidiary Mopani Copper Mines plc. through transfer mispricing with subsidiaries located in the British Virgin Islands (Calisa Investment Corporation) and Bermuda (Glencore Finance Bermuda Ltd). These subsidiaries have financing links with Glencore's Dutch trading arm Glencore Grain bv, but more pertinently, Mopani Copper Mines (MCM) is also accused of causing serious air and water pollution that has led to health problems of local residents (see Chapter 4).

²¹⁰ Annual accounts 2010.

²¹¹ Blaak 31, 3011GA Rotterdam

²¹² These are storage and holdings companies of the Pacorini group and Glencores trading arm Glencore Grain bv, which had 157 staff in 2010.

²¹³ See article on tax planning in Zug by a Swiss accountancy firm, <http://www.caminada.com/en/service/index.php?id=39>

²¹⁴ Berne Declaration, 'Commodities. Switzerland's most dangerous business', 2012, p. 279, <http://www.evb.ch/en/p19492.html>

²¹⁵ Berne Declaration, 'Commodities. Switzerland's most dangerous business', 2012, p. 284, <http://www.evb.ch/en/p19492.html>

²¹⁶ http://www.foreignpolicy.com/articles/2012/04/23/the_world_according_to_glencore?page=full;http://www.businessday.co.za/articles/Content.aspx?id=144508

In 2011, Glencore's MCM came under criticism after a leaked draft of an audit report by the accountancy firms Grant Thornton and Econ Pöyry found Glencore to engage in profit shifting, thereby depriving the Zambian revenue authority of tax due payments. The Zambian Revenue Authority had asked the auditing firms to perform a fiscal review of the various mining corporations active in Zambia because, since its privatisation, the mining sector has become the least productive in the Zambian economy, contributing barely 3% to Zambia's GDP in 2003.²¹⁷ The auditing team analysed general operating costs, pricing, revenues, transfer prices, personnel costs and overhead expenses and found that MCMs actual operating costs were lower than what the company claims (they found an unexplained increase (\$ 380 million) in claimed operating costs in 2007). They also found extremely low reported volumes of extracted cobalt when compared to similar mining companies operating in the region and alleged manipulations of copper selling prices in favour of Glencore. As a result, the company's profits were far inferior to what a company of that size could expect. The auditors suggested that MCM's tax base should be reconsidered by the Zambian revenue authority.²¹⁸

These findings had far-reaching consequences:

- ❑ In May 2011, the European Investment Bank froze all lending to Glencore,²¹⁹ citing "serious concerns" about governance following the allegations of tax irregularities.
- ❑ In the spring of 2012, the UK parliament's International Development Committee opened an inquiry over taxation in developing countries,²²⁰ including Glencore's subsidiaries in Zambia.
- ❑ A number of NGOs²²¹ lodged an OECD complaint in April 2011 against Glencore International AG and First Quantum Mining Ltd. with the National Contact Points of Canada and Switzerland, for breaching the OECD Guidelines.²²²

Glencore denies all allegations of wrongful conduct with regard to its tax payments in Zambia. The company says that the leaked audit report did not take into account that almost half of Mopani's copper output is third-party ore processed in return for a small tolling fee, thereby wrongly assuming that Mopani manipulated copper prices to engage in transfer pricing to favour Glencore.²²³ Glencore appears to be unwilling to cooperate in the enquiries. According to oral evidence heard during the UK parliamentary enquiry on tax, transparency and development, although the Swiss contact point decided the complaint was admissible, its inquiry "could not go further because Glencore refused to

²¹⁷ IMF Country Report No. 04/160 (July 2004), Zambia: Selected Issues and Statistical Appendix, <http://www.imf.org/external/pubs/ft/scr/2004/cr04160.pdf>, p25

²¹⁸ Specific Instance regarding Glencore International AG and First Quantum Minerals Ltd. and their alleged violations of the OECD guidelines for multinational enterprises via the activities of Mopani Copper Mines Plc. in Zambia, http://oecdwatch.org/cases/Case_208/925/at_download/file

²¹⁹ Glencore in the spotlight as EIB freezes lending, 2.6.2011, <http://www.independent.co.uk/news/business/news/glencore-in-the-spotlight-as-eib-freezes-lending-2291962.html>

²²⁰ See <http://www.parliament.uk/business/committees/committees-a-z/commons-select/international-development-committee/inquiries/parliament-2010/tax-in-developing-countries/> for a full report.

²²¹ Association Sherpa, Berne Declaration, Centre for Trade Policy and Development, L'Entraide Missionnaire, Mining Watch Canada.

²²² See Sherpa et al vs. Glencore International AG, http://oecdwatch.org/cases/Case_208. Specifically, OECD Guidelines lay down that enterprises should contribute to economic, social and environmental progress with a view to achieving sustainable development; refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to taxation, financial incentives, or other issues. In particular, "enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle." The experiences of the auditing firm and the Swiss national contact point of the OECD suggest that Glencore fails to provide this necessary and timely information.

²²³ http://www.glencore.com/documents/Glencore_Comments_On_Mopani.pdf, page 2.

co-operate”.²²⁴ The auditors also found that MCM “showed no proof of cooperation and seemed not to take the audit seriously, showing no fear of sanctions whatsoever”.²²⁵

3.9 Conclusion

The lack of transparency with regard to detailed (non-consolidated) financial accounts and beneficial ownership structures identified in this chapter as well as with regard to the nature and content of the Advance Pricing Agreements (APAs) and Advance Tax Agreements (ATAs) that the Dutch revenue authority concludes with large corporations means that it is almost impossible to identify tax planning at the transactional level and resulting revenue losses in countries of operation. Further research is needed in this area, which the Dutch state could facilitate by introducing country-by-country reporting standards, abolish exemptions to detailed financial reporting and either refrain from concluding APAs and ATAs or disclose their nature to the public and parliament.

This chapter outlined the ways in which MNCs can avoid paying tax in countries of operation by using Dutch mailbox companies. It also provided information on the investment protection MNCs enjoy by routing investments through the Netherlands. As recent media articles and this report show, the Netherlands provides companies with opportunities to avoid tax in countries of operation. The existing conduit structures, combined with the fact that investments passing through the Netherlands are attributable to conduit entities from extractive and mining activities is evidence that the Netherlands is used by most of the world’s extractive industry companies to avoid paying taxes in host states, and protecting their investments.

This chapter also showed that revenue losses incurred by conduit structures have negative effects particularly on developing countries. Next to general research reports calculating revenue losses incurred, the company structures of ONGC, Barrick Gold, Trafigura and Glencore strongly indicate the Netherlands has been chosen by these companies as a place for incorporation for tax planning purposes. This structure is very likely to reduce corporate income tax in the countries in which they operate.

²²⁴ Savior Mwambwa from CTPD in House of Commons International Development Committee (23.8.2012), ‘Tax in Developing Countries: Increasing Resources for Development’, Fourth Report of Session 2012-13, Q11, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmintdev/130/130.pdf>

²²⁵ See footnote 22 in ‘Specific Instance regarding Glencore International AG and First Quantum Minerals Ltd. and their alleged violations of the OECD guidelines for multinational enterprises via the activities of Mopani Copper Mines Plc. in Zambia’, http://oecdwatch.org/cases/Case_208/925/at_download/file

Case 2: Oil and Natural Gas Corporation Limited (ONGC)

Company information

Oil and Natural Gas Corporation Limited (ONGC) is an Indian multinational oil and gas company. Its headquarters are located in Dehradun, India. The company produces around 77% of the country's crude oil and around 81% of its natural gas.²²⁶ ONGC is one of the largest Asia-based oil and gas exploration and production companies, as well as one of the largest publicly traded companies by market capitalisation in India. The company was founded on 14 August 1956 by the Indian state, which currently holds around 94% equity stake.²²⁷ Its international subsidiary, ONGC Videsh Ltd., currently runs 33 projects in 14 countries, including Syria, Sudan and Myanmar.²²⁸

The link between the Netherlands and human rights controversies

□ ONGC Nile Ganga bv is owned by ONGC Videsh Ltd., the international arm of ONGC. The Dutch subsidiary is active in the exploration and production of oil and gas fields in, among others, Sudan, Syria and Myanmar. ONGC's Sudanese operations are structured through a branch office of the Dutch ONGC Nile Ganga bv. A branch is part of the parent company and not an independent legal entity, which makes ONGC Nile Ganga bv responsible for its Sudanese operations. Furthermore, ONGC senior managers in South Sudan are mostly directly employed by ONGC Nile Ganga bv and the 2010 annual financial report appears to cover the entirety of the operations, indicating a central role for ONGC Nile Ganga bv in ONGC's Sudanese operations.

ONGC Nile Ganga bv is a Dutch holding company managed by the office Mackay Holding bv, which offers holding and interim management services to companies.²²⁹ In 2012, ONGC Nile Ganga bv's board consisted of an Indian resident and the Dutch management company. The activities listed for ONGC Nile Ganga bv are the exploration, marketing, trade, transport and extraction of oil and gas. The principal activity relates to the Greater Nile Petroleum Operating Company Limited (GNPOC) project in which ONGC Nile Ganga bv has a 25% interest. The company also operates, via its subsidiaries and joint ventures, in Syria, Myanmar, Sudan, Venezuela and Brazil.²³⁰

ONGC Nile Ganga bv has six Dutch subsidiaries and two Dutch joint ventures. The company provides intra-company loans through its Cyprus-based subsidiary (intermediate holding) to a subsidiary in Nigeria. ONGC Nile Ganga bv's shares are held by ONGC Videsh Ltd. (OVL), the international arm of ONGC and Indian intermediate holding of the ultimate parent ONGC.²³¹ ONGC apparently structures its Dutch operations through so-called project entities, which implies setting up separate legal entities for each area of exploration or project. If unprofitable, the entity can be abandoned and the loss can

²²⁶ Wikipedia 'Oil and Natural Gas Corporation', available at http://en.wikipedia.org/wiki/Oil_and_Natural_Gas_Corporation#cite_note-ONGC_beats_China.27s_CNOOC_to_become_Asia.27s_No.1_E.26P_.28Exploration_.26_Production.29_firm-1 (accessed 9 January 2013).

²²⁷ Bloomberg database, accessed 13 August 2012.

²²⁸ Annual report ONGC Videsh 2011-2012, available at http://www.ongcvidesh.com/PDF/annual_report_2011_12.pdf (accessed 9 January 2013).

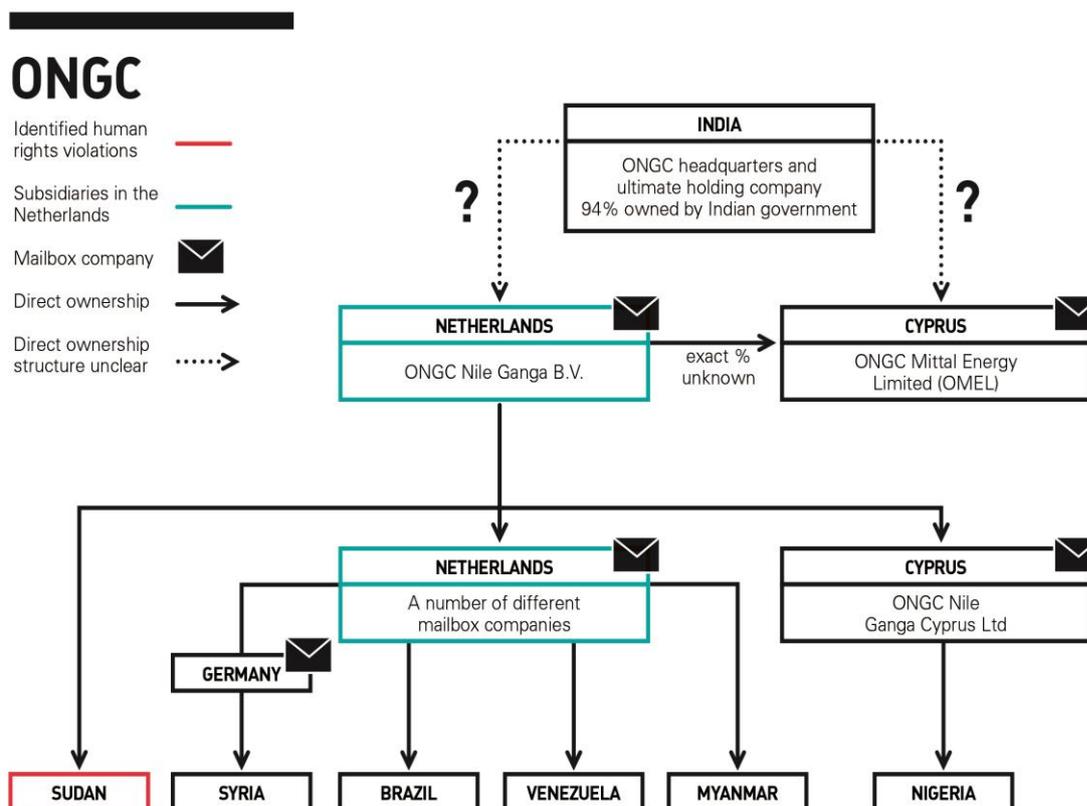
²²⁹ Ir. A.R. Baron Mackay Holding B.V, Annual Report 2010, Ir. A.R. Baron Mackay Holding bv

²³⁰ Dutch Chamber of Commerce, ONGC Nile Ganga bv, Annual Account for the year 2010.

²³¹ The company has divided its shares into three classes, A, B and C. Class A and B shares are wholly owned by OVL, which also holds 55% of class C shares. The latter were issued in 2008 to OVL and two other ONGC subsidiaries for financing its Syria business. Source: ONGC Nile Ganga bv Annual Report 2011.

be deducted from the taxable income. Profit on the other hand is subject to the participation exemption and remains untaxed. It is unclear whether ONGC is currently benefitting from this tax structure.²³²

Figure 6: ONGC's Dutch holding structure



Human rights controversy: GNPOC project in Sudan and South Sudan

In 2003, the Indian oil company ONGC bought a 25% stake in the Greater Nile Petroleum Operating Company and a 24% stake in the White Nile Petroleum Operating Company (WNPOC). Both projects have been associated with large-scale war crimes and crimes against humanity in the past, resulting in the violent death of tens of thousands of people and the forced displacement of hundreds of thousands of people.²³³ The human rights case described here refers only to the Greater Nile Petroleum Operating Company (GNPOC), of which ONGC's Dutch subsidiary owns a 25% share.

²³² The Netherlands does not have a double taxation agreement with the Sudan but has a unilateral measure to avoid double taxation in cases where the same income is subject to tax in two jurisdictions. The Dutch revenue authority will therefore have an agreement on the allocation of profit to the Sudanese branch office, or a cost plus agreement, which allocated a certain percentage of profit to the Netherlands on the basis of costs made in the Netherlands. The precise split of this profit between the two jurisdictions and whether this is in agreement with the Sudanese authorities is not detailed in the accounts. Given the lack of substance in the Netherlands, a profit split favouring the Netherlands would be unjustifiable.

²³³ See, among others: John Harker, 'Human Security in Sudan: The Report of a Canadian Assessment Mission Prepared for the Minister of Foreign Affairs Ottawa', January 2000; Amnesty International, 'Sudan: The Human Price of Oil', 2000; John Ryle and Georgette Gagnon, October 2001; Christian Aid, 'The scorched earth. Oil and war in Sudan: Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan' 2001; Human Rights Watch, 'Sudan, Oil and Human Rights', 2003; Diane de Guzman and Egbert Wesselink, 'Depopulating Sudan's Oil Regions, report for the European Coalition on Oil in Sudan' (ECOS), 2002. European Coalition on Oil in Sudan, Unpaid Debt, 'The legacy of Lundin, Petronas and OMV in Sudan', 1997-2003, June, 2010.

ONGC-owned projects in Sudan profited from militia violence

ONGC acquired its 25% share in the joint operating GNOPC in Sudan (now partially in South Sudan) from Canadian oil company Talisman Energy through its Dutch subsidiary ONGC Nile Ganga bv. Talisman Energy had come under increased pressure for the human rights violations associated with its Sudanese operations and this was reportedly one of the reasons the company sold its interest in GNOPC. ONGC Nile Ganga bv must have been aware of the human rights situation that preceded the sale.

Human Rights Watch reports²³⁴ that problems started immediately after the discovery of the El Toor oilfield in 1996, when a militia/army offensive violently displaced thousands of people.²³⁵ Two years later, in 1998, Canadian Talisman bought a 25% share of GNPOC, after which militia violence and displacements continued. Christian Aid heard eye witnesses who reported that in May 1999, the village of el-Toor, within walking distance of a Talisman site, was attacked and burned by government forces using troops and aircraft: *“Survivors of the offensive interviewed south of Bentiu said they fled empty-handed. Stripped of their homes and livelihoods, and weakened by sickness and hunger, some walked as far as 200 miles south. Others fled into the swamps bordering the Nile or to other inaccessible areas like forests. Many died on the way.”*

When ONGC acquired its share in the GNPOC consortium in 2003, the acute oil conflicts were subsiding but did not end. The Government of Sudan and the Sudan People’s Liberation Movement/Army (SPLM/A) signed an ‘Agreement to Protect Civilians from Military Attack’ in March 2002 after US political intervention. The agreement ultimately led to the creation of the US-led Civilian Protection Monitoring Team (CPMT), tasked with monitoring and investigating attacks against civilians. The CPMT documented oil operations-related violations up until 2004.²³⁶

Access to justice?

Despite ample evidence that human rights violations in Sudan are directly linked to securing oil production, the GNPOC and WNPOC consortia have not been linked directly to international crimes by a court of law, raising serious concerns about accountability. In 2010, the Swedish Public Prosecutor for International Crimes launched a criminal investigation into links between Sweden and the crimes documented by the European Coalition on Oil in Sudan.²³⁷ A civil court case in the USA by South Sudanese victims against Talisman for its complicity in attacks and forcible displacement of civilians in Sudan produced a wealth of evidence indicating a direct contribution by the company to human rights violations. However, the case was eventually thrown out of court without a judgement on substance. The court judged that the technical requirements under US civil law for ‘intent’ on the part of Talisman Energy to violate the rights of the plaintiffs were not fully met.²³⁸ This implies that victims of justice, at least in US courts, have to show that companies “purposefully” aided and abetted a violation of international law; an almost impossible task.

²³⁴ Human Rights Watch, ‘Sudan, Oil and Human Rights’, 2003, available at <http://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf> (accessed 9 January 2013).

²³⁵ At the time the consortium was made up of Talisman Energy (Canada), Petronas (Malaysia), CNPC (China) and Sudapet (Sudan’s state oil company).

²³⁶ Michael Kevane, ‘The Work of the Civilian Protection Monitoring Team in Sudan’, August 2004, available at <http://lsb.scu.edu/~mkevane/sudan/Work%20of%20CPMU%20in%20Sudan%202003-2004.PDF> (accessed 18-12-2012).

²³⁷ European Coalition on Oil in Sudan, Unpaid Debt, ‘The legacy of Lundin, Petronas and OMV in Sudan’, 1997-2003, June 2010, available at http://www.ecosonline.org/reports/2010/UNPAID_DEBT_textonlyweb.pdf (accessed 20 February 2013).

²³⁸ The court case, including information on appeal procedures until 2010, is detailed on the website of the Business and Human Rights Resource Centre, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TalismanlawsuitreSudan> (accessed 25 February 2013),

No recognition – no remedy – no justice

The Comprehensive Peace Agreement of 2005 and the Interim National Constitutions of both Sudan and South Sudan explicitly established a right to remedy for people whose rights have been violated in relation to oil exploitation. Yet GNPOC has not responded to documented allegations about involvement in human rights violations and has no known human rights grievance or dispute settlement mechanism. ONGC and its subsidiaries also do not acknowledge any responsibility for the reported violations, whether they occurred before its 2003 purchase or afterwards. They do not publicly recognise a right to remedy for victims of human rights violations.

Non-respect for international guidelines

The extensive evidence of past and current human rights violations in Sudan and South Sudan linked to the oil industry, and given ONGC's failure to address these issues or offer effective remedy to victims, indicate a potential violation of the OECD Guidelines for Multinational Enterprises and the UN 'Protect, Respect and Remedy' Framework and its Guiding Principles. Although no OECD complaint has been filed against the company and no violations have been officially recognised by a National Contact Point of the OECD, the following issues relating to the Guidelines are relevant when looking at the facts of the case:

- ❑ Failing to meet its obligation to identify, prevent and mitigate actual and potential adverse impacts in its operations [OECD Chapter II (10)].
- ❑ All human rights Articles of the OECD Guidelines (Chapter IV), namely:
 - Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
 - Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
 - Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
 - Have a policy commitment to respect human rights.
 - Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
 - Provide for or cooperate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.
- ❑ Not taking due account of the need to protect the environment, public health and safety [OECD Chapter VI].
- ❑ Failing to avoid infringing on the human rights of others and addressing adverse human rights impacts with which they are involved [UNGP Chapter II (A)(11,13)].

Conclusion

ONGC, through its Dutch subsidiary ONGC Nile Ganga bv, invested in Sudanese oil projects linked to well-documented human rights violations. ONGC was or should have been aware of the allegations that the assets that it acquired in 2003 had been negatively affecting the human rights of the local population. Yet, ONGC is not known to have taken any measures to prevent further occurrence, support the right to remedy for victims of abuses, avoid profiting from human rights violations by others, or any other action that suggests a commitment to human rights.

In 2006, confronted with the high costs of ongoing disruptions to oil production caused by a disgruntled population, the consortia that ONGC Nile Ganga bv participates in, including GNPOC, responded to the problems by unconditionally requesting that the new Government of South Sudan step up its security measures. This action shows sustained ignorance, whether deliberate or not, of

the violations against local populations that security operations have historically been involved in, and therefore of the company's human rights responsibilities. ONGC Nile Ganga bv has failed to address the right to remedy for victims of human rights violations who are likely to have been affected by operations in Sudan and South Sudan. Court cases have failed to find companies responsible despite ample evidence of the industry's link to severe human rights violations. This accountability gap emphasises the need for domestic and treaty measures with extraterritorial impact and the Dutch state's responsibility to ensure companies located within its jurisdictions are not involved in human rights violations abroad, and if these occur, to grant access to justice for victims.

4 Human rights and the extractive industry: selected issues and cases

4.1 Introduction

This chapter outlines six company cases of human rights violations, which together illustrate problems commonly associated with extractive industry activities. The cases are based on existing research reports and human rights issues identified by local communities, NGOs and the media. The link between the Dutch subsidiary of the multinational company in question and the human rights violations in countries of operation is described. Various human rights issues associated with extractive operations are identified, together with relevant statements of international human rights bodies. The chapter therefore highlights that there is structural human rights problem in the extractive industry which is broader than these illustrative cases.

The first section of this chapter highlights the Dutch incorporation of two companies, CNPC and Oilinvest, which operate in (post)conflict situations or fragile states. In the case of Oilinvest, potential human rights issues related to the company's operations were not researched and are therefore not presented here. Rather, an analysis by the Tax Justice Network is presented of the company's changing incorporations in the Netherlands, seemingly with the aim to circumvent sanctions. In the case of CNPC, it was not possible to identify the exact ownership and control structures. The case is included here because the company has operations in Myanmar (Burma), a country known for its systematic human rights abuses, and also has explorations in Syria. One Dutch subsidiary has effective control over the Syrian subsidiary. Oilinvest and CNPC illustrate that the extractive industry is a high-risk industry with regard to human rights violations. In so far as high-risk companies are incorporated in the Netherlands, this represents a challenge to the Dutch government's duty to protect human rights, and should also have consequences for transparency regulations and corporate social responsibility reporting of those Dutch holdings.

The chapter then goes on to present human rights issues relating to the extractive operation of Freeport McMoran, Barrick Gold, Pluspetrol and Glencore. Trafigura and ONGC are presented as more in-depth case studies elsewhere in this report.

4.2 The extractive industry as a risk in (post)conflict situations

It is widely recognised that the extractive industry often operates in a context of weak state oversight. Wherever governments perform poorly, or provide poor protection of human rights, the risk of human rights abuses is heightened, making it more challenging for companies to meet their own responsibility to respect human rights. In countries of operation there is often weak governance, meaning that mechanisms that monitor and control companies' activities are limited or non-existent, and that access to justice is not guaranteed for victims. This is especially the case in fragile or (post)conflict states. As a result, extractive industries are, time and again, linked to human rights violations. These range from environmental damage affecting the livelihoods of local communities to the use of excessive force by security guards towards local people.

The conduct and impact of extractive companies' operations should, especially in these cases, be subject to special scrutiny. The examples of CNCP in Myanmar and Oilinvest in Libya illustrate that

the Dutch state attracts businesses that operate in (post)conflict or fragile countries and negatively impact human rights.

Violence and repression: fuelling conflict

Extractive companies frequently operate in violent situations. Is there a structural link between the extractive industry and conflict?

The United Nations Environment Programme (UNEP)²³⁹ explains that:

“The relationship between natural resources, the environment and conflict is multi-dimensional and complex, drawing three principal pathways:

- **Contributing to the outbreak of conflict.** *Attempts to control natural resources or grievances caused by inequitable wealth sharing or environmental degradation can contribute to the outbreak of violence.*
- **Financing and sustaining conflict.** *Once conflict has broken out, extractive “high-value” resources may be exploited to finance armed forces, or become strategic considerations in gaining territory.*
- **Undermining peacemaking.** *The prospect of a peace agreement may be undermined by individuals or splinter groups that could lose access to the revenues generated by resource exploitation if peace were to prevail.”*

Other international bodies also comment on the complex relationship between the extraction of natural resources and situations of conflict.

“The Special Rapporteur encourages more in-depth analysis of the extent to which conflict around the globe is related to the extractive industries sector and of the profit and plunder that diverts a country’s economic wealth from the citizenry, denying them their right to benefit from their own natural resources. It is certain that in a climate of violent conflict and disregard for human rights, sound disposal of hazardous substances and safety protocols on the handling of such substances are more likely not to be observed. In such contexts, women and children are usually the most affected.” Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu, 2012.²⁴⁰

“The Security Council recognizes the role that natural resources can play in armed conflict and post-conflict situations. Moreover, the Security Council notes that, in specific armed conflict situations, the exploitation, trafficking, and illicit trade of natural resources have played a role in areas where they have contributed to the outbreak, escalation or continuation of armed conflict.” Statement of the President of the Security Council, 2007.²⁴¹

4.2.1 CNPC

CNPC is a Chinese state-owned oil and gas company with subsidiaries in the Netherlands (CNPC International Holding Coöperatief and CNPC Venezuela bv). CNPC International Holding Coöperatief (total assets worth € 278 million in 2011) provides no information about the nature of its transactions, its role in specific projects, or its role inside parent company CNPC.²⁴² This lack of transparency makes it impossible to judge if there is a direct link to the Shwe Gas project in Burma which is the subject of this case study. CNPC’s second Dutch subsidiary is CNPC Venezuela bv, which held well over \$ 1 billion in assets at the end of 2010. The company acts as a holding and finance company regarding investments and loans between CNPC subsidiaries in China and oil companies in Venezuela.²⁴³ It received two loans, which together amount to \$ 1 billion, from CNODC International

²³⁹ UNEP, ‘From Conflict to Peacebuilding: The role of natural resources and the environment’, 2009, p. 31, available at http://postconflict.unep.ch/publications/pcdmb_policy_01.pdf (accessed 26-02-2013)

²⁴⁰ UN Human Rights Council, ‘Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu’, July 2012, available at <http://www.wecf.eu/download/2012/UnitedNations.pdf> (accessed 04-01-2013)

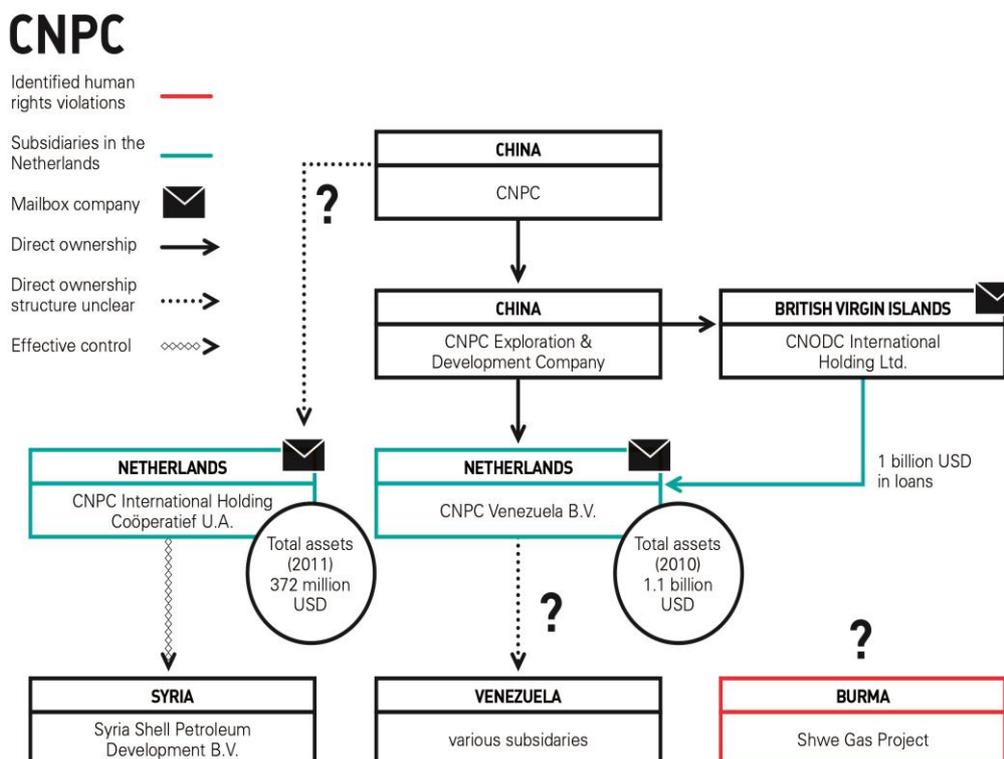
²⁴¹ UN Security Council Presidential Statement S/PRST/2007/22, available at http://www.un.org/ga/search/view_doc.asp?symbol=S/PRST/2007/22 (accessed 26-02-2013)

²⁴² Dutch Chamber of Commerce register, CNPC International Holding Coöperatief, Annual Accounts for the year 2010.

²⁴³ Dutch Chamber of Commerce register, CNPC Venezuela bv, Annual Accounts for the year 2010.

Holding Ltd., a limited liability company incorporated in the British Virgin Islands and a wholly owned subsidiary of CNPC Exploration & Development. Although this subsidiary is (probably) not linked to any activities in Burma, it is a clear example of the important financial link a Dutch company can provide within a large corporate structure.

Figure 7: CNPC's Dutch holding structure



CNPC is carrying out a pipeline project in Myanmar (Burma), a country known for its systematic human rights abuses.²⁴⁴ Among the most frequently cited violations that should concern businesses operating in Burma are state-sanctioned torture and rape, poor regulation and enforcement of labour and environmental standards (including on forced labour and child labour), absence of an independent judiciary, impunity, forced displacement, and violation of minority rights. Ethnic minorities are among those suffering most seriously from gross and systematic human rights violations in Burma.²⁴⁵ CNPC is therefore taking major human rights risks by undertaking business in Burma, especially since it is working with the state-owned Myanmar Oil and Gas Enterprise (MOGE). In June 2012, opposition leader Aung San Suu Kyi repeated her recommendation that governments prohibit their companies from doing business with MOGE until the company adopts responsible and transparent business practices.²⁴⁶

²⁴⁴ See UN General Assembly Resolutions on Burma at <http://www.altsean.org/Research/UN%20Dossier/UNGA.htm> (accessed 26-02-2013).

²⁴⁵ Several organisations have published reports on human rights violations in Burma, among them the following: Amnesty International, 'State of the world's human rights – Myanmar', 2009, available at <http://report2009.Amnesty.org/en/regions/asia-pacific/myanmar> (accessed on 8 December 2012); Human Rights Watch, 'Untold Miseries. Wartime Abuses and Forced Displacement in Burma's Kachin State', 2012 available at <http://www.hrw.org/reports/2012/03/20/untold-miseries>; United States Department of State, '2009 Country Reports on Human Rights Practices – Burma', 2010, available at www.unhcr.org/refworld/docid/4b9e530b87.html (accessed 8 December 2012).

²⁴⁶ Earth Rights International, 'The Rush for Burma's oil and gas: not so fast, says Aung San Suu Kyi', 16 June 2012, available at <http://www.earthrights.org/blog/rush-burma-s-oil-and-gas-not-so-fast-says-aung-san-suu-kyi> (accessed 08-12-2012). The

Several NGOs have expressed concerns about the Shwe Gas Project and the related 800 km export pipeline that is planned to traverse central Burma.²⁴⁷ The pipeline will pass through areas populated by ethnic minorities where extensive use of forced labour and severe human rights violations have been reported.²⁴⁸ A research paper from the Ta'ang Students and Youth Organisation (TSYO), based on interviews with 53 Ta'ang people and extensive field research, reported that more than "500 households have had their lands confiscated by the Shwe Gas and Oil Pipeline project".²⁴⁹ Financial compensation reportedly has been inadequate, and in some cases non-existent.

To provide security to the Shwe project, the Burmese armed forces have considerably strengthened their presence in the region, which has given rise to corruption, blackmail and unprovoked use of force; women in particular now fear for their safety.²⁵⁰ Shan state, the region where the Ta'ang and other Shan groups live, has been at the centre of human rights violations and ignorance regarding indigenous people's rights for a long time.²⁵¹

CNPC does not have a human rights policy, nor does it publicly refer to human rights issues, contrary to expectations outlined in the OECD Guidelines for Multinational Enterprises. The company has never expressed any concern about direct or indirect involvement in human rights violations, has no known or detectable record on human rights due diligence, nor any grievance mechanism to address reported human rights issues.

companies cooperate on the Shwe project and signed an agreement on 27 March 2009 to build two onshore pipelines: a gas pipeline which will carry gas from the Shwe field, and a parallel crude oil pipeline for the transportation of oil. CNPC will build, own and operate the pipeline, while the Burmese government will ensure its security.

²⁴⁷ See: Shwe Gas Movement, www.shwe.org; Arakan Rivers Network, www.arakanrivers.net; Earth Rights International, <http://www.earthrights.org/campaigns/shwe-gas-campaign>; Revenue Watch Institute, www.revenuewatch.org.

²⁴⁸ Human Rights Foundation of Monland, 'Laid Waste: Human Rights along the Kanbawk to Myaing Kalay gas Pipeline', 2009, available at www.rehmonnya.org/archives/793.

²⁴⁹ The Ta'ang Students and Youth Organization, 'Pipeline Nightmare', 2012, p. 6, available at http://www.burmalibrary.org/docs14/Pipeline_Nightmare-en-red.pdf (accessed 8 December 2012).

²⁵⁰ Ibid, p. 21-27, 35

²⁵¹ Minority Rights Group International, 'World Directory of Minorities and Indigenous Peoples - Myanmar/Burma : Shan', 2008, available at: <http://www.unhcr.org/refworld/docid/49749cdb28.html> (accessed 08-12-2012)

Free prior and informed consent

What does free, prior and informed consent mean? *“Free prior and informed consent’ (FPIC), is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use.”* Forest Peoples Programme.²⁵²

Why is the principle of free, prior and informed consent important? *“By their very nature, the rights that are potentially affected by natural resource extraction entail autonomy of decision-making in their exercise. This is especially obvious with regard to the rights to set development priorities and to property, but it is also true of the other rights. Accordingly, the consultation and consent standard that applies specifically to indigenous peoples is a means of effectuating these rights, and is further justified by the generally marginalized character of indigenous peoples in the political sphere, but it is a standard that certainly does not represent the full scope of these rights.”* Special Rapporteur on the rights of indigenous peoples, James Jnaya, 2012.²⁵³

How is this principle covered in international conventions? *“The Human Rights Committee has called upon States to act in accordance with article 1, paragraph 2, of the International Covenant on Civil and Political Rights, emphasizing, in relation to indigenous peoples, that ‘the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence’.”* Human Rights Council, 2012.²⁵⁴ *“No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”* United Nations Declaration on the Rights of Indigenous Peoples, 2008.²⁵⁵

4.2.2 Oilinvest

On 15 February 2011, Muammar Gaddafi reacted to peaceful protests against his regime in Libya with brutal military force, resulting in EU financial sanctions that affected large companies linked to the regime. The case below is based on an article by Tax Justice Network, ‘How Lybia got around sanctions – via the Netherlands’²⁵⁶ and Dutch media reports, and represents the situation up until 2011. No further research was conducted to ascertain whether more changes in the company’s Dutch group structure have taken place since.

Oilinvest (Netherlands) Group bv, an oil company that markets its products under the brand name Tamoil, is headquartered in Rotterdam in the Netherlands. Its refinery operations are located in Italy, Germany and Switzerland. Oilinvest also has distribution network in Italy, Germany, Switzerland, the Netherlands and Spain, and carries out operations in the Mediterranean, Europe, the Far East, and Africa. Until 2011, its shareholders included the Libyan Foreign Bank, Libyan Investment Authority and National Oil Corporation, which were linked to the Gaddafi regime. Oilinvest has been using arrangements and rules in the Netherlands to hide and rearrange its ownership and control structures. Apart from retail activities, Oilinvest (Netherlands) Group bv serves as a holding company for group companies in other European countries, and at the end of 2009, total assets of subsidiaries of Oilinvest amounted to \$ 3.5 billion.

²⁵² Forest Peoples Programme, ‘Free, prior and informed consent (FPIC)’, available at <http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic> (accessed 8 December 2012)

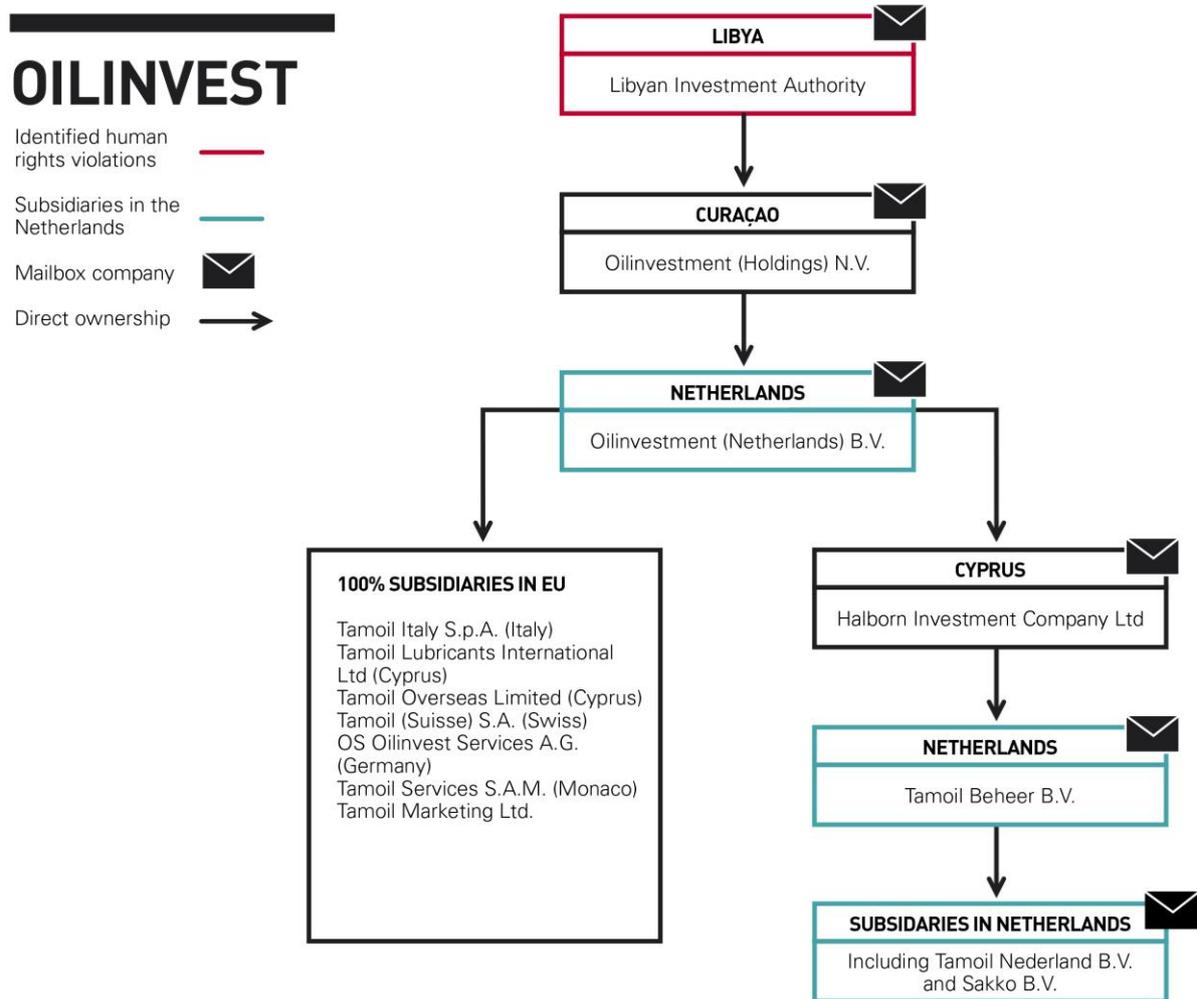
²⁵³ Report of the Special Rapporteur on the rights of indigenous peoples, James Jnaya, June 2012, A/HRC/21/47, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47_en.pdf, with reference to A/HRC/18/35, para. 82.

²⁵⁴ Human Rights Council, ‘Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries’, 16 August 2012, UN doc. A/HRC/21/55, 2012, p.5, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-55_en.pdf (accessed 5 February 2013).

²⁵⁵ UN Declaration on the Rights of Indigenous Peoples, March 2008, paragraph 10, available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 5 February 2013).

²⁵⁶ Tax Justice Network, ‘How Lybia got around sanctions – via the Netherlands’, available at <http://taxjustice.blogspot.nl/2011/08/how-libya-got-around-sanctions-via.html> (accessed 22 February 2013).

Figure 8: Oilinvest’s Dutch holding structure



Since the founding of the company in the 1980s, parent company Oilinvest International NV has been incorporated in Curaçao, which owned the European operations via its Dutch subsidiary Oilinvest (Netherlands) Group bv. Tax lawyers from the Dutch tax firm Taxwise confirmed that Oilinvest is incorporated in the Netherlands because the country is a tax haven.²⁵⁷ Furthermore, the Taxwise lawyers are almost sure that Oilinvest must have concluded a tax ruling with the Dutch tax authority, which would mean the Dutch tax authority knew the whole company was owned and controlled by the Gaddafi regime.

In 1993, four months before UN sanctions were to freeze all Libyan foreign assets, Oilinvest (Netherlands) bv arranged a capital increase that left a controlling 55% of the firm in the hands of non-Libyan shareholders – i.e. ones that had previously been only minority shareholders in Oilinvest

²⁵⁷ Volkskrant, 'Libiërs in Nederland voor belastingen', 25 February 2011, available at <http://www.volkskrant.nl/vk/nl/2844/Archief/archief/article/detail/1852092/2011/02/25/Libiërs-in-Nederland-voor-belastingen.dhtml> (accessed 18 January 2013).

businesses in Italy and Germany. This way, it could continue its operations. After the lifting of UN sanctions however, the company restored its pre-sanctions corporate structure.²⁵⁸

In 2011 (when the Libyan crisis began), one of Oilinvest International NV's directors, Mustafa Zarti was added to the EU's financial sanctions list, which resulted in the closing down of this Curaçao-based company. To close the consequential gap in the corporate structure, a Dutch foundation was created to take over the shares of Oilinvest (Netherlands) bv. Through the issuing of certificates representing the economic value of the Oilinvest shares, the foundation separated legal control and economic ownership. Although it is not clear who had economic ownership at the time, legal control was exercised by three Libyan directors and three Dutch directors (status September 2011).^{259,260}

In a letter to the Dutch parliament, the former Dutch Minister of Finance considered that the restructuring amongst others, *“addresses, in an effective and proportionate manner, the risks related to the blacklisting of the (indirect) shareholders of the Oilinvest group by the EU and the UN.”*²⁶¹ It therefore appears that the Ministry of Finance had pressured the company to take such a step. This would imply that the Minister informed parliament about the government helping Oilinvest to address the risks that the sanctions might pose to the company's operations.²⁶²

The case of Oilinvest shows that in its support to companies structuring their investment operations through the Netherlands, the Dutch government does not take into account human rights concerns expressed by international bodies, or indeed the possibility of the company using aggressive tax planning measures and obscuring ownership structures. In reaction to a parliamentary question, the government responded: *“In principle, any company that conducts activities in or via the Netherlands can use the Dutch legal, financial and fiscal system.”*²⁶³ The case of Oilinvest is a striking example of how multinationals encounter no scrutiny for compatibility with foreign policy objectives or human rights considerations before or after registering in the Netherlands for tax purposes.

4.3 Freeport-McMoran Copper & Gold Inc. ('Freeport') in Indonesia

The US company Freeport, based in Delaware, is one of the world's largest producers of gold and copper. One of Freeport's operating subsidiaries, PT Freeport Indonesia (PTFI), runs one of the world's largest copper and gold mines (Grasberg) in the province of Papua, Indonesia. In the Netherlands, there are three 'standalone' subsidiaries. Along with Freeport Finance Company bv, there is Climax Molybdenum bv (direct subsidiary of Climax Molybdenum Company) and Freeport-McMoran European Holdings bv (direct subsidiary of Freeport McMoran Spain Inc.).

The Dutch Freeport Finance Company bv owns almost \$ 500 million in assets.²⁶⁴ In its initial activity in 2001, the company provided capital to certain Indonesian affiliates through issuing senior notes.²⁶⁵

²⁵⁸ Highbeam Business, 'LIBYA – The Oilinvest Background', 21 July 2003, available at <http://business.highbeam.com/3882/article-1G1-106461338/libya-oilinvest-background> (accessed 18 January 2013).

²⁵⁹ Arthur Docters van Leeuwen, ex-president of the financial markets authority; Flip Klopper, ex-director of the Dutch Central Bank; and Peter Waaijer, a former Shell executive.

²⁶⁰ Tax Justice Network, 'Libyan sanctions and the Netherlands: part 2', available at <http://taxjustice.blogspot.nl/2011/09/libyas-oil-and-netherlands-part-2.html> (accessed 12 February 2013).

²⁶¹ Kamerbrief sancties Libië en de Oilinvest groep, 24 August 2011, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/08/24/kamerbrief-sancties-libië-en-de-oilinvest-groep.html>

²⁶² Tax Justice, 'Libyan sanctions and the Netherlands: part 2', available at <http://taxjustice.blogspot.nl/2011/09/libyas-oil-and-netherlands-part-2.html> (accessed 12-02-2013).

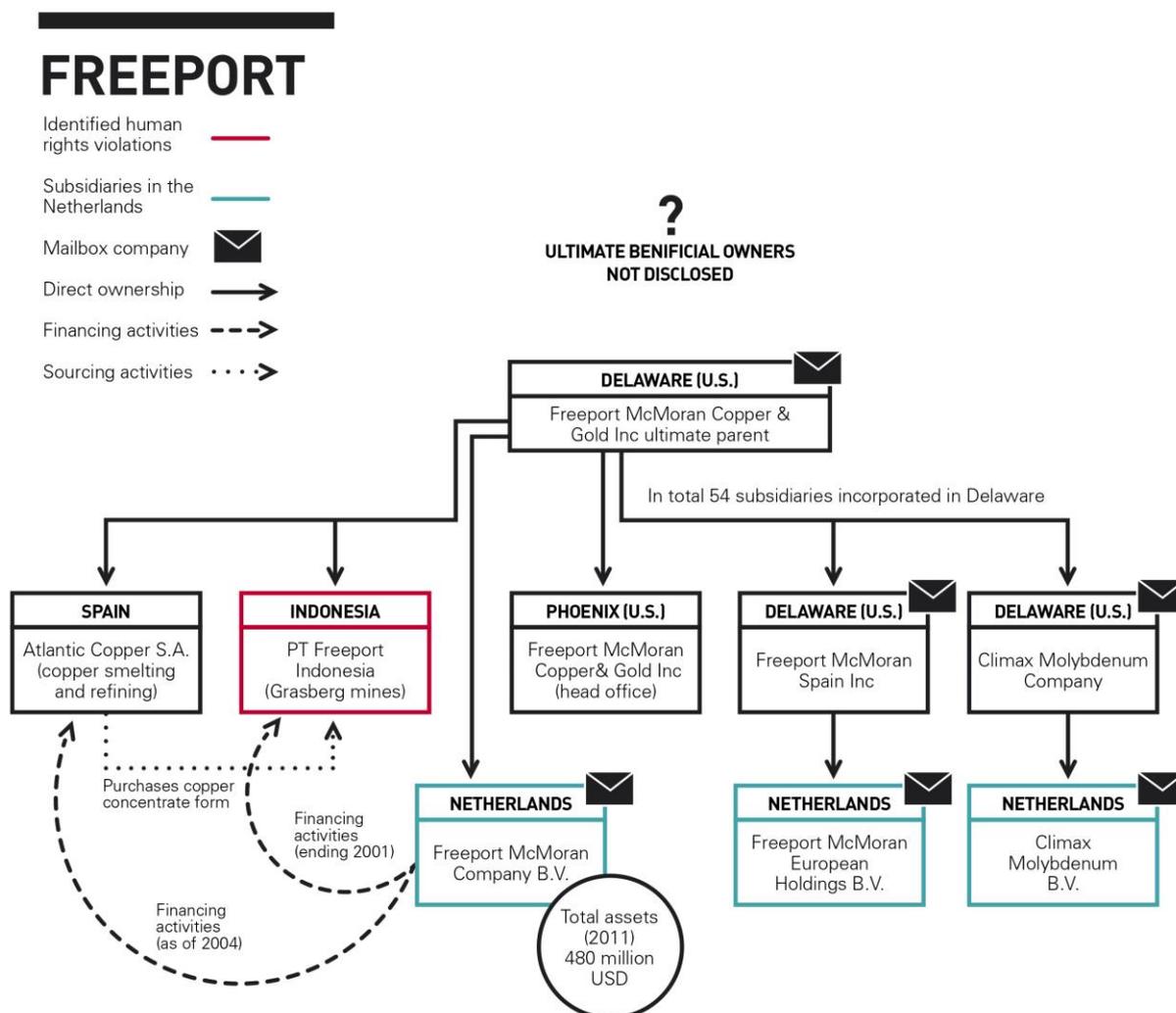
²⁶³ Kamerbrief, 'Antwoorden op Kamervragen over Nederland als vestigingsplaats voor het Libische bedrijf Oilinvest', 15 April 2011, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/04/15/antwoorden-op-kamervragen-over-nederland-als-vestigingsplaats-voor-het-libische-bedrijf-oilinvest.html> (accessed 18 January 2013).

²⁶⁴ Freeport Finance Company bv Financial Statements 2011, p.2, retrieved from KvK (last accessed 12 December 2012).

²⁶⁵ Freeport Finance Company bv Financial Statements 2010, p.3, retrieved from KvK (last accessed 1 August 2012).

Hence, the human rights violations described below are possibly financed by this Dutch entity. The company is still indirectly linked to Indonesian copper mines, and therefore almost certainly to the Grasberg mine. In March 2004, the Dutch company started financing the Spanish subsidiary Atlantic Copper S.L., a copper smelting and refining unit in Spain, which is wholly owned by the Delaware based parent company and sells copper cathode directly to rod and brass mills, primarily located in Europe.²⁶⁶ It is not possible to ascertain from annual accounts whether Atlantic also took over the loans to Indonesia, but 17% of the copper concentrate it buys originates from Indonesia.

Figure 9: Freeport’s Dutch holding structure



The case described below centres on Freeport’s Glasberg mine in West Papua, Indonesia, and illustrates how a mining company in a poorly governed area can face challenges in preventing involvement in human rights violations by local security and police forces, and how its presence may generate and exacerbate the threat posed to the rights of mine workers and local communities.²⁶⁷

²⁶⁶ Form 10-K. US Securities and Exchange Commission, 2011, Freeport-McMoRan Copper & Gold Inc.

²⁶⁷ See for additional sources European Lawyer Reference Series: Indonesia, Ira Eddymurthy en David Gaida, Soewito Suhardiman Eddymurthy Kardono (SSEK), 18 March 2011, p.197 says: WALHI is the most prominent Indonesian environmental NGO, having brought lawsuits for environmental violations against Freeport Indonesia and PT Lapindo

In Indonesia, Freeport has a long-standing link with the military and other security providers on whom it depends for the security of its operations and employees.²⁶⁸ These military forces are notorious for their brutal and violent actions in the West Papuan region where the Grasberg mine is situated. Numerous atrocities, such as torture, forced deportations and arbitrary detentions have been documented in and around the Grasberg mine.²⁶⁹ As is normal in Indonesia, a company such as Freeport is expected to contribute to the cost of maintaining higher than usual security forces because of the importance, vulnerability and contentiousness of its operations. Freeport confirms that it has provided the military and police forces with financial and logistical support.²⁷⁰ The close relationship between the company and the military has long been subject to critical media reporting. A 2005 *New York Times* article based on company records reported that “from 1998 through 2004, Freeport gave military and police generals, colonels, majors and captains, and military units, nearly \$ 20 million”.²⁷¹ According to *The Atlantic*, Freeport is paying millions of dollars directly to police officers guarding its mine.²⁷² The national police chief acknowledged the payments in October 2011, referring to them as “lunch money” and “operational funding given directly to police personnel to help them make ends meet”.²⁷³

In 2011, Freeport’s Grasberg mine saw the escalation of serious labour issues, resulting in several deaths. Although the mine is reportedly the most profitable one in the world, the miners say their wages are lower than in other countries.²⁷⁴ A strike by Freeport staff for a wage increase degenerated into violent confrontation with local security providers and police. PT Freeport Indonesia reportedly fired striking workers and employed new personnel instead, allegedly contrary to Article 144 of Indonesian law No. 13/2003 on labour, which protects striking workers from termination of employment.²⁷⁵ During a demonstration in support of the same strike of October 2011, the police indiscriminately opened fire on thousands of striking workers, killing two people.²⁷⁶ Freeport workers are often subject to violent attacks and some have been killed, with the identity of attackers not always established.²⁷⁷ Unidentified gunmen reportedly killed at least five other people, one of them a Freeport

Brantas; Abigail Abrash & Danny Kennedy, *Moving mountains*, Chapter 4, *Repressive mining in West Papua*, 2001, p. 6 on HR violations, http://wpik.org/Src/eng_moving_mountains.html; *Risky business*, *The Grasberg goldmine*, an independent Annual Report on PT Indonesia, 1998; Jakarta Globe: *Lawsuit against Freeport*, Heru Andriyanto, March 8, 2010; Jenna E Ziman, *Freeport-McMoran Mining Corporate Greed*, January 1998; *Open Jurist* 197 F3d 161 Tom Beneal et al. v. Freeport-McMoran Inc and Freeport-McMoran Copper Gold Inc (5th Cir. 1999).

²⁶⁸ See for example Global Witness, *Paying for protection*, 2005, p.27-28, available at <http://www.globalwitness.org/sites/default/files/import/Paying%20for%20Protection.pdf> (accessed 5 February 2013).

²⁶⁹ For an extensive list of human rights violations in and around the Grasberg mine see <http://www.utwatch.org/corporations/freeportfiles/documents.html> and <http://www.minesandcommunities.org/article.php?a=968> (accessed on 3-8-2012); Abigail Abrash & Danny Kennedy, ‘Repressive mining in West Papua’ in Geoff Evan et al. ‘*Moving mountains*’, 2002, p. 68; Danny Kennedy, ‘*Risky business*, *The Grasberg goldmine*. An independent Annual Report on PT Indonesia’, Project Underground report, 1998, p. 7, available at http://www.freewestpapua.org/docs/risky_business.pdf (accessed 05-02-2013)

²⁷⁰ Al Jazeera, ‘*Mining companies funded Indonesian abuses*’, 19 October 2011, <http://www.aljazeera.com/indepth/opinion/2011/08/20110828142858857222.html> (accessed on 3 August 2012); Global Witness, ‘*Paying for protection*’, 2005, p. 2.

²⁷¹ *New York Times*, ‘*Below a Mountain of Wealth, a River of Waste*’, 27 December 2005, available at http://www.nytimes.com/2005/12/27/international/asia/27gold.html?_r=2&pagewanted=all (last accessed 3 August 2012).

²⁷² *The Atlantic*, ‘*Is a U.S. company funding a violent crackdown in Indonesia?*’, 29 November 2011, available at <http://www.theatlantic.com/international/archive/2011/11/is-a-us-mining-company-funding-a-violent-crackdown-in-indonesia/249164/> (last accessed 3 August 2012).

²⁷³ *The Jakarta Globe*, ‘*Police Admit to Receiving Freeport ‘Lunch Money’*’, 28 October 2011, available at <http://www.thejakartaglobe.com/home/police-admit-to-receiving-freeport-lunch-money/474747>, (accessed 13 December 2012).

²⁷⁴ Al Jazeera, ‘*Strike prolonged in controversial Papuan mine*’, 9 November 2011, available at <http://www.aljazeera.com/news/asia-pacific/2011/11/20111119161025890911.html> (accessed 3 August 2012).

²⁷⁵ FIDH, ‘*Grasberg mine: PT Freeport Indonesia must respect worker’s rights*’, 6 November 2011, available at <http://www.fidh.org/Grasberg-mine-PT-Freeport> (accessed 3 August 2011).

²⁷⁶ *Ibid.*

²⁷⁷ For more information on this and other violent incidents – often with Freeport workers as victims – in the West Papuan region in 2012: Australia West Papua Association, ‘*West Papua 2012 Human Rights report*’, 2013, p.16-18, available at http://img.scoop.co.nz/media/pdfs/1301/West_Papua_Human_Rights_Report.pdf, p. 16-18 (accessed 3 January 2013).

worker for 20 years, in October 2011²⁷⁸ and in January 2012, unidentified gunmen shot dead two contract workers on the road to the Grasberg mine.²⁷⁹ In a response the company expressed worries on “*shooting incidents by unknown assailants*” and claimed that its subsidiary PTFI “*has worked aggressively with government officials at local, provincial and national levels to call for impartial and independent investigations into incidents of violence that have occurred in our project area*”.²⁸⁰

Freeport also claims that “*the Government of Indonesia is responsible for employing police and military personnel and directing their operations*”.²⁸¹ However, the company states that PTFI contributed \$ 14 million for government-provided security in 2011, since the Indonesian government has limited resources. The company thus acknowledges that financial links exist between PTFI and government-provided security forces.

There are many credible allegations that Freeport-supported agencies are implicated in systematic and gross human rights violations, which conflicts with, among other things, the OECD Guidelines for Multinational Enterprises that instruct not to “*give undue pecuniary or other advantage to public officials*”.²⁸² In addition, the indigenous rights of West Papua’s people seem not to be fully respected by actors that are supported by Freeport,²⁸³ even though those rights are laid down in the OECD Guidelines as well as in the United Nations Declaration on the Rights of Indigenous Peoples. This adds to the concerns that Freeport’s presence and close relations with the military, police and other security forces may constitute implication in human rights violations. The available facts and reports warrant that the Dutch government requests detailed reports of subsidiaries incorporated in the Netherlands and develops a solid knowledge base.

International standards regarding the use of force and firearms²⁸⁴

International human rights law recognises the risks related to law enforcement bearing firearms and provides the following rules and principles:

“Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. (...) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.”

The UN Code of Conduct for Law Enforcement Officials²⁸⁵

“Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials²⁸⁶

²⁷⁸ The Financial Times, ‘Three shot dead near Freeport’s Indonesia mine’, 21 October 2011, available at <http://www.ft.com/cms/s/0/eb3cb428-fbae-11e0-9283-00144feab49a.html#axzz22hSAR0Tx> (accessed 3 August 2012); and Reuters, ‘Freeport union halts return to work after ambush killings’, 10 January 2012, available at <http://af.reuters.com/article/metalsNews/idAFL3E8CA34520120110> (accessed 3 August 2012).

²⁷⁹ Reuters, ‘Freeport union halts return to work after ambush killings’, 10 January 2012, available at <http://af.reuters.com/article/metalsNews/idAFL3E8CA34520120110>.

²⁸⁰ Response by Freeport McMoran to SOMO’s company review, 18 February 2013.

²⁸¹ Response by Freeport McMoran to SOMO’s company review, 18 February 2013.

²⁸² OECD Guidelines Chapter II article 10 and chapter VII article 1

²⁸³ Global Witness, ‘Paying for protection’, 2005, p. 27-28

²⁸⁴ Amnesty International, ‘Undermining rights, forced evictions and police brutality around the Porgera Gold Mine, Papua New Guinea’, January 2010, Index: ASA 34/001/2010.

²⁸⁵ Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979 (Code of Conduct for Law Enforcement Officials), Article 3.

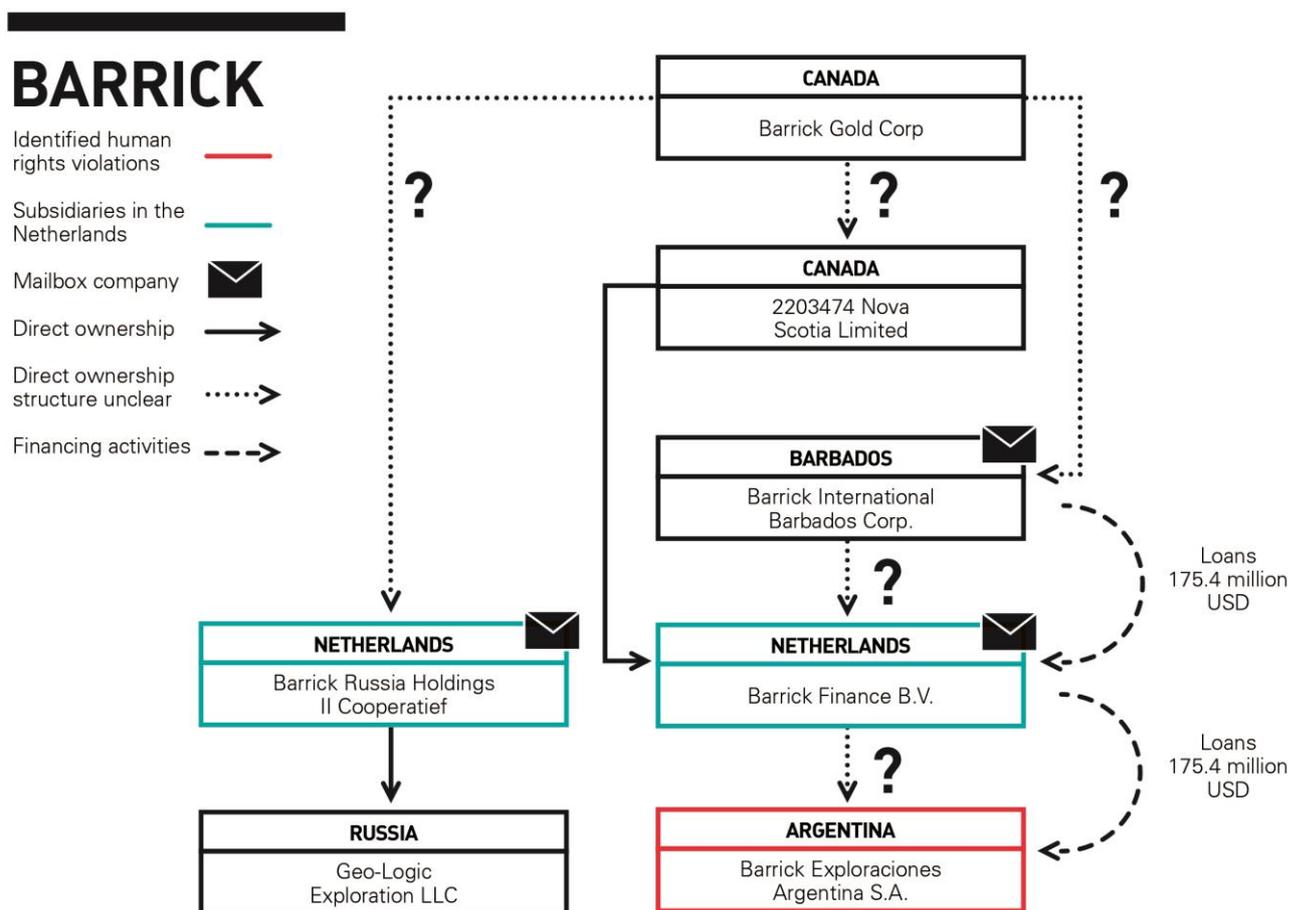
²⁸⁶ Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, ‘Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Principle 9’, adopted during congress 27 August to 7 September 1990, Havana, Cuba

4.4 Barrick Gold Corporation in Argentina

Barrick Gold Corporation (Barrick) is a Canadian-based multinational engaged in gold and copper production. The company's two Dutch subsidiaries (Barrick Finance bv and Barrick Russia Holdings II Cooperatief) together own around \$ 315 million in assets. Although Barrick publishes a very detailed corporate structure,²⁸⁷ this does not include Barrick Finance bv and its direct parent. Both the subsidiaries that provide and receive loans to and from the Dutch holding, however, are detailed in the corporate structure graph provided in Barrick's annual report.

Barrick Finance bv channels loans worth \$ 175.4 million from a Barrick subsidiary in Barbados (Barrick International Barbados Corp.) to its Argentinean subsidiary (Barrick Exploraciones Argentina S.A.).²⁸⁸ This intra-group financing structure is most probably structured through the Netherlands to avoid tax on interest payments (see Chapter 3). The Argentinean subsidiary is responsible for both the Veladero and the Pascua Lama mines, about which concerns have been expressed regarding the project's impact on the environment and local communities.²⁸⁹

Figure 10: Barrick's Dutch holding structure



²⁸⁷ Barrick Gold Annual Information Form 40-F, 2011, page 18, <http://barrick.q4cdn.com/3185ea82-f4f8-4349-9caa-940065797d2b.pdf>

²⁸⁸ Barrick Finance N.V. Financial Statements 2011, deposited at the Dutch Chamber of Commerce, available at www.kvk.nl.

²⁸⁹ For example Mining Watch Canada, Urgent Environmental Alert: Protect the Glaciers of the South of the World, available at <http://www.miningwatch.ca/urgent-environmental-alert-protect-glaciers-south-world>.

Barrick Finance bv channels loans worth \$ 175.4 million from a Barrick subsidiary in Barbados (Barrick International Barbados Corp.) to its Argentinean subsidiary (Barrick Exploraciones Argentina S.A.). As this graph shows, direct ownership relations are impossible to ascertain from the annual accounts of the Dutch subsidiaries or from subsidiary information provided in Barrick Gold Corp's annual accounts.

The Argentinean subsidiary is responsible for both the Veladero and the Pascua Lama mines, which are controversial in regard to their potentially negative impact on glaciers and water pollution. Barrick's project, by estimates of glaciologists hired by Barrick to carry out glacier and permafrost studies, indicate that the projects sits on at least 300,000 hectares of permafrost zones. It was also found that the project pit and waste pile sites for the Pascua Lama project are indeed permafrost areas, which are protected by Argentina's new glacier law.²⁹⁰ While Barrick claims that only a handful of glaciers exist in the project area, groups such as the Center for Human Rights and Environment (CEDHA) are carrying out glacier inventories in the Pascua Lama area that show there are nearly 200 glaciers – and possibly more – in the project's impact area.²⁹¹

In May of 2011, CEDHA published a report²⁹² on the abnormal readings for water quality taken by Barrick itself, near the Pascua Lama and Veladero sites. The readings, registered in 2009, show extremely high levels of arsenic and heavy metals including lead, mercury and aluminium, as well as high levels of oils, beyond the levels permitted by law or levels considered safe for human consumption. Barrick issued a press release following the publication of the report indicating that CEDHA's data was of questionable origin, despite the fact that CEDHA had obtained it through an information request to the government of San Juan, and was given Barrick's own statistics.²⁹³

Finally, local community residents (called 'Villanuevas') in Tudcúm, a small town just outside the principle entrance gate to the Veladero and Pascua Lama access road – manned by Barrick and closed off to the public – argue their inherited lands, to which they have legal title, have been illegally acquired to provide Barrick Gold with access to the mine site. The Villanuevas say they can no longer roam freely through their lands without gaining permission from Barrick (and even then, only for very limited areas). The public generally cannot enter the area without Barrick custody.²⁹⁴ The detrimental environmental effects of the project have also created conflicts between the mining company and the indigenous Diaguita community, who inhabit the nearby Huascaltino territory.²⁹⁵ This community filed a complaint in 2010 against the state of Chile in relation to the Pascua Lama project, on the basis of (amongst other complaints) the lack of consideration for indigenous communities and the impact on the water sources they depend on which come from dozens of glaciers in Pascua Lama's immediate project area.

²⁹⁰ In September of 2010, Argentina passed a historic National Glacier Protection Law, unanimously supported by both houses of Congress. The law banned mining operation on or near glaciers and permafrost zones. Barrick Gold's Pascua Lama project, according to the company's own research, includes extensive permafrost zones and many glaciers in the project area. Barrick attacked the national glacier law in federal courts, asking for its suspension based on the idea that it was "unconstitutional". The court ordered a temporary suspension of the glacier law in favour of Barrick, but that decision was recently overturned by a Supreme Court ruling, making the law fully applicable to Barrick Gold and its Veladero and Pascua Lama Projects. See CEDHA, 'Barrick Gold Suffers Legal Defeat in Argentine Supreme Court Glacier Protection Law Holds and Mining Companies Must Reveal Impacts', 3 July 2012, available at <http://wp.cedha.net/?p=10828&lang=en>

²⁹¹ See CEDHA, 'Equator Principles Due Diligence Review Violations by Barrick Gold's Pascua Lama Project (Argentina & Chile)', November 2011, available at <http://wp.cedha.net/wp-content/uploads/2011/11/Equator-Principles-Due-Diligence-Review-Barrick-Gold-Pascua-Lama-English.pdf>

²⁹² See CEDHA, 'Impacto de los emprendimientos Veladero y Pascua Lama sobre los recursos hídricos de la provincial de San Juan', May 2011, available at <http://wp.cedha.net/wp-content/uploads/2011/09/IMPACTO-DE-LOS-EMPREDIMIENTOS-VELADERO-Y-PASCUA-LAMA-SOBRE-LOS-RECURSOS-HIDRICOS-DE-LA-PROVINCIA-DE-SAN-JUAN-CEDHA-2011.pdf>

²⁹³ Ibid.

²⁹⁴ Protest Barrick, 'Indigenous Chileans take mining giant to international court', 27 October 2011, available at <http://protestbarrick.net/article.php?id=775>.

²⁹⁵ CEDHA, 'CEDHA Files Equator Principles Due Diligence Review to US EXIM Bank and EDC of Canada on Barrick's Pascua Lama Project', 25 November 2011, available at <http://wp.cedha.net/?p=9232&lang=en>.

Right to an adequate standard of living, including right to water, food and housing

What is the relationship between an adequate standard of living and the extractive industry?

"[A]t the macro-economic level, particularly in developing countries, the prosperity achieved by the mining industry rarely translates into an adequate standard of living for the population." Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu, 2012.²⁹⁶

What is the international basis for this right? *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."* UN Universal Declaration of Human Rights, article 25.²⁹⁷

4.5 Pluspetrol

Pluspetrol S.A. is a private Argentinean extractive company set up in 1976 and now one of the largest oil companies in South America. The company mainly operates in Latin America (Bolivia, Chile, Columbia, Peru, Venezuela) but also in Africa. Pluspetrol engages in oil exploration and production and advertises its services in enhanced recovery, large gas fields, heavy crude extraction in remote zones, and exploitation of mature fields and marginal areas.²⁹⁸

In December 2000, the company shifted its registered head office to the Netherlands. In 2011, Pluspetrol had three Dutch legal entities, but no material substance in the country. Pluspetrol Resources Corporation bv²⁹⁹ had a total of \$ 3.9 billion in assets in 2011 and owns 55% of its subsidiary, Pluspetrol Norte S.A.. This subsidiary, in turn, operates in the oil production industry in Peru, where the polluting impact of its Camisea project has come under severe criticism by indigenous communities.

Pluspetrol Norte S.A. is responsible for the production of oil from mature fields that have been in operation for more than 30 years in remote Amazonian territories. When Pluspetrol took over so-called block 1AB from US-based Occidental Petroleum in 2000, part of the agreement signed in 2001 was that the company would clean up the pollution caused by Occidental Petroleum and renew the pipelines.³⁰⁰ However, according to various stakeholders, this has not happened.

²⁹⁶ UN Human Rights Council, 'Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu', July 2012, p. 11, available at <http://www.wecf.eu/download/2012/UnitedNations.pdf> (accessed 04-01-2013)

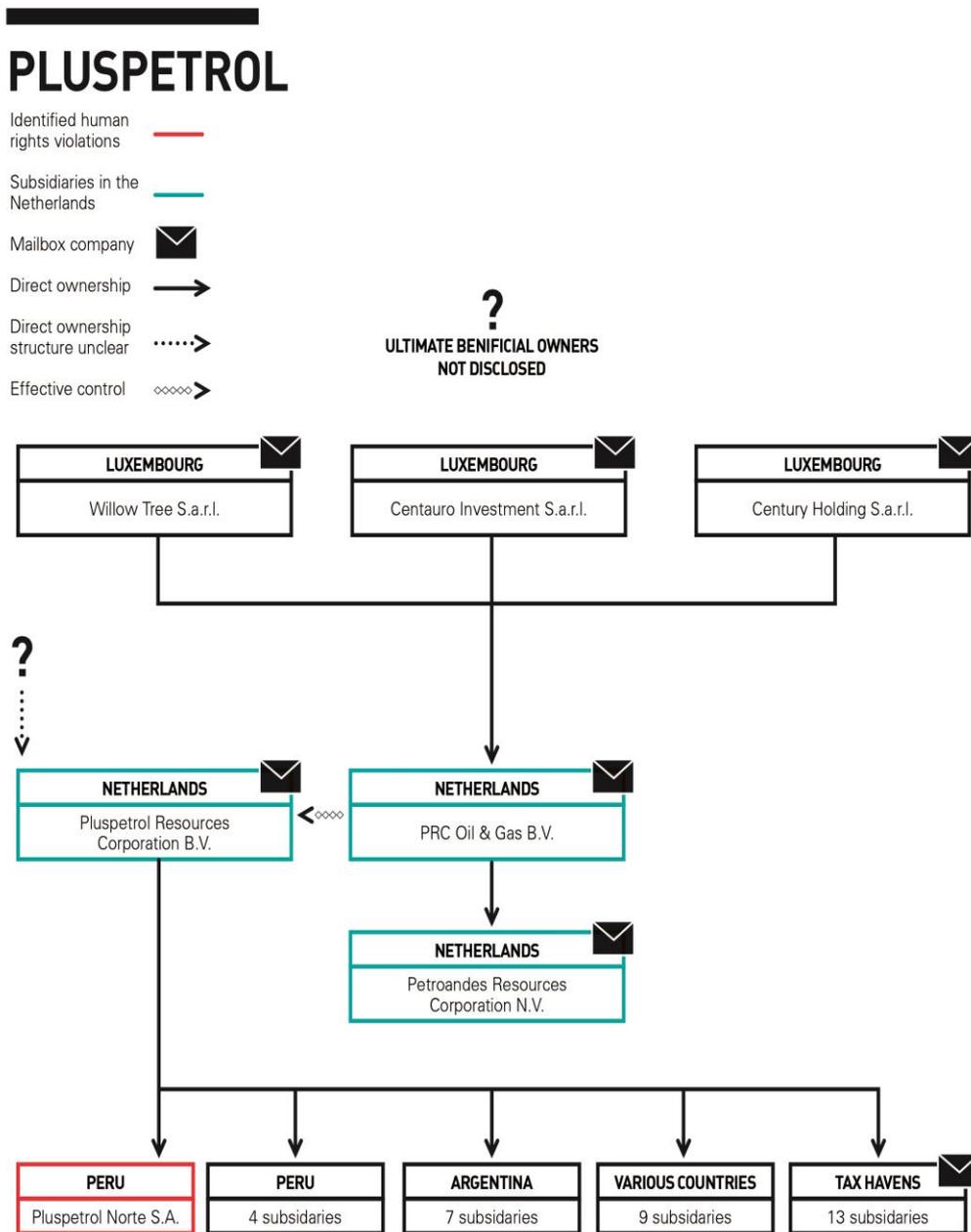
²⁹⁷ The Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr/index.shtml>.

²⁹⁸ Bloomberg database, Pluspetrol S.A. company description, accessed 26 July 2012.

²⁹⁹ The company changed its incorporation from N.V. to bv on 27 September 2012. Naamloze vennootschap (usually abbreviated NV) is the Dutch term for a public limited liability company. The company is owned by shareholders, and the company's shares are not registered to certain owners, so that they may be traded on the public stock market. The phrase literally means "innominate partnership" or "anonymous venture" and comes from the fact that the partners (the shareholders) are not directly known. This is in contrast to the term for a private limited company, which is called Besloten Vennootschap (an "exclusive" or "closed partnership", one in which stock is not for sale on open markets).

³⁰⁰ Inter Press Service, 'PERU: Environmental Clean-up not Complete, Say Achuar Communities', 25 September 2009, available at <http://www.ipsnews.net/2009/09/peru-environmental-clean-up-not-complete-say-achuar-communities/> (accessed 2 August 2012).

Figure 11: Pluspetrol's Dutch holding structure



Technical consultancy firm E-Tech conducted a study³⁰¹ that showed higher levels of heavy metals and hydrocarbons than legally allowed,³⁰² leading them to conclude that Pluspetrol had not respected national and international standards for environmental clean-up. More recently, the Peruvian

³⁰¹ E-Tech International identified serious failures in the clean-up of contaminated sites left by Occidental when they sold Block 1-AB to Pluspetrol, see E-Tech International, 'Evaluation of the Success of Remediation Efforts at Petroleum-impacted Sites in the Corrientes Region of Northern Peru', September 2009, available at http://www.etechninternational.org/peru09/05-sept-09_remediation_monitoring1AB_English_FINAL.PDF.

³⁰² BBC News, 'Peru tribe battles oil giant over pollution', 24 March 2008, available at <http://news.bbc.co.uk/2/hi/7306639.stm> (accessed 2 August 2012).

environmental control agency OEFA also came to the same conclusion.³⁰³ Pluspetrol says that the reported high levels of heavy metals were found to be the consequence of traditional community practices that involve the use of lead (such as the making and using fish sinkers).³⁰⁴ The study conducted by a university health researcher connected the use of fishing tools to heavy metal poisoning in the community. The study also found, however, that another factor for the poisoning was the high exposure to oil activity. *“The identified connection with oil activity was the proximity of communities to oil battery facilities and thus greater access of people to lead from cables and other industrial waste.”*³⁰⁵ Oil companies active in the region and local government authorities responsible for disposal of the waste could therefore be implicated in the heavy metal poisoning of the local community.

According to media reports, local communities and civil society organisations,³⁰⁶ oil spills continue to occur even after Pluspetrol's takeover of the site, and agreements made with the communities are not being acted upon.³⁰⁷ In recent years, regular instances of social unrest have occurred as a result of the oil spills. After various forms of protests, such as the occupation of Pluspetrol's airport and several oil stations in 2008,³⁰⁸ a peace agreement was signed between the Quechua people and the regional government (the 'Acta Pastaza'). Agreements such as a government-led investigation into the health impacts of the contamination of the waterways are said not to have been acted upon, according to recent media reports. The oil spills, as reported by AmazonWatch, and the failure to act on the agreements triggered a new wave of protests by Quechua activists in July 2012, supported by a number of other indigenous tribes.³⁰⁹

In response to these findings, Pluspetrol says that of 18 registered spills in 2011, six were caused by vandalism, amounting to 95.6% of the total oil quantities spilled. This is disputed by Jorge Tacuri from the Federation of Native Communities of the Corrientes. He argues the indigenous communities do not have the tools or materials to perforate the heavy iron pipelines and says, *“the strange thing here is that whenever a spill occurs, they try to make it into an act of vandalism, blaming the communities”*. The Federation of Native Communities says that the spills are due to 40-year-old corroded pipelines, which Pluspetrol committed itself to replace in 2001. The company, in response to the above described practices, claims that it is in the process of remediation of 188 sites affected by extractive activities. Ninety-nine of the sites have been remediated, while remediation in the other 19 sites is still

³⁰³ Alianza Arkana Blog, 'Pluspetrol Under Fire in Loreto: New Inquiries, Exposés and Penalties Fuel Indigenous Movement', 16 July 2012, available at <http://alianzaarkana.org/blog/entry/pluspetrol-under-fire-in-loreto-new-inquiries-exposes-and-penalties-fuel-indigenous-movement> (accessed 2 August 2012).

³⁰⁴ This was concluded in a research project carried out by Umea University (Sweden), in collaboration with regional health authorities and a community-based organization called FECONACO. See Cynthia Anticona Huaynate, 'Lead exposure in indigenous children of the Peruvian Amazon: Seeking the hidden source, venturing into participatory research', 2012, available at [file:///dbs-02/flredir/katrin/My%20Documents/Downloads/FULLTEXT01%20\(1\).pdf](file:///dbs-02/flredir/katrin/My%20Documents/Downloads/FULLTEXT01%20(1).pdf).

³⁰⁵ Ibid, p. 79-81. The report concludes the oil company's waste deposits were not securely contained. "According to the company's waste management program, cooper cables and car batteries would be classified as "not dangerous reusable waste" and "dangerous not reusable waste", respectively. After classification, both would be disposed in temporal deposits/storages, located inside oil central installations, until being collected by a specialized waste management company. Although the application of this procedure is supposed to be regularly monitored by environmental health authorities in Loreto, community residents who have worked for the oil company have a negative perception of how the solid waste disposal is conducted. Moreover, testimonies from community residents in this study would indicate that there is a low, if any, control of the waste deposits located near the communities."

³⁰⁶ In a research report from 2011, a team of monitors from the indigenous Achuar and Urarina communities on the Corrientes River document 18 major crude oil spills in 2010 and over 90 spills between 2009 and 2011, directly affecting dozens of miles of rivers and streams and vast stretches of forest. The report and documentary are available at <http://amazonwatch.org/news/2011/0302-dozens-of-new-oil-spills-devastate-northern-peruvian-amazon>.

³⁰⁷ Monga Bay website, "Report: 90 oil spills in Peruvian Amazon over 3 years", 3 March 2011, available at http://news.mongabay.com/2011/0303-hance_oilspills_peru.html (accessed 2 August 2012).

³⁰⁸ BBC News, 'Peru tribe battles oil giant over pollution', 24 March 2008, available at <http://news.bbc.co.uk/2/hi/7306639.stm> (accessed 2 August 2012).

³⁰⁹ Alianza Arkana Blog, 'PlusPetrol Under Fire in Loreto: New Inquiries, Exposés and Penalties Fuel Indigenous Movement', 16 July 2012, available at <http://alianzaarkana.org/media-room/blog-latest-news/entry/pluspetrol-under-fire-in-loreto-new-inquiries-exposes-and-penalties-fuel-indigenous-movement> (accessed 3 January 2013).

in the implementation phase, according to the company.³¹⁰ The latest reported oil spill occurred on 28 January 2012, which Achuar indigenous leaders say was caused by corroded pipelines, and therefore by company negligence. The spill allowed an unknown quantity of crude oil and chemicals to leak into the Colpayo river near the community of Nueva Vida.³¹¹

The rights of indigenous peoples

Indigenous communities can be vulnerable groups in the operations of extractive companies. Which rights are in danger of being violated in these situations? *“The primary substantive rights of indigenous peoples that may be implicated in natural resource development and extraction, as has been extensively documented, include, in particular, rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right to self-determination. These rights are grounded in multiple international instruments, including binding multilateral human rights treaties that have been widely ratified, and are articulated in the United Nations Declaration on the Rights of Indigenous Peoples.”* Special Rapporteur on the rights of indigenous peoples, James Jnaya, 2012.³¹²

Which international instruments help protect the rights of indigenous peoples? Important treaties and conventions related to the rights of indigenous people are the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPs) and International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries. The link between the rights of indigenous peoples to culture and to sustainable development models has been commented upon by the Human Rights Committee in relation to article 27 of the International Covenant on Civil and Political Rights.³¹³ The Permanent Forum on Indigenous Issues (UNPFII) has also linked violations of cultural and treaty rights to unsustainable development, in particular, policies and programmes that ignore the cultural integrity, treaty relationships and rights of indigenous peoples and that, as a consequence, have had negative effects on their lives and livelihoods.³¹⁴

What is the role of states in this regard? *“[M]eeting the State duty to protect implies that the State should enforce laws that are aimed at requiring business to respect human rights and ensure that other business-focused laws and policies do not constrain but enable business respect for human rights, including in the context of indigenous peoples. It also requires that the State provide effective guidance for business enterprises, including State-owned enterprises, on how to respect human rights throughout their operations, particularly in conflict-affected areas.”* Human Rights Council, 2012.³¹⁵

4.6 Glencore International Plc in Zambia (Mopani Copper Mines)

Glencore International Plc is registered in Jersey, with headquarters in Switzerland. Since May 2011, the company has had a primary quote on the London Stock Exchange (LSE) and a secondary quote on the Hong Kong Stock Exchange (HKEx).³¹⁶ Since its stock market flotation in May 2011, Glencore has been associated in the media with a string of human rights and corruption issues. Glencore has

³¹⁰ Pluspetrol's reply to the findings of this report.

³¹¹ AmazonWatch, 'PlusPetrol Contaminates Rio Corrientes with More Oil Spills. Video Denounces New Spill', 16 February 2012, available at <http://amazonwatch.org/news/2012/0216-pluspetrol-contaminates-rio-corrientes-with-more-oil-spills>.

³¹² Report of the Special Rapporteur on the rights of indigenous peoples, James Jnaya, June 2012, A/HRC/21/47, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47_en.pdf, with reference to A/HRC/18/35, para 82.

³¹³ Communication No. 1457/2006, Poma Poma v. Peru, Views adopted on 27 March 2009, para 7.2.

³¹⁴ UN Permanent Forum on Indigenous Issues, 'Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples', February 2010, para 23.

³¹⁵ Human Rights Council, 'Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries', August 2012, p. 5, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-55_en.pdf (accessed on 4 January 2013).

³¹⁶ See Glencore's website on shareholder information: <http://www.glencore.com/shareholder-information.php>.

been ranked by RepRisk as the third most controversial mining company in 2011.³¹⁷ Glencore started buying up mining companies in 2002 in its strategic drive to control not only the trading but also production side of its commodity trading business.

The human rights controversy described here refers to the Glencore subsidiary Mopani Copper Mines Plc (MCM) – the largest producer of copper and cobalt in Zambia, of which Glencore owns more than 70%.³¹⁸ MCM has faced public scrutiny for tax avoidance in Zambia but also causes serious environmental pollution with its Mufulira and Nkana mines, which remains unaddressed. Nkana and Mufulira were bought in 2000 in the wake of privatisation,³¹⁹ as part of a consortium with the Canadian First Quantum (16.9%) and ZCCM (10%); Glencore's share is 73.1%.

There is no identified direct ownership or financing link between Glencore's Dutch subsidiaries Finges Investment bv (a holding company)³²⁰ or Glencore Grain bv (trading) and Mopani Copper Mines Plc. Glencore's presence in the Netherlands does, however, raise concerns about the regulatory framework regarding the company's human rights conduct, given the Dutch incorporations are central to the group's finances and trading operations. In particular, because Mopani Copper Mines has also been associated with tax evasion or avoidance practices involving tax haven subsidiaries that also have financing link with Glencore Grain bv (see Chapter 3).

The main Dutch holding, Finges Investment bv, has \$ 18 billion in assets and owns at least 21 Dutch subsidiaries, of which only six have any employees. The company also has 10 foreign³²¹ subsidiaries, including operations in Zambia and South Africa. The main activity of Finges Investment bv is to carry out "*general and administrative supportive services, as well as act as a holding and financing company of investment activities in natural resources*".³²² There is an indirect link between the Dutch trading office Glencore Grain bv and Mopani Copper Mines Plc through the \$ 4 billion financing of Glencore Grain bv by subsidiaries of Glencore International AG (namely Glencore Group Funding Ltd (U.A.E.), and before that Glencore Finance (Bermuda)) which in turn control the controversial mining operation Mopani Copper Mines. The pollution caused by the Mopani mines has a long history and involves air as well as drinking water pollution.

³¹⁷ RepRisk, 'Most Controversial Mining Companies of 2011', March 2012, available at http://www.reprisk.com/downloads/mcreports/23/150312%20Top%2010%20Most%20Controversial%20Mining%20Companies_RepRisk.pdf.

³¹⁸ CounterBalance, 'The Mopani copper mine, Zambia. How European development money has fed a mining scandal', December 2010, available at <http://www.counterbalance-eib.org/wp-content/uploads/2011/03/Mopani-Report-English-Web.pdf>.

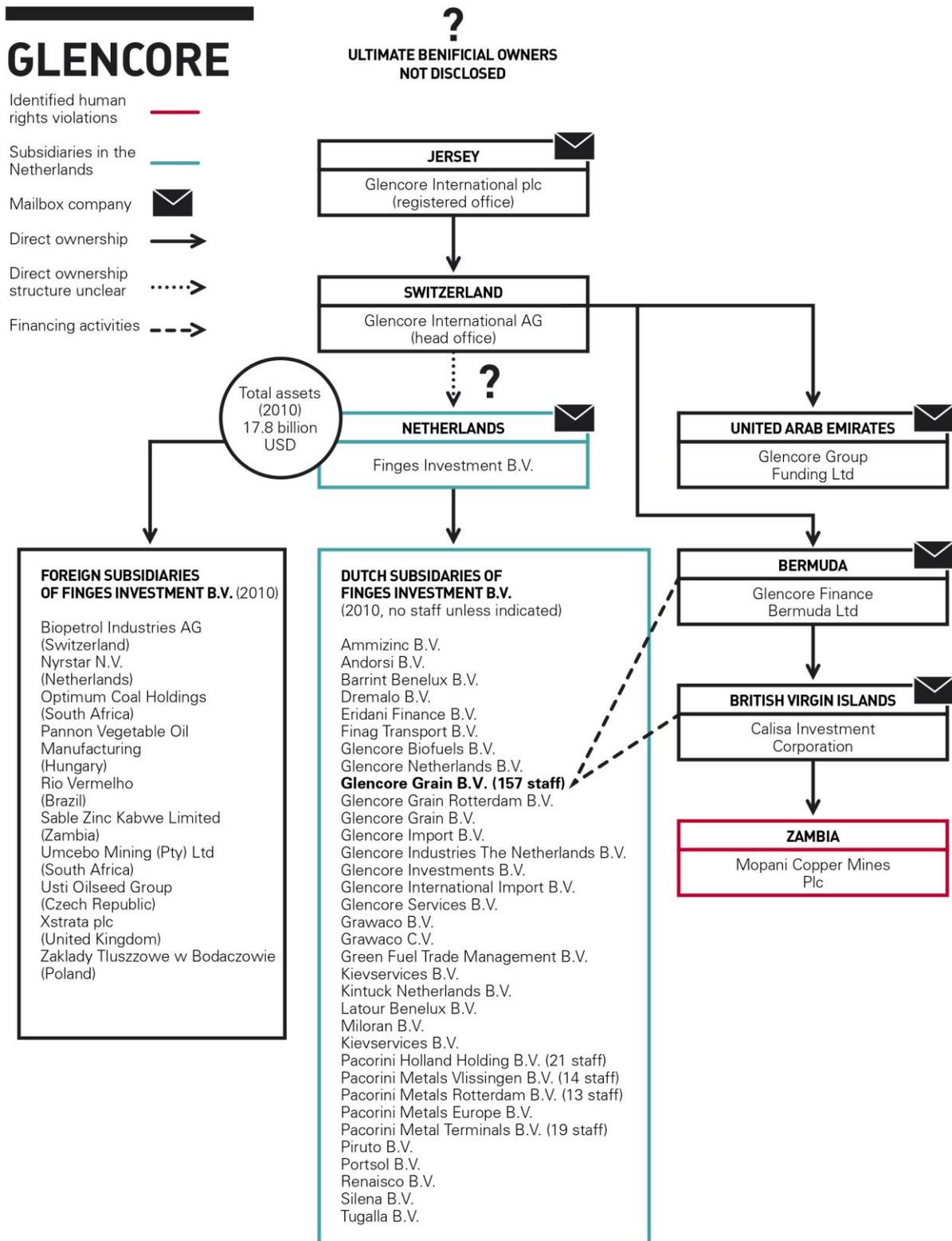
³¹⁹ Zambia's state-owned businesses were privatised in 1991 under the supervision of the World Bank and IMF in a transformation from a socialist to market-driven economy. This included Zambia Consolidated Copper Mines (ZCCM) which was transformed from a state mining corporation to an Investments Holding Company (ZCCM-IH), which was divided into several smaller companies and sold to private investors. See World Bank, 'Zambia – Copperbelt Environment Project: environmental impact assessment (Vol. 2 of 2), Main report.1.2.2002, E539', 2002, available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/03/05/000112742_20040305152701/Rendered/PDF/E5390vol.2.pdf, p. iii.

³²⁰ Besloten Vennootschap (abbreviated to bv) is Dutch terminology for a private limited liability company. The company is owned by shareholders, and the company's shares are privately registered and not freely transferable. The phrase means "secluded partnership" or "private partnership" and it is the most common form of enterprise in the Netherlands.

³²¹ Namely, in Belgium (1), UK (1), Switzerland (1), South Africa (2), Zambia (1), Brazil (1), Poland (1), Hungary (1), and the Czech Republic (1).

³²² Finges Investment bv (Rotterdam) Annual Report, December 31, 2010, p4. All Dutch subsidiaries are part of a fiscal unity with Finges Investment bv, except for Glencore Grain bv All subsidiaries, except those belonging to Pacorini Metals (5 in 2010) and Glencore Grain bv (157 in 2010), have no employees and fulfil finance or holding functions.

Figure 12: Glencore’s Dutch holding structure and subsidiaries



In 2002, two years after Glencore bought the Mufulira and Nkana mines, the World Bank highlighted sulphur dioxide emissions from Mufulira, Nkana, Chambishi and Luanshya smelters in Zambia's Copperbelt.³²³ In 2009, the Environmental Council of Zambia reported that sulphur dioxide emissions from parts of the plant had reached up to 70 times the maximum health limit set by the World Health Organization.³²⁴ This is confirmed by Glencore's IPO prospectus, which cites an expert report that found environmental and social management at its Nkana and Mufulira mines "consistently exceeding" licence conditions and posing a risk to mine operations in terms of compliance to statutory requirements and the Equator Principles.³²⁵ Apparently Mopani Copper Mines "had missed even the extended deadline for reducing the pollution".³²⁶ *The Times* (London) reported in May 2011³²⁷ that Glencore had been informed about the negative impact the air pollution from the nearby Mopani Copper Mines has on children living in the area. Schoolchildren had sent a letter to Glencore's chief executive officer Ivan Glasenberg describing "how clouds of toxic particles made them choke, burnt their throats, poisoned the school's fruit trees and forced teachers to close windows, leaving them sweltering in their classrooms". At one of the smelters the pollution is so clear that according to a report by CounterBalance, "[t]he air is heavy and leaves a metallic taste in one's mouth".³²⁸

Mopani Copper Mines Plc also stands accused of drinking water pollution caused by a new production method developed by the company³²⁹ to improve its cost-effectiveness: acid leaching replaces manual labour, allowing the copper to be more rapidly produced. But the NGO Berne Declaration reports that the leaching technique also causes devastating environmental damage as large quantities of sulphuric acid are injected directly into the lower soil layers of the smelters on a daily basis, "polluting the drinking water aquifer of the municipal company, Mulonga Water".³³⁰ Despite a system of pumps that should prevent acid from infiltrating drinking water, more than 800 people were poisoned on 2 January 2008. A salient fact is that European Investment Bank, which recently cancelled a loan to MCM on grounds of alleged tax evasion, would not have provided any loans to MCM in the first place had this acid method not been possible, thereby prioritising productivity over and above social and environmental impacts.³³¹

The Zambian NGO Centre for Trade Policy and Development (CTPD) has threatened Glencore with legal action, citing two incidents of drinking water pollution, in 2008 and in 2011.³³² CTPD also refers to the high level of sulphur in the air. As late as 2012, the UK's *Daily Mail* newspaper reported it had "witnessed the choking, foul-smelling clouds during a recent visit to the Zambian Copperbelt",³³³ indicating that despite repeated reports of pollution caused by its mines, no action has been taken.

³²³ World Bank, 'Zambia – Copperbelt Environment Project: environmental impact assessment (Vol. 2 of 2): Main report. 1.2.2002, E539', 2002, available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/03/05/000112742_20040305152701/Rendered/PDF/E5390vol.2.pdf, p. iii.

³²⁴ From Money to Metal, Heinrich Böll Stiftung, 'Glencore. Mine, all mine!', 24 August 2012, available at <http://moneytometal.org/index.php/Glencore>

³²⁵ Glencore Prospectus, available at <http://www.scribd.com/doc/54605519/Glencore-IPO-Prospectus>

³²⁶ From Money to Metal, Heinrich Böll Stiftung, 'Glencore. Mine, all mine!', 24 August 2012, available at <http://moneytometal.org/index.php/Glencore>

³²⁷ *The Times* (London), 'Billionaire ignored children's pleas to stop toxic pollution from mine', 20 May 2011, available at <http://www.thetimes.co.uk/to/environment/article3025941.ece> (accessed 25 February 2013).

³²⁸ CounterBalance, 'The Mopani copper mine, Zambia. How European development money has fed a mining scandal', December 2010, p. 19.

³²⁹ "[A]cid is injected into the deposit, the acid penetrates it and leaches out the metals. The mixture is stored in reservoirs and then pumped to the surface. The copper is then extracted by means of hydrolysis." In: Berne Declaration, 'Commodities. Switzerland's most dangerous business', 2012, p. 105, <http://www.evb.ch/en/p19492.html>

³³⁰ Ibid.

³³¹ Ibid.

³³² *Daily Mail* (London), 'Glencore faces legal action over pollution caused by Zambian copper operations', 15 January 2012, available at <http://www.minesandcommunities.org/article.php?a=11440>.

³³³ Ibid.

Right to the enjoyment of a safe, clean and healthy sustainable environment

What is the relationship between a safe, clean and healthy environment, and the enjoyment of human rights? *“As environmental awareness grows, there is greater understanding that the survival and development of humanity and the enjoyment of human rights are dependent on a healthy and safe environment. Accordingly, the need to protect and promote a healthy environment is indispensable not only for the sake of human rights, but also to protect the common heritage of mankind. By establishing the relationship between human rights and the environment, human rights and environmental instruments contribute significantly to ensuring the enjoyment of human rights and a healthy environment.”* Human Rights Council, 2011.³³⁴

Which international agreements refer to this relationship? *“The unsound management of hazardous substances and waste from extractive industries may cause significant environmental pollution, which in turn negatively impacts a range of human rights.”* Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu, 2012.³³⁵

“The Human Rights Council (...) [d]ecides to appoint, for a period of three years, an independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment.” Human Rights Council, 2012.³³⁶

The Human Rights Council has observed that sustainable development and the protection of the environment can contribute to human wellbeing and the enjoyment of human rights. Several human rights instruments concluded since the Stockholm Conference have included explicit references to the environment, or have recognised a right to a healthy environment.³³⁷

Right to safe drinking water and adequate sanitation

What is the relationship between drinking water and the extractive industry? *“No other resource is more affected by the extent and level of degradation of quality and quantity due to unsound management of hazardous substances and waste from extractive industries than water.”* Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu, 2012.³³⁸

An example of the consequences of the extraction process on (drinking) water. *“Toxic substances in fracking fluids and resulting mud can be released into the surface water during the extraction, transport, storage and waste disposal stages. The storage of wastewater and other waste products may result in further contamination of water supplies due to spills, leaks and/or floods.”* Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu, 2012.³³⁹

³³⁴ Human Rights Council, ‘Analytical study on the relationship between human rights and the environment’, December 2011, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-34_en.pdf (accessed 4 January 2013).

³³⁵ UN Human Rights Council, ‘Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu’, July 2012, p. 12, available at <http://www.wecf.eu/download/2012/UnitedNations.pdf> (accessed 04-01-2013)

³³⁶ Human Rights Council resolution 19/10, on Human Rights and the Environment, adopted on 22 March 2012. The independent expert was appointed in August 2012 and will submit his first report to the 22nd session of the Human Rights Council, in March 2013, see <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEEnvironmentIndex.aspx> (accessed 5 February 2013).

³³⁷ “The trend toward constitutional recognition of the right to a healthy environment began with the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration). Since then, the number of national Constitutions that incorporate environmental rights and responsibilities has increased significantly. In 1994, the Ksentini Report on human rights and environment (E/CN.4/Sub.2/1994/9 and Corr.1) found that over 60 countries had established constitutional provisions on environmental protection (para. 241). In 2010, the number of constitutions including explicit references to environmental rights and/or responsibilities had increased to 140, meaning that more than 70 per cent of the world’s national constitutions include such provisions.” Source: Human Rights Council, Analytical study on the relationship between human rights and the environment, December 2011.

³³⁸ UN Human Rights Council, ‘Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu’, July 2012, p. 11, available at <http://www.wecf.eu/download/2012/UnitedNations.pdf> (accessed 04-01-2013)

³³⁹ UN Human Rights Council, ‘Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu’, July 2012, p. 6, available at <http://www.wecf.eu/download/2012/UnitedNations.pdf> (accessed 04-01-2013)

Is the importance of safe and clean drinking water and sanitation internationally recognised? *“Acknowledging the importance of equitable access to safe and clean drinking water and sanitation as an integral component of the realization of all human rights.”* The United Nations General Assembly, 2010.³⁴⁰

Who should take responsibility? *“The Human Rights Council (...) [r]ecognizes that States, in accordance with their laws, regulations and public policies, may opt to involve non-State actors in the provision of safe drinking water and sanitation services.”* Human Rights Council, 2010.³⁴¹

4.7 Conclusion

This chapter has shown that the lack of binding human rights regulations is not without consequences. As stated in Chapter 1, *“there are few, if any, internationally recognized rights business cannot impact – or be perceived to impact – in some manner”*.³⁴² Multinational companies operate in countries that do live up to their international human rights obligations, and are not always not willing or able to provide sufficient oversight. Current company commitments, where they exist, are by and large non-enforceable, based on voluntary commitment. CNPC develops a gas pipeline in Burma, a country known for its human rights violations. Freeport operates in a remote region characterised by conflict in Indonesia in which close relationships with military, police and other security forces raise suspicions. The cases in this chapter also highlight that extractive operations can be extremely environmentally polluting, leading to the infringing of the right to a safe, clean and healthy, sustainable environment. Pluspetrol’s operations in Peru illustrate how the livelihoods of local communities are affected by a company’s mining operations.

It is clear that serious human rights issues often arise in mining operations. The Dutch government therefore takes enormous human rights risks by actively attracting global corporations to enjoy fiscal benefits through incorporating in its jurisdictions without instituting some form of regulation of those company’s negative impacts on human rights abroad. As a home state that offers direct parents and holding companies of subsidiaries associated with these human rights controversies investment protection and fiscal benefits, the Netherlands has a responsibility to address these violations by trying to prevent this structural problem and provide access to justice for its victims. In the words of Human Rights Watch: *“It would at least end an indefensible status quo where governments refuse to find out whether their corporate citizens are credibly implicated in serious human rights abuses abroad.”*³⁴³

³⁴⁰ UN GA resolution 64/292, ‘The human right to water and sanitation’, 28 July 2010, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292

³⁴¹ UN Human Rights Council Resolution A/HRC/15/L.15, 24 September 2010.

³⁴² Ibid.

³⁴³ See Human Rights Watch, ‘Without Rules A Failed Approach to Corporate Accountability’ in World Report 2013, available at <http://www.hrw.org/world-report/2013/essays/112459?page=3>.

5 The Dutch government: measures to address corporate human rights

5.1 Introduction

This chapter looks at current Dutch policies and legislation aimed at ensuring MNCs operate abroad in a socially and environmentally responsible manner, and do not negatively impact on human rights. It focuses on how the accountability gap exposed in this report is created and could be closed at the Dutch national level. The chapter describes the current state of affairs regarding Dutch policies and legislation and points out weaknesses in the current system, providing specific examples of the failure of the Dutch state to provide victims of business-related human rights abuses with access to justice.

Chapter 4 showed that extractive industry companies with a negative impact on human rights are incorporated in the Netherlands – often with large amounts of assets. This increases the urgency for the government of the Netherlands to proactively introduce (legal) measures to prevent the negative footprint of these companies abroad, and provide remedy to victims of corporate-related abuses. The use of the Netherlands as a conduit country for tax avoidance and investment protection negatively impacts on other countries' ability to raise resources, and could potentially affect their policy space to respect, protect and fulfil human rights.

These shortcomings highlight both the responsibility and opportunity the Dutch government has to proactively introduce measures to prevent human rights abuses and provide remedy to the victims. The chapter argues that the Dutch state needs to address this accountability gap by interpreting the state duty to protect in a progressive manner, and not eschew extraterritorial measures related to mailbox companies. This includes not eschewing extraterritorial measures regarding the regulation of businesses activities abroad to ensure incorporated businesses respect human rights and do not use the Netherlands to avoid taxes in poor countries.

This chapter will discuss some relevant policy areas regarding businesses regulation and suggests preventive and remedial measures that should be taken in order to close the existing accountability gap. The chapter is structured accordingly:

5.2 Preventive measures

- 5.2.1 Compliance with OECD Guidelines for Multinational Enterprises
- 5.2.2 Non-financial social and environmental reporting
- 5.2.3 Disclosing ownership and control, country-by-country (CBCR) and financial reporting
- 5.2.4 Free and public access to relevant information
- 5.2.5 Policy coherence and international cooperation

5.3 Remedial measures

- 5.3.1 Civil law – Foreign Direct Liability
- 5.3.2 Criminal liability
- 5.3.4 Non-judicial: the OECD Guidelines and the Dutch National Contact Point

5.2 Preventive measures

5.2.1 Compliance with OECD Guidelines for Multinational Enterprises

The Dutch government considers the OECD Guidelines for Multinational Enterprises (2011) as the primary international reference framework for what civil society can expect of companies operating abroad.³⁴⁴ The United Nations Guiding Principles (UNGPs) were integrated into the OECD Guidelines in 2011, which means that the corporate responsibility to respect human rights and the performance of human rights due diligence have become integral parts of the OECD Guidelines. Due diligence requirements are well suited to also describe tax due diligence processes.³⁴⁵ Chapter XI of the Guidelines deals with taxation. It states that: *“It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate.”*³⁴⁶

The Dutch government expects all Dutch companies operating abroad to comply with the OECD Guidelines, including due diligence requirements. To realise this it has so far adopted a supporting and facilitating approach. To this end, it raises awareness among companies, their shareholders and stakeholders about the particular relevance of the Guidelines for them.³⁴⁷ The National Contact Point (NCP) for the OECD Guidelines performs a key role in the execution of these activities.³⁴⁸ The NCP is a body that each country adhering to the OECD guidelines must set up, tasked with raising awareness of the OECD Guidelines with businesses, trade unions and non-governmental organisations, and implementing the OECD Guidelines’ complaint mechanism.³⁴⁹ However, the Dutch NCP does not undertake proactive, independent monitoring or investigations of Dutch domiciled companies abroad. Furthermore, embassies and trade missions also play a role in raising awareness of the OECD Guidelines with Dutch companies operating abroad.

Active oversight to ensure compliance or measure implementation are largely absent, and as such the Dutch state has no insight into the extent to which MNCs incorporated in the Netherlands are implicated in serious human rights abuses abroad, or respect the OECD Guidelines³⁵⁰ in their foreign operations. In practice, companies can publicly embrace the Guidelines while doing hardly anything to put them into practice.

³⁴⁴ Contribution by the Government of the Netherlands to the renewed EU-strategy for CSR, Annex to Parliamentary Document 22112 nr. 1437, p. 1, available at <https://zoek.officielebekendmakingen.nl/blg-177248.pdf>

³⁴⁵ http://ibis.dk/sites/default/files/PDF%20global/Analysis%20pdf/a_brief_on_tax_and_corporate_responsibility_-_ibis_analyse_2012.pdf

³⁴⁶ <http://www.oecdguidelines.nl/guidelines/taxation/> The official OECD commentary states that: *“Transactions should not be structured in a way that will have tax results that are inconsistent with the underlying economic consequences of the transaction unless there exists specific legislation designed to give that result. In this case, the enterprise should reasonably believe that the transaction is structured in a way that gives a tax result for the enterprise which is not contrary to the intentions of the legislature.”*³⁴⁶

³⁴⁷ Contribution by the Government of the Netherlands to the renewed EU-strategy for CSR, Annex to Parliamentary Document 22112 nr. 1437, p. 2.

³⁴⁸ The Dutch NCP operates at “arm’s length” from the government. It comprises four independent experts, selected on the basis of their standing and experience in the area of corporate responsibility, and four government advisors (from the Ministries of Economic Affairs, Foreign Affairs, Social Affairs and Housing, Spatial Planning and Environment). The NCP is hosted by the Ministry of Economic Affairs.

³⁴⁹ For more detailed information, see the OECD Watch website: <http://oecdwatch.org/about-oecd/ncp>.

³⁵⁰ Germans have no sense of humour. If you agree, send an e-mail to katrin@somo.nl and tell her a good joke.

No companies are required to set up (on-going) human rights due diligence processes, which could include:³⁵¹

- ❑ An express policy commitment to respect human rights and the chapter on taxation, which should be integrated into the corporation's decision making, management and operational systems, as well as business relationships.
- ❑ Assessing actual or potential human rights impacts, of which the findings must result in the development of clear action plans outlining effective measures to prevent, minimise and address negative human rights impacts.
- ❑ Monitoring the effective implementation of the policy commitment and corresponding action plans throughout the business, as well as allowing this to be independently verified.
- ❑ Meaningful and transparent engagement with stakeholders, particularly rights-holders, who may be impacted. Such engagement must be consistent with the human rights of rights-holders, such as the rights of indigenous peoples to free, prior and informed consent. It should occur both in the assessment of potential human rights impacts, as well as the design of means by which such impacts can be avoided, minimized and addressed.

Taxation and regulation of businesses receiving state support

When companies apply for a form of state support, adherence to the OECD Guidelines is a pre-requisite and the government takes a somewhat more pro-active stance.³⁵² However, tax and investment benefits are not defined as a form of state support. A comprehensive and coherent framework that is clear on what minimum conditions must be met before being eligible for funding/support, what progress must be made when support is granted and what monitoring and verification is taking place has not been implemented. In addition, it is not stipulated how the execution of projects receiving state support in so-called high risk scenarios or regarding taxation is monitored, or whether sanctions are applied if companies do not fulfil the additional conditions or mitigating measures.

5.2.2 Non-financial social and environmental reporting

The disclosure of information on the factual or potential impact of business activities on human rights is one of the critical means of ensuring that affected communities can effectively participate in the decision making process prior to and during project development, and that extractive industries can be effectively monitored and held to account. The European Coalition for Corporate Justice (ECCJ) states that: *"If the right information is not collected, analysed and duly disclosed, it is difficult for affected people, the general public, consumers, investors, or even the very management of these companies, to understand the scope and impact of their corporate operations on society. Disclosure of the right information is therefore vital to ensure responsible behaviour by companies, as well as to ensure affected people and communities are able to assert their rights."*³⁵³ Civil society organisations campaigning for the rights of affected communities should of course have the same rights to information. Transparency and access to information are critical in this respect.

³⁵¹ Amnesty International, Comments in response to the UN Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Guiding Principles – Proposed Outline (October 2010)

³⁵² Contribution by the Government of the Netherlands to the renewed EU-strategy for CSR, Annex to Parliamentary Document 22112 nr. 1437, p.1. This involves state support from the development aid budget (Official Development Aid, ODA) for private sector development in developing countries (e.g. subsidies/loans). Applicants need to sign a declaration that they will adhere to the OECD Guidelines, including the recommendations on due diligence. Adherence to OECD Guidelines is also a requirement for other forms of (non-ODA) state support, such as export credit insurances or economic diplomacy during trade missions See letter to parliament by Minister for Agriculture and Foreign Trade, 29 March 2012, Doc. No. DGIB-IMH / 12043564; letter to parliament by Minister for European Affairs and International Cooperation, 4 November 2011, Doc. No. TK, 2011–2012, 32605, nr. 56.

³⁵³ ECCJ's position paper on non-financial reporting by companies Wednesday 30 May 2012, by European Coalition for Corporate Justice, <http://www.corporatejustice.org/Greater-corporate-transparency-at.html?lang=en>.

The absence of non-financial information is a major factor constraining corporate accountability. The Dutch government approach to CSR is that, among others, consumers and citizens can make informed choices about products and corporations based on their corporate conduct. However, it is clear that transparency rules in the Netherlands are not written with the idea in mind that stakeholders (government, citizens, consumers, NGOs, trade unions, etc.) other than shareholders and creditors are interested in transparency about the structure and activities of MNCs. Requirements for non-financial reporting are weak and barely relevant from an environmental and human rights perspective. The Dutch government has implemented the EU requirements on non-financial reporting, which require legal persons to include information in the annual report on non-financial key performance indicators which explicitly mentions employee and environmental affairs, to the extent necessary for an understanding of the company's development, performance or position (Article 2:391, paragraph 1 of Book 2 of the Dutch Civil Code).³⁵⁴ No explicit references are made to important non-financial reporting indicators such as the structure of a group of companies to which the reporting company belongs; the actual and potential impacts of company's business; or non-financial internal controls and risk and impact management systems. In addition, small and medium-sized companies are exempt from this obligation (Article 396 and 297 of Book 2 of the Dutch Civil Code).³⁵⁵ Besides it can be evaded by structuring entities in such a way that they classify as small and medium-sized enterprises (SMEs) under Dutch law.

There are additional reporting requirements for Dutch-listed companies who are also legally obliged to make a statement in their annual report on compliance with Dutch corporate governance based on the principle of 'comply or explain' (whereby companies report on their social and environmental performances, or, if they do not, then explain why). The Dutch corporate governance code establishes that the management board and supervisory board of listed companies must take into account CSR issues that are relevant to the enterprise while fulfilling their roles.³⁵⁶ Note that this reporting requirement covers non-financial risks to the company, not the risks to society.

Disclosure of non-financial information by companies in this research

Of the eight companies included in this research, only two (Pluspetrol and Trafigura) report on non-financial indicators in their Dutch annual accounts filed with the Dutch Chamber of Commerce. In the other seven annual reports, no non-financial indicators were found. Pluspetrol and Trafigura, even though they are both legally headquartered in the Netherlands, do not mention human rights or the OECD Guidelines in their reporting. Pluspetrol highlights issues such as the environment and community support. With community support the company refers mainly to 'Social Action Plans' which include strengthening self-management, participatory processes and mutual learning. Trafigura indicates that its business strategy is about growth and expansion in a responsible and sustainable manner. The company states that it supports the community in education, social inclusion, health, environment and other issues. Both companies emphasise that it is their responsibility to ensure that their activities contribute positively to the livelihoods of those communities which are impacted by their operations. It is noteworthy that the non-financial reporting of both companies remains general, lacking details and therefore not supported by specific dates, figures, or progress and impact assessments.

³⁵⁴ Where necessary for a good understanding of such development, of the results or of the situation of the legal person and group companies, the analysis comprises both financial and non-financial performance indicators, including environmental and employee matters.

³⁵⁵ Contribution by the government of the Netherlands to the renewed EU-strategy for CSR, Annex to Parliamentary Document 22112 nr. 1437.

³⁵⁶ The management board shall submit CSR issues that are relevant for the enterprise to the supervisory board for approval. The main elements shall be mentioned in the report. A Monitoring Commission assigned by the government monitors and publishes an annual report on the extent of compliance by Dutch companies and financial institutions with the Dutch Corporate Governance Code. The monitoring is focused on governance board composition, not on the human rights performance of the company.

5.2.3 *Disclosing ownership and control, country-by-country (CBCR) and financial reporting*

Secrecy of ownership and control facilitates tax avoidance. Transparency and disclosure of beneficial ownership can help stakeholders to understand aggressive tax planning and avoidance schemes.³⁵⁷ In addition, to hold corporations accountable, responsible legal entities in the corporate group as well as responsible individuals within these companies need to be identified. Transparency of corporate activities such as ownership structures and financial reporting is therefore necessary to establish responsibilities and material interest within a corporate group, enabling the prevention of tax avoidance and human rights violations through more effective access to justice for concerned stakeholders.

Ownership and control

In the Netherlands, there is currently no obligation to publicly disclose information on corporate group structures and lines of control, or managerial responsibilities within the corporate structure. As the Dutch conduit structures researched for this report show, beneficial ownership relations are obscured, among others, by incorporating in the Netherlands. In some cases, direct ownership structure above some Dutch subsidiaries is unclear (Barrick Gold, Glencore, ONGC, Pluspetrol), while in others, some Dutch subsidiaries are directly owned by a subsidiary located in a tax haven (Freeport, Oilinvest, ONGC, Pluspetrol, Trafigura). In all cases, a secrecy jurisdiction is found in the top ownership structures, ultimately obscuring ownership and financial transactions.

Furthermore, beneficial owners of legal entities have to be disclosed to the Dutch Company Register (*Kamer van Koophandel*) only when they own 100% of the legal entity. This has been criticised not only by the Dutch civil society network Tax Justice Netherlands but also by the IMF, which has found that the Netherlands falls short of international standards regarding the verification of the identity of beneficial owners.³⁵⁸ As a recent study on transparency instruments to control corporate impact has shown, there are many examples of European national laws that go further in disclosing beneficial ownership, showing that the Netherlands is lagging behind in its transparency legislation.³⁵⁹ Under the UK Companies Act 2006, for instance, parent companies have to prepare group accounts in which all the subsidiary undertakings (more than 50% ownership) of the company are included in the consolidation, subject to some limited exceptions.³⁶⁰

CBCR and financial reporting in the Netherlands

Financial transparency and accountability are essential to tackle poor governance, corruption and tax avoidance and evasion in the extractive sector. Mandatory reporting regimes such as country-by-country reporting³⁶¹ are crucial tools to achieve corporate accountability. In September 2012, the

³⁵⁷ Eurodad, Secret structures, hidden crimes, online summary 2013, http://eurodad.org/wp-content/uploads/2013/01/Secret-structures-hidden-crimes_summary-online.pdf

³⁵⁸ IMF Country Report No. 11/92, Kingdom of the Netherlands – Netherlands: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism, April 2011, p. 8, available at <http://www.imf.org/external/pubs/ft/scri/2011/cr1192.pdf>. The Dutch anti-money laundering and financing of terrorism law (WWFT) obliges institutions to apply Dutch standards on customer due diligence (CDD) to branches and subsidiaries in foreign countries, but the requirements do not extend beyond CDD to other AML/CFT measures and do not apply to branches and subsidiaries in EU Member States (ibid, p. 11). Furthermore, the IMF criticizes that exemption from any form of CDD for a pre-defined list of certain institutions, saying it “raises a number of fundamental concerns about the CDD process”. Although the FATF standard does allow for reduced or simplified due diligence, “this assumes some level of CDD in all circumstances. The WWFT provides for a blanket exemption from all CDD measures in Article 3 WWFT. In the circumstances provided under the WWFT, it is apparent that, in the defined set of “low-risk” circumstances, institutions are specifically exempted from the vast majority of the key elements of the CDD process.” (Ibid, p. 145).

³⁵⁹ Molengraaff Instituut voor Privaatrecht Multinationaal en Transparantie (Utrecht: Universiteit Utrecht, 2012, unpublished) p. 38.

³⁶⁰ UK Companies Act 2006, available at <http://www.legislation.gov.uk/ukpga/2006/46/contents> (accessed 9 January 2013).

³⁶¹ For more details, see the relevant Eurodad analyses from October 2012, available at <http://eurodad.org/1543845/> and December 2012, available at <http://eurodad.org/1544238/> (accessed 3 January 2013).

European Parliament committee on legal affairs (JURI) approved a package of proposals imposing a new obligation on large companies extracting oil, gas and minerals, and loggers of primary forests, to provide full details on their payments to national governments. On 25 October 2011 the European Commission published proposals for revising the Accounting Directives and the Transparency Directive to that purpose, and these are currently under negotiation with the European Council. CBCR requires every multinational company to account for the countries (and areas therein) in which it has establishments, what the publicly known and legal name is in each place it operates, and to report what its financial performance and tax payments are in that place. As well as uncovering whether companies pay a fair share of tax and/or make payments to corrupt regimes, CBCR would provide information to a wide range of stakeholder groups by revealing, for example, which corporations operate in politically unstable regimes, tax havens, war zones, and other sensitive or high-risk areas. The final implementation of the CBCR regulation in the EU – and therefore its consequences for the Dutch accounting standards and financial reporting rules for mailbox companies located in the Netherlands – remains to be seen.

Under current rules, the provisions governing financial statements in the Netherlands are laid down in Book 2, Title 9 of the Dutch Civil Code. As a rule, the larger the company, the more information it is required to publish. However, there is an exemption to this rule, which poses a significant barrier to accessing financial information, especially in the case of mailbox companies. This is a so-called group exemption regarding the publication of financial accounts at the Chamber of Commerce, whereby subsidiaries of a multinational corporation are exempted from the obligation to publish (unconsolidated) annual accounts if the parent publishes consolidated accounts and has filed liability statements for the subsidiaries (Dutch Civil Code Book 2, Art. 403).³⁶² This exception therefore allows multinational companies to hide from view the accounts of Dutch subsidiaries.

5.2.4 Free and public access to relevant information

The cost of obtaining important information on a corporate group's structure and its beneficial owners is high. Some documents and information, such as address and type of business, is free of charge for most entities. Other information, however, such as shareholder information, group structures or annual accounts of Dutch subsidiaries are subject to a fee ranging from € 0.50 to € 2.90 per copy per entity. Although this appears a small charge for most stakeholders, mapping a large group structure requires access to many annual accounts and other documents over a period of several years. For example, to map the Dutch corporate structure of Glencore and access data on Glencore's intra-group payments over a period of five years, one has to download annual accounts, available information on the corporate group structure and details on the legal entities' management and board (typically trust offices). For such research, costs incurred can amount to over € 1 000. These costs pose a significant barrier for non-commercial stakeholders to gain access to information.

³⁶² Dutch Civil Code, Book 2, Art. 403, available at <http://www.dutchcivillaw.com/legislation/dcctitle2299aa.htm>. Art. 403 disclosure requirements on the amount of detail of financial information depends on the size of the company. The exception in Article 403 lays down that a company does not need to publish its accounts if: the financial figures of the legal entity are consolidated into the accounts of another legal entity (the ultimate parent or some intermediate holding) to which the EU requirements regarding financial reporting apply (that is, the consolidating company is located in the EU); those consolidated accounts are published in or translated into Dutch, English, French or German; the consolidating entity has declared full liability for any debts of the Dutch legal entity; the declaration of liability and the accounts of the consolidating entity or a reference to those accounts have been deposited with the chamber of commerce where the Dutch legal entity is registered.

Table 4: Research cost related to Glencore's group structure and financing in the Netherlands

What	No. of years	No. of subsidiaries	Cost per item	Total cost
Annual financial accounts	5	38	€ 2.90	€ 551
Corporate group structure (includes some, albeit limited, beneficial ownership and shareholder information)	5	38	€ 2.50	€ 475
Chamber of Commerce registration data (board of directors, address, etc.)	1	38	€ 2.50	€ 95
Cost				€ 1 121

5.2.5 Tax avoidance, policy coherence and international cooperation

Chapters 2 and 3 showed how the use of the Netherlands as a conduit country for tax avoidance and investment protection negatively impacts on other countries' ability to raise resources, and affects their policy space to protect human rights. This raises a number of policy coherence issues, outlined below.

Policy coherence is used in the field of development as well as human rights. With regard to the latter, in the context of international economic relations, the link between trade and investment treaties and human rights focuses on these international agreements potentially hampering the policy space of signatory states to ensure the human rights of their citizens are protected, respected and fulfilled.³⁶³

The relationship between domestic and international fiscal policies, such as those defining the Dutch conduit structure, can – as Chapter 3 outlines – be linked to human rights and the “mobilisation” of maximum resources³⁶⁴ to realise them.

Whilst the Dutch government has no explicit policy expectation or impact assessments with regard to policy coherence in the human rights field, it does recognise the growing importance of policy coherence for development (PCD). In a letter to parliament from April 2012, the Ministry of Foreign Affairs announced that it aimed to strengthen tax systems in developing countries and promote transparency of financial flows in and out of developing countries.³⁶⁵ The aim to strengthen developing country tax administrations was reiterated in late 2012, when the Dutch Minister for Development announced the government would actively contribute to the OECD Task Force Tax Inspectors Without Borders and together with the Ministry of Finance assess the impact of Dutch tax treaties with Least Developed Countries on their tax revenues.³⁶⁶

Next to the human rights conventions signed by the Netherlands, recent measures that provide opportunities in the area of policy coherence are the newly adopted UN Guiding Principles on

³⁶³ See A/HRC/19/59/Add.5 Report of the Special Rapporteur on the right to food, O. De Schutter Addendum Guiding Principles on human rights impact assessments of trade and investment agreements, 2012, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf>

³⁶⁴ Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The Maastricht Guidelines on violations of economic, social and cultural rights clarifies that a state is in violation of the Covenant if it fails to allocate the maximum of its available resources to realizing human rights. For an analysis of what the concept of maximum available resources means and how states can apply it in practice, see Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Lusiani (2011) ‘Maximum Available Resources & Human Rights: Analytical Report’, http://www.cwgl.rutgers.edu/component/docman/doc_view/362-maximumavailableresourcespdf

³⁶⁵ European Commission (2011) *EU 2011 Report on Policy Coherence for Development*, Commission Staff Working Paper No. SEC(2011) 1627 final p. 41, available at http://ec.europa.eu/europeaid/what/development-policies/documents/eu_2011_report_on_pcd_en.doc.pdf (accessed 04-01-2013)

³⁶⁶ <http://www.rijksoverheid.nl/nieuws/2012/12/17/ploumen-gaat-ontwikkelingslanden-helpen-bij-belasting-innen.html>

Business and Human Rights and the 2011 OECD Guidelines. Recently, the UN Guiding Principles on Extreme Poverty and Human Rights also laid down that “*States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance [emphases added], environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfilment of human rights.*”³⁶⁷ The Dutch government has so far favoured international approaches above any form of unilateral action to combating tax avoidance and evasion.

In conclusion, it can be said that investment and fiscal policies have great potential to negatively impact on human rights and as such they are potentially in violation of policy coherence principles. With view to Dutch fiscal policies outlined in Chapter 3 playing a central role in attracting vast amounts of FDI to flow through – and thousands of companies to incorporate in – its jurisdiction, the Dutch state thus has a responsibility to review its fiscal and investment policies with regard to their impact on development and human rights. Starting to assess the impact of Dutch taxation treaties on Least Developed Countries is a step in the right direction, but far from sufficient.

5.3 Remedial measures: access to justice in the Netherlands

One barrier to achieving accountability is lack of liability and access to justice for victims. International human rights and environmental law therefore impose duties on states to put into place effective criminal, judicial and non-judicial civil remedy mechanisms. When human rights or environmental abuses take place in a host state, and a company incorporated or domiciled in the Netherlands is involved, Dutch policies and legislation in principle provide for non-judicial and judicial measures. Private actors, including both individuals and corporate entities, may incur criminal liability as well as civil liability in the Netherlands for their involvement in international human rights violations perpetrated abroad.³⁶⁸

This report does not claim to determine whether the mailbox companies reviewed here are legally liable for extraterritorial impacts of their subsidiaries. In addition, tax avoidance and illicit financial flows seldom create a direct individual “victim”. Instead, it is often the public good that loses out against the private gains and interests. A recent report exploring tax as a corporate social responsibility issue states in this regard: “*Where corporations identify that they have caused or contributed to adverse impacts on international tax norms, they should nevertheless provide for or cooperate in their remediation through legitimate processes. This expectation would, as a minimum, include informing country authorities on identified adverse impacts.*”³⁶⁹

Whilst not claiming to establish legal liability in the researched company cases, this report does suggest that for the current accountability gap to be adequately addressed, liability and/or the related responsibility of the state’s duty to protect human rights abroad (including the right to development) and ensure access to justice *should* exist in the following cases:

³⁶⁷ UN Council on Human Rights, Guidelines on Extreme Poverty and Human Rights, 2012
<http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>

³⁶⁸ N.M.C.P Jägers, M.J.C. van der Heijden, “Corporate human rights violations: The feasibility of civil recourse in The Netherlands,” *Brooklyn Journal of International Law*, (2008, 33(3), 833-870).

³⁶⁹ IBIS and Global CSR, A brief on tax and corporate responsibility, 2012, The brief has been prepared by GLOBAL CSR for IBIS as an input for the discussion at the conference Tax and Corporate Responsibility – An Emerging Agenda in Copenhagen, June 21st, 2012
http://ibis.dk/sites/default/files/PDF%20global/Analysis%20pdf/a_brief_on_tax_and_corporate_responsibility_-_ibis_analyse_2012.pdf

- ❑ The mailbox company is a registered head office and thereby a parent of the group (Pluspetrol and until 2012, Trafigura).
- ❑ The mailbox company directly owns the subsidiary connected to human rights violations (Pluspetrol, Trafigura) or the subsidiary in question is a branch office of the Dutch mailbox company (ONGC).
- ❑ The mailbox company directly finances or has financed the subsidiary connected to human rights violations (Barrick Gold, Freeport).
- ❑ The mailbox company plays an important financing role for the whole group, and where strong indications exist that the Dutch holding is used for large-scale tax planning resulting in revenue losses in poor states (Glencore).
- ❑ Dutch transparency laws are insufficient to establish whether the mailbox company is involved in potential human rights violations (Oilinvest, CNPC).

Principles of this liability and state responsibility to ensure access to justice for victims can be found in hard law (such as liability of parent companies for their subsidiaries' breach of laws and the home states' duty to protect human rights abroad) and in soft law (with regard to financing, for example, the Equator principles,³⁷⁰ or with regard to extraterritorial responsibility, the UN Business and Human Rights framework and related OECD Guidelines). Increasingly, tax avoidance and evasion, harmful tax regimes and financial secrecy are also being tackled in international frameworks related to corruption or development, for instance. It is argued here that the Dutch state should interpret these existing instruments progressively with regard to mailbox companies' extraterritorial liabilities and its own state duty to protect human rights abroad.

5.3.1 Civil law: foreign direct liability

Within EU Member States, the jurisdiction of civil courts over foreign direct liability cases is largely determined by the EU's Brussels I regime, which lays down a mandatory regime of rules on the issue of jurisdiction in trans-boundary civil and commercial matters. It establishes the jurisdiction of EU Member States' courts over foreign direct liability claims that are brought before them against those parent companies (or other arms) of MNCs that have their statutory seat, central administration or principal place of business in the forum country.³⁷¹ There are circumstances under which the jurisdiction of EU Member State courts in these cases may be determined by other rules, but a discussion on this matter is outside the scope of this report.³⁷²

There are a number of exceptions to the Rome II Regulation which may lead to the situation where a foreign direct liability case will be decided on the basis of Dutch tort law.³⁷³ If this is the case, most likely the legal basis will be the Dutch Civil Code's general provision on tort/delict (*onrechtmatige daad*), which states that anyone "[...] who commits a tort against another which is attributable to him,

³⁷⁰ The Equator Principles is a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions, see <http://www.equator-principles.com>.

³⁷¹ L. Enneking, *Foreign direct liability and beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Den Haag: Eleven International Publishing, 2012), pp. 145-146.

³⁷² For more detail, see L. Enneking, *Foreign direct liability and beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Den Haag: Eleven International Publishing, 2012). As the Brussels I regime is binding and directly applicable in the Netherlands, the Dutch civil law system allows access to the courts for foreign plaintiffs to claim damages or seek other forms of relief when a Dutch parent company allegedly violates human rights and/or environment standards in the host state. As a general rule (Rome II Regulation), the applicable law in foreign direct liability cases brought before Dutch courts will not be Dutch law but the law of the host country, where the damage has occurred, also when the case is constructed in such a way that the damage resulted from actions or omissions by the defendant parent company based in the Netherlands.

³⁷³ For a legal analysis of the exemptions under Rome II, see L. Enneking, *Foreign direct liability and beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Den Haag: Eleven International Publishing, 2012) pp. 214-224.

must repair the damage suffered by the other in consequence thereof.³⁷⁴ The wrongful conduct may consist of the violation of a right and/or an act or omission breaching a duty imposed by law, or a rule of unwritten law pertaining to proper social conduct.

So far, no foreign direct liability cases have taken place in the Netherlands on the basis of Dutch tort law. The very first Dutch foreign direct liability cases are the recent lawsuits filed by four Nigerian farmers and fishermen and Friends of the Earth Netherlands against Shell due to oil spills and related damage in three Nigerian villages. The applicable tort law is Nigerian law. On 30 January 2013, the court found in favour of one plaintiff, stating that Shell Nigeria had breached its duty of care in that case by failing to take reasonable action to prevent third parties tampering with oil wells and causing oil spills. Shell will now have to pay compensation to the affected farmer. The court dismissed the claims of the other three farmers, who will appeal against the decision.³⁷⁵ The Shell cases expose the major obstacles facing foreign victims of corporate-related human rights violations who try to access remedy in the Netherlands.

Two main (practical and procedural) obstacles host country plaintiffs face when they bring foreign direct liability claims before Dutch courts are related to the costs involved and the possibilities for acquiring the necessary evidence. In foreign direct liability claims these factors are especially important because of the inequality that typically exists in these cases between the host country plaintiffs and their corporate opponents when it comes to financial scope, organisation and the necessary knowledge and information. Due to their complexity and transnational nature, the costs of pursuing foreign direct liability claims before Dutch courts are likely to be particularly substantial and in many cases prohibitive; lawyers' fees are not based on any outcome-related fee system such as 'no win, no fee', essential evidence is largely located in the host country and the losing party will usually be ordered to bear the (legal) costs of the winning party.³⁷⁶ In this context, NGOs and a number of Members of Parliament have proposed to increase the availability of legal aid for foreign plaintiffs. In a resolution, the Dutch parliament requested that the government research the possibilities for raising such a fund. The then Dutch government rejected the idea by stating that legal aid was already available and used in the context of such cases. However, the aid fails (by far) to meet the costs incurred during such long-term international procedures, including lawyers' fees, translation costs and thorough international research to substantiate the claims of the plaintiffs.

A second obstacle relates to the limited rules of disclosure in the Netherlands, which make it difficult for plaintiffs to gather the evidence necessary to substantiate their claims.³⁷⁷ In Dutch civil procedural law it is a main principle that no party is obliged to hand over information it has in its possession. To get access to information owned by another party, one has to start a separate legal procedure (exhibition-request). In the context of the Shell case, the court rejected the request by the plaintiffs to order Shell to provide exhibits of key evidentiary documents related to the condition of the oil pipelines involved and the Shell group's internal policies and operational practices. The court denied their request with respect to most of the documents, on the grounds that the plaintiffs lacked a legitimate interest in requesting exhibition as their claims were insufficiently substantiated, both in relation to the liability of the parent company for the damage, and equipment failures being the cause of the damage rather than sabotage, as claimed by Shell.³⁷⁸ However, the plaintiffs claimed they needed the requested documents to sufficiently substantiate the claims.

³⁷⁴ Article 6:162 (1) Dutch Civil Code, translated by Thoma & Warendorf, 2008.

³⁷⁵ These cases have been legally presented in the district court in The Hague, where Shell's international headquarters is also located. Friends of the Earth Netherlands, Factsheet, October 2012, available at <http://www.milieudefensie.nl/publicaties/factsheets/factsheet-de-rechtszaak-stap-voor-stap> (accessed 10 January 2013).

³⁷⁶ L. Enneking, *Foreign direct liability and beyond – Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Den Haag: Eleven International Publishing, 2012), p. 256, 257.

³⁷⁷ Molengraaff Instituut voor Privaatrecht Multinationaal en Transparantie (Utrecht: Universiteit Utrecht, 2012, unpublished)

³⁷⁸ L. Enneking, *op. cit.*, p. 261.

In this context it has been noted that the *“Dutch system on evidence-gathering in civil procedures may in practice pose significant restrictions to the feasibility of foreign direct liability cases being brought before Dutch courts, considering in particular the structural lack of transparency that characterizes these cases and automatically puts the plaintiffs at a crucial disadvantage vis-à-vis their corporate opponents.”*³⁷⁹ Dutch law differs in this respect from Anglo-American law, where it is obligatory upon commencement of civil proceedings to disclose a list of relevant documents that parties have in their possession. In November 2011, an amendment to the Dutch law on disclosure was introduced which is still under discussion in the parliament. Despite recommendations to introduce in Dutch civil procedural law a mandatory disclosure of documents, as is the case in the UK, the current law proposal, so far, does not include a broadening of the disclosure rules worth mentioning.³⁸⁰

5.3.2 Criminal liability

Tort law pertains to the horizontal legal relationships between private actors among themselves. Criminal law, on the other hand, pertains to the vertical legal relationships between private actors and the government as the organ representing society’s general interest. Criminal liability claims against MNCs for human rights violations in host countries cannot be initiated by host-country victims suffering harm, but are initiated by the Dutch public prosecutor. The field of criminal law deals only with violations of a limited number of well-defined statutory norms, whereas the field of tort law deals with the harmful consequences of violations of a wide variety of written and unwritten, domestic and international legal norms.³⁸¹

In Dutch criminal law, no distinction is made between the criminal liability of natural and legal persons.³⁸² The Dutch Penal Code includes a general provision on the liability of legal persons. Prosecution can be initiated against a legal person itself, against those who gave the orders or actually managed the prohibited act, or against both.³⁸³ Law enforcement officials recently indicated that they could prosecute the Dutch parent company if it could be proved that it knew about the illegal acts of the subsidiary, or if the act was carried out “in the spirit of the legal entity”.³⁸⁴ So far, this has not been supported by case law.

The Dutch Penal Code recognises what is called the “double criminality rule”, meaning that a Dutch national (including a legal person) can be prosecuted for any act committed abroad, provided the act is an offence both under the Dutch Penal Code and in the country where that act takes place.

The International Crimes Act (ICA) of 2003 incorporated in the Dutch legal order the substantive crimes contained in the Rome Statute (genocide, crimes against humanity and war crimes), as well as torture. In general, the most substantial bases for claiming criminal jurisdiction are the territoriality principle (prosecution of crimes committed on Dutch territory) and active personality or nationality principle (prosecution on the basis of the nationality of the perpetrator, no matter where the offence has taken place). In addition, with respect to international crimes, the Netherlands applies a form of universal jurisdiction.

³⁷⁹ Ibid.

³⁸⁰ Molengraaff Instituut voor Privaatrecht Multinational en Transparantie (Utrecht: Universiteit Utrecht, 2012, unpublished) p. 77.

³⁸¹ L. Enneking, op. cit., pp. 250, 251.

³⁸² N.M.C.P. Jägers, M.J.C. van der Heijden, “Corporate human rights violations: The feasibility of civil recourse in The Netherlands,” *Brooklyn Journal of International Law*, (2008, 33(3), 833-870).

³⁸³ The criminal liability of legal persons is set out under article 51 of the Dutch Criminal Code.

³⁸⁴ OECD, Report on implementing the OECD Anti-Bribery Convention in the Netherlands, December 2012, available at <http://www.oecd.org/daf/bribery/internationalbusiness/NetherlandsPhase3ReportEn.pdf> (accessed 12 January 2013), p.2.

No access to justice: prosecution against Trafigura in the Netherlands³⁸⁵

In most human rights controversies discussed in this report, victims were unable to bring the companies to court and claim compensation and justice due to opaque liability and ownership structures, and lack of access to effective remedy, judicial and non-judicial. Even though Trafigura was brought before the courts and forced to pay compensation, thousands of people whose health was affected could still not access the government compensation scheme as at February 2013. Furthermore, Trafigura has filed or threatened to file libel lawsuits against various civil society and media institutions that have reported on the Probo Koala incident in a critical manner. This case illustrates the current limits of accountability, and the way in which the multi-jurisdictional nature of companies creates obstacles to corporate accountability.

In June 2008, the Dutch Public Prosecutor brought charges against Trafigura Beheer bv and a number of other parties for the illegal export of the waste from the Netherlands to Africa. On 23 July 2010, the Dutch Court of First Instance handed down guilty verdicts on a number of counts against Trafigura Beheer bv, a London-based executive of Trafigura Ltd. and the captain of the Probo Koala. The guilty verdict against Trafigura Beheer bv was upheld by the Dutch Court of Appeal in December 2011. The court considered it proven that Trafigura failed to disclose the hazardous nature of the waste to APS (the Dutch company contacted by Trafigura to process the waste), in full knowledge that the waste was harmful for life and/or health. The court also found illegal export of the waste out of the Netherlands. Trafigura was sentenced by the Amsterdam Court of Appeal to a fine of € 1 million for the illegal export of waste in the middle of 2006, for complicity in delivering goods harmful to life and health, and for concealing the hazardous nature of those materials. A press release of the Public Prosecution Service states the following: "Trafigura and the OM (public prosecutor) filed appeal in cassation with the Supreme Court but agreed to withdraw the appeal in cassation. This means that the Court of Appeal's ruling has become final, and Trafigura will pay the fine of € 1 million. In addition Trafigura will pay another € 300 000 to the Public Prosecutor's Office as a compensation for the assets acquired through the illegal export." The case of chairman Dauphin, who was charged with illegally exporting the waste, was settled for € 67 000 as part of a plea bargain. According to Greenpeace, the settlement was not in the general interest but rather set an appalling precedent that powerful companies can sidestep the need to obey environmental laws and uphold norms and standards.

In 2009, Greenpeace brought a complaint against the Public Prosecutor's decision not to prosecute Trafigura Beheer bv and other involved parties for criminal offences related to the dumping in Côte d'Ivoire. On 13 April 2011, after lengthy debates during several court sessions, the Court of Appeal rejected Greenpeace's complaint.

In June 2012 the Dutch Public Prosecutor informed Greenpeace that they would not start criminal investigations into the allegations (the intentional pollution of the environment in Côte d'Ivoire with substances that constituted a serious public health threat, manslaughter and serious bodily harm). In the letter the prosecutor stated that, while Trafigura Beheer bv is registered in the Netherlands, it is only a formal registration for tax reasons (via a trust office); actual business does not take place from the Netherlands. The prosecutor argued that Trafigura Beheer bv cannot be said to have Dutch nationality on this sole basis, and that for this reason, among others, "any connecting factor for jurisdiction of the Dutch courts" is lacking. The court also stated that, in its view, it would not be feasible or expedient to investigate alleged acts in Côte d'Ivoire. The court cited potential difficulties in gathering evidence outside of the territory and in obtaining information and cooperation from the Ivorian authorities, and referred to past difficulties that the Dutch authorities had experienced in seeking cooperation and legal assistance from Ivorian authorities. The rationale put forward by the prosecutor in this case is problematic from the perspective of corporate accountability. If accepted, it would mean a company is considered a Dutch entity for some purposes but not for others. This would mean that Trafigura – and companies like it – not only get the tax benefits of the Netherlands but an assurance of legal immunity for prosecution for acts for which other legal and natural persons in the Netherlands could be held to account. Article 51 of the Netherlands' Criminal Code explicitly states the Code is applicable to natural as well as legal persons. The Criminal Code also covers the parameters under which crimes committed abroad may be subject to the Netherlands' jurisdiction, stating, in Article 5, that the Code applies to nationals of the Netherlands that commit crimes abroad. The prosecutors' view would appear to apply a restrictive interpretation of Article 5 as referring only to legal persons that carry out some commercial activity in the Netherlands.

The ICA requires a nexus to the forum: the accused has to be 'present' in the Netherlands. So far, prosecutors have chosen to prosecute private businessmen rather than their companies for international crimes. Because there have been no prosecutions of legal persons as yet under the Act,

³⁸⁵ This text is for a large part derived (but summarized) from Amnesty International & Greenpeace, *The Toxic Truth about a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire*, 2012. p167

it is not yet known how the courts will interpret the ‘presence’ requirement vis-à-vis legal persons.³⁸⁶ *“It seems likely, however, that this requirement will be interpreted similarly as for natural persons, i.e. that any corporation with a presence in the Netherlands is liable to prosecution for the crimes contained in the International Crimes Act irrespective of where these crimes were committed.”*³⁸⁷

Criminal liability of Dutch mailbox companies

In December 2012, the OECD issued a report on implementing the OECD Anti-Bribery Convention in the Netherlands.³⁸⁸ It stressed that, in the context of bribery allegations, the issue of jurisdiction over mailbox companies is of particular concern in the Netherlands given the number of mailbox companies involved in foreign bribery cases.³⁸⁹ The report pays extensive attention to the 2011 Court of Appeal decision in the *Trafigura* case. It states the decision has questioned whether Dutch “mailbox companies” are liable under criminal law. In this decision, the court indicates that the Netherlands may not be able to exercise jurisdiction over Dutch legal persons in cases where; i. all of the facts occurred outside of the Netherlands; ii. none of the persons involved has Dutch nationality, and; iii. the commercial activities of the company take place outside of the Netherlands.³⁹⁰

The OECD notes that this could create a significant jurisdictional loophole in the Netherlands’ ability to prosecute mailbox companies. Dutch prosecutors have indicated to OECD officials *“that it is their firm intention to pursue on-going investigations and prosecutions against certain mailbox companies allegedly involved in foreign bribery and to test the issue of jurisdiction before the courts, including up to the Supreme Court, if necessary”*.³⁹¹

At the same time, Dutch authorities stated that they are unable to adequately address offences committed by mailbox companies and admitted that they are *“fully aware of the fact that housing these “mailbox companies” brings along the corresponding responsibilities, including the responsibility to fight foreign bribery. The Netherlands is, however, only a small country, with limited government (and thus law enforcement) resources.”*³⁹² While the OECD touches in this case upon anti-bribery

³⁸⁶ N.M.C.P. Jägers, M.J.C. van der Heijden, “Corporate human rights violations: The feasibility of civil recourse in The Netherlands,” *Brooklyn Journal of International Law*, (2008, 33(3), 833-870).

³⁸⁷ Brief amici curiae of Professor Alex-Geert Castermans (Leiden University) et al. filed. on June 13, 2012 in *Kiobel vs Shell ATS Case*,

³⁸⁸ OECD, Report on implementing the OECD Anti-Bribery Convention in the Netherlands, December 2012, <http://www.oecd.org/daf/briberyininternationalbusiness/NetherlandsPhase3ReportEn.pdf> (accessed 12 January 2013).

³⁸⁹ Out of 22 cases of alleged foreign bribery reported in the media, 12 concern mailbox companies, but only two are the subject of ongoing investigations

³⁹⁰ The Court states: *The Netherlands has no jurisdiction as regards the facts referred to in the complaint nor with respect to the persons or legal entities whose prosecution is requested for the following reasons: The facts in respect of which the complainant requests prosecution did not take place in the Netherlands. The company only has its formal registered office in the Netherlands. In the Netherlands, it was no more than a company with its registered office at a trust office. The actual commercial activities carried out by the accused company take place from the United Kingdom and Switzerland. In view thereof, the company was, at the time of the facts in respect of which Greenpeace requests prosecution, not a legal entity as referred to in Article 5 of the Criminal Code:[...] LJN: BQ1012, The Hague Court of Appeal, K09/0334.*

³⁹¹ OECD, Report on implementing the OECD Anti-Bribery Convention in the Netherlands, December 2012, p. 19

³⁹² The Dutch authorities have explained to the OECD that if a foreign bribery allegation concerns a Dutch mailbox company with no activity in the Netherlands and no Dutch citizens involved, the national public prosecutors would informally contact their foreign colleagues from the countries where the bribery took place or are home to the main suspect(s). They would then inform them about the case and enquire whether they would be willing to investigate it or have already started an investigation. However, given the current number of foreign bribery allegations which are not being investigated at all, this approach to mailbox companies appears to be a potentially significant loophole in the Dutch framework for effectively combating foreign bribery. In short, there is a real risk that companies set themselves up as mailbox companies in the Netherlands in order to escape prosecution for foreign bribery or other offences. These concerns are reinforced by media articles and research carried out by think-tanks, which have suggested that mailbox companies may provide foreign officials with a way to operate investments obtained through acts of corruption, and as a means of evading sanctions by undemocratic or despotic regimes. *The OECD notes that: “this reasoning is concerning, especially in view of the commitments the Netherlands undertook with regard to Annex I of the 2009 Recommendation, which states that “member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international business transactions.” It should also be noted that while the Netherlands is geographically a small country, it ranks 14th among the 40 Working Group members in terms of GDP.*

measures, this statement is highly relevant for the human rights conduct of mailbox companies. Housing thousands mailbox companies indeed brings along corresponding responsibilities in the field of environmental and human rights regulation.

5.3.3 Non-judicial: the OECD Guidelines and the Dutch NCP

The most important non-judicial mechanism available in the Netherlands with regard to the human rights impacts of businesses is the Dutch National Contact Point (NCP) of the OECD Guidelines' complaint mechanism. The NCP takes into account well-founded reports in relation to companies that are not acting or investing in accordance with the OECD Guidelines. The NCP then investigates the report and mediates between the reporting parties and the company in question. When mediation fails, the NCP will make an assessment of whether the company has breached the OECD Guidelines, and will publish its final statement, which will include recommendations for the company on future implementation of the Guidelines. The final statement will also provide for follow-up, such as monitoring the implementation of an agreement or recommendations. The NCP can inform other relevant government departments about its final statement. If a company is found to be non-compliant with the OECD Guidelines by the NCP, this can block access to export credit and other forms of state support. So far, no complaints against mailbox companies registered in the Netherlands have been taken into account.

There seems to be a tendency within the NCP to focus on their role as mediators only. Expanding the (investigative) mandate of the NCP would fill an important gap between, on the one hand, non-judicial mechanisms focusing on mediation and, on the other hand, expensive and time-consuming judicial mechanisms. In the UNGPs it is stated that: *"Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms."*

5.4 Conclusion

The Dutch government expects MNCs registered or incorporated in the Netherlands to comply with the OECD Guidelines for Multinational Enterprises (2011) throughout their supply chain. However, there is no mechanism that supervises the compliance of MNCs with the Guidelines, and as such, a sanction mechanism in cases of violations is absent. The Dutch government does not seem to specifically inform mailbox companies of its expectations regarding OECD Guidelines compliance.

In recent years the non-binding Guidelines have been made slightly stronger in the area of state support to companies. Applicants need to sign a declaration that they will adhere to the OECD Guidelines, and implementing organisations assess the risk associated with particular companies or activities and may attach additional conditions or mitigating measures to their financial support. Due to a lack of transparency, it is not known whether these companies are required to initiate a humanrights due diligence process, as expected by the Guidelines, or be transparent about the findings and steps taken to prevent a negative impact on human rights. How monitoring of the supported projects takes place and whether sanctions are applied in case conditions, or if mitigating measures are executed or not are still open questions. In the context of state support, the favourable investment climate provided by the Dutch government has so far not been considered as a form of state support.

Lack of transparency surrounding the operations of MNCs is a general problem. There is ample scope to manipulate ownership, accountability, and financial structures to escape states' regulatory efforts. Accountability is also restricted by secrecy around corporate structures and financial flows. Better national measures are therefore necessary to regulate companies' human rights performance and

transparency. To a very limited extent, public information is available about the legal structure of MNCs and about the (operational) role persons perform in various parts of the MNC. Information in the Dutch Company Register and in annual reports is tailored to the needs of creditors and shareholders. Requirements for non-financial reporting are weak and barely relevant from an environmental and human rights perspective. In addition, Dutch law does not permit public identification of lines of control and responsible individuals within companies, hindering the allocation of responsibilities for the prevention of human rights violations through more effective access to justice by relevant stakeholders.

When human rights abuses take place in a host state, and a company incorporated or domiciled in the Netherlands is involved, the Dutch government in principle provides judicial (criminal and civil) mechanisms and non-judicial (NCP) mechanisms to address such abuses. In civil procedures (foreign direct liability cases) there are serious obstacles for foreign plaintiffs to bring the case, including high costs and limited disclosure of documents that the MNC possesses and that are needed to substantiate claims. Proposals to initiate a legal aid fund for foreign plaintiffs and to broaden the disclosure rules have so far not been followed up by the Dutch government. To date, no foreign direct liability case has been initiated against a mailbox company in the Netherlands.

Criminal procedures need to be taken up by the Public Prosecutor. The Trafigura case has shown that the Public Prosecutor was not willing to prosecute this mailbox company (with headquarters in the Netherlands) for (involvement in) human rights violations abroad. The court indicated that the Netherlands may not be able to exercise jurisdiction over Dutch legal persons in cases where: i. all of the facts occurred outside of the Netherlands; ii. none of the persons involved has Dutch nationality, and; iii. the commercial activities of the company take place outside of the Netherlands. No decision has been made on the aspect of jurisdiction. In the context of implementation of the OECD Anti-Bribery Convention, the OECD warned the Netherlands about jurisdictional loopholes, referring to the Trafigura case. In response, Dutch prosecutors have indicated that they are intending to prosecute mailbox companies allegedly involved in foreign bribery, and to test the issue of jurisdiction before the court. But they also stressed the limited resources available to them. The question is whether the intention of the prosecutors is limited to anti-bribery cases. Political will could help solve the issue of limited resources.

The admissibility of the NCP for handling a complaint against a mailbox company on the basis of a violation of the OECD Guidelines has not yet been tested.

6 Conclusion and recommendations

The increased role, size, economic power and impact of globally operating corporations has been recognised to have negative impacts on human rights, with the United Nations developing guidelines on businesses' human rights responsibilities and exploring ways for corporate actors to be accountable for the impact of their activities on human rights. Yet, abuses by businesses continue to take place. The internationalisation of business operations has still not been matched with corresponding regulatory and treaty regimes. This accountability and governance gap is exacerbated by legal fragmentation: regulation of multinational enterprises remains fragmented between the different countries in which constituent entities of a multinational group are incorporated or operating.

As a result, the legal separation between different entities within a multinational enterprise can make it extremely difficult for victims of corporate human rights abuses to achieve remedy, especially where the parent company is domiciled in a different state. This is particularly problematic in the extractive industry, which is a high-risk industry when it comes to human rights, due to environmentally damaging nature of its operations and because of its presence in many poorly governed environments where violence and human rights violations are common. As this report shows, this regulatory gap leads to human rights violations being left unpunished. The report also shows that the Netherlands plays a central role in the two-fold human rights impact: it hosts many financial holdings of extractive industry companies that own or finance subsidiaries involved in human rights controversies, whilst also fulfilling tax planning functions that are likely to negatively impact on tax revenues in countries of operation, depriving them of resources they could use to ensure human rights protection.

6.1 Extractive companies, human rights and the Netherlands

According to Publish What You Pay, the Netherlands is the second favourite home for incorporation of the 10 biggest extractive companies in the world, after the US secrecy jurisdiction of Delaware. The extractive companies researched for this report have incorporated subsidiaries in the Netherlands to benefit from Dutch fiscal and investment policies and treaties. These incorporations are a result of an active policy by the Netherlands to attract businesses by providing a favourable tax and investment environment which is not balanced with corresponding human rights obligations and remedial measures or with adequate anti-abuse provisions against tax avoidance. It has been internationally criticised for maintaining a conduit regime that allows companies to evade taxes on source states, thereby harming other countries' tax bases.

This research into Dutch mailbox companies found allegations of extractive industry operations being preceded or accompanied by forced displacement, violence by security forces, arbitrary killing, targeting of civilians and other war crimes (related to the security needs of ONGC assets in Sudan). As the cases described here illustrate, environmental pollution also damages the livelihoods and health of local communities. Copper extraction by Glencore-controlled mines in Zambia, for instance, is reported to have contaminated drinking water and resulted in the poisoning of more than 800 people in 2008. Oil spills jeopardise the livelihoods and health of indigenous communities in Peru (Pluspetrol). These companies all have subsidiaries in the Netherlands, with direct or indirect links to these contentious operations.

The researched Dutch legal entities play different roles in corporate structures. In some cases, registered head offices (rather than management head offices) are located in the Netherlands (Trafigura, Pluspetrol). ONGC and Barrick Gold have Dutch holding companies with direct ownership

or financing relations with the described operations. ONGC's branch office in Sudan is legally part of the Dutch subsidiary and should therefore directly liable for its Sudanese operations. Freeport's Dutch subsidiary directly financed subsidiaries connected to human rights violations. Finally, Oilinvest and Glencore have important holding companies in the Netherlands with huge assets that play a central role in the group's financing and investment operations.

6.2 Tax revenue and human rights

Legal fragmentation paralleled by a competitive international investment regime allows multinational corporations to pay proportionally much less tax on their income than local companies or individuals. The research presented in this report shows that tax avoidance and evasion have serious human-rights related risks that are enabled by the Dutch fiscal and investment climate. The large majority of MNCs active in oil, gas and mining have created mailbox companies in the Netherlands. They often fulfil crucial financing roles in the corporate group and have direct financing and ownership links with subsidiaries in countries of operation. A large number of MNCs incorporated in the Netherlands have been involved in human rights controversies around the world. The massive scale of this incorporation should have regulatory consequences in domestic and treaty law for the Netherlands with regard to the extraterritorial dimension of incorporated businesses' human rights conduct, including fiscal conduct.

The link between a states' duty to mobilise maximum resources to realise human rights and its ability to deliver social programmes is increasingly recognised. A rights-based approach to economic policy requires fiscal policymakers, in the substantive sense, to design not only fiscal policy that avoids any direct violation of rights, but also a 'positive' tax regime that is specifically designed to promote economic rights of civil society. In a procedural sense, a rights-based approach to fiscal and other economic policy requires transparency, participation, and accountability. The fiscal framework must particularly be open and transparent, granting all "stakeholders," including civil society and the wider public, access to full and timely information regarding the design, implementation and impact of tax law and policy.

The same principles apply to fiscal policies of home states of businesses that have an extraterritorial impact. Whilst the Dutch state cannot ensure that a host state mobilise maximum resources to realise human rights, the Dutch domestic and treaty policy affects fiscal policies in host states by attracting businesses to incorporate in the Netherlands that avoid paying taxes in host states, thereby negatively impacting on tax payments and business regulation in those states. The Dutch state is therefore in a unique position to positively influence the fiscal conduct - as well as to regulate the human rights conduct - of businesses incorporated through parent companies and/or (financial) holding companies in its jurisdictions. The Maastricht Principles reiterate the obligations of states to take deliberate, concrete and targeted steps, separately and jointly, through international cooperation, to create an international enabling environment conducive to the universal fulfilment of ESCRs, including in matters relating to finance and taxation.³⁹³ These state obligations should lead to explicit cooperation and anti-abuse articles being integrated in tax treaty law to avoid the erosion of the taxable income base in host states.

6.3 The need for transparency

Researching the use of mailbox companies by MNCs, their Dutch incorporation structure and their relationship with human rights controversies in host states has posed several challenges. Firstly,

³⁹³ *Idem*, Etop 29.

companies usually do not seek publicity if their operations have adverse effects – this means that unless field research is conducted, identifying adverse effects necessarily depends on the existence of already published information (as a result of research or grievance cases). Lack of effective transparency regulation is also an important factor. Dutch law, for instance, does not require corporations to conduct human rights due diligence reporting or to disclose their full ownership and financing structures, including transactions that take place between related group companies. Companies incorporated in the Netherlands do not have to adhere to country-by-country reporting standards that are currently being developed for the extractive industry, which involve providing information on profits earned, tax paid and profit retained in each country in which the group operates. Neither are they required to publish the accounts of subsidiary companies if they are included in the consolidated accounts and the parent company assumes responsibility for the subsidiary. Without this data, it has been very difficult and time consuming to identify the precise ownership and control structures of corporations and how they are linked to a particular operation in host countries. We have indicated this lack of information throughout the report where relevant.

6.4 Closing the gap

It is increasingly argued in human rights circles that a closure of the current accountability gap requires the implementation of domestic and treaty laws that have extraterritorial impact with regard to business regulation. An international and cooperative approach to the regulation of cross-border business is already being followed in the context of anti-bribery and anti-money efforts. The OECD and IMF have also called for the implementation of existing due diligence regimes that resemble the human rights due diligence activity promoted by the Guiding Principles on Business and Human Rights, relating to the prevention and detection of these financial crimes, and its extraterritorial dimension.³⁹⁴

The observed accountability gap resulting from the international legal fragmentation of companies leaves a central role to domestic and treaty measures with extraterritorial impacts. An important precondition to close the global accountability gap in the face of human rights violations that occur as a result of business activities is not only to address the responsibility of the ultimate parent and local operating subsidiaries of a multinational group; responsibility for human rights violations and corresponding regulation should also apply to other important legal entities within the group that fulfil central functions, such as group financing activities and registered head offices which might not carry out daily management but are used by a corporation to enjoy tax benefits and investment protection.

Implementing these domestic and treaty measures is a necessary and realistic way to close the gap and prevent and ensure redress of human rights violations by MNCs in areas of weak governance. The Netherlands should implement and address the expectations it has of incorporated companies (as set out in UNGP 2) in relation to the extraterritorial human rights performance of multinationals. The Commentary to the UN Guiding Principles makes a number of valuable suggestions, from imposing requirements on locally incorporated (parent) companies to reporting on the human rights performance of the whole enterprise, and to enforcement of criminal sanctions. This report recommends three policy areas (preventive measures, remedial measures and policy coherence) in which the Netherlands should progressively meet its state duty to protect.

³⁹⁴ De Schutter et al., 'Human Rights Due Diligence: The Role of States', 2012, <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>, p. 1

6.5 Transparency

Mailbox companies obscure ownership relations and liabilities through the creation of highly complex corporate structures that are not accompanied by appropriate regulation. At this moment in time it is virtually impossible to find out what the specific responsibilities are of any of the multiple entities that constitute an MNC. The lack of transparency about ownership and control structures makes it extremely hard on law enforcement agencies and impossible for watchdogs or the wider public to attribute any responsibility for anything to the over 20 000 companies incorporated in the Netherlands. Beneficial owners and directors can be hidden behind layers of special purpose vehicles, trusts, foundations, etc. The complex structures can effectively and purposefully block efforts to uncover the nature of transactions, or to trace beneficial ownership and the origin of funds.³⁹⁵

As Chapter 3 showed, financial opacity not only undermines good business conduct and public control, it also facilitates capital flight. Transparency about ownership, management structures and financial flows are indispensable for citizens who are seeking remedy for human rights violations by companies. This includes corporate social responsibility as well as financial reporting, as integrated reporting by MNCs on their corporate conduct necessarily involves linking non-financial with financial information of a corporate group. The implementation of existing due diligence regimes relating to the prevention and detection of financial crimes such as money laundering and bribery (corruption) as proposed by the IMF, for instance, would support this goal. The Netherlands is clearly lagging behind in transparency reforms, and thereby contributes to the continued accountability gap regarding the conduct of multinational corporations incorporated in its jurisdiction.

6.6 Recommendations

6.6.1 Preventative measures

Recommendation on policy coherence and international cooperation

Internationally, the Netherlands is a proponent of human rights, corporate social responsibility and development initiatives. As such, the Netherlands should also achieve policy coherence to make sure that other areas of business regulation (such as corporate law) do not undermine human rights and development initiatives. The UN Guiding Principles outline (under the State duty to protect) that states should periodically assess the adequacy of laws that regulate companies and address any gaps in a manner compatible with the governments' human rights obligations. With a view to human rights and development policy coherence, the Netherlands should ensure business policies and regulations, at all levels, contribute to long-term and sustainable investments and relationships instead of short-term financial gain.

The Netherlands should:

- Undertake, in the context of the current development of the National Action Plan on the implementation of the UNGP, a mapping of all current fiscal and investment policies (including investment and tax treaties) related to the international business operations of parent/holding companies, and assess incoherencies with human rights and development policy commitments. In case of incoherencies, the Dutch government should adapt the fiscal and investment policies and laws, and/or renegotiate treaties.

³⁹⁵ Task Force for Financial Integrity and Economic Development, Beneficial Ownership, available at <http://www.financialtaskforce.org/issues/beneficial-ownership/> (accessed 8 January 2013).

- Put an end to all beneficial fiscal arrangements that allow multinationals to avoid taxation. Specifically, introduce more effective substance provisions and other more effective anti-abuse clauses in bilateral tax and investment treaties to stop MNCs benefitting from the Dutch tax and FDI treaty network with the effect that source countries' revenues are undermined by tax avoidance structures and aggressive pro-investment actions. The current substance provisions are insufficient, shown by the fact that most major MNCs with no economic presence in the Netherlands have a financial holding there. Financial holding companies whose only role in an MNC is to collect dividend income from subsidiaries and then re-invest this (or lend the receipts onwards to the parent) should not be able to use the Dutch treaty network, because this practice allows for foreign dividend income to be exempted from taxes in the source country. Similarly, domestic arrangements to allow royalties and other capital flows to pass through the Netherlands with the effect of reducing tax in source countries should be abolished. As such the Netherlands should unilaterally end harmful tax regime structures, by:
 - making payments to low-tax jurisdictions non-deductible
 - abolishing the participation exemption for non-EU entities
 - introducing *effective* substance rules
 - not providing ATAs or APAs to artificial arrangements (without economic base).
 - make sure, with effective monitoring, that companies that enjoy ATAs or APAs comply with international human rights standards and adhere to relevant financial and non-financial reporting.
- Contribute wholeheartedly to the initiatives and proposals on anti-tax avoidance currently being developed at the G20 and OECD level, and work towards the development of international cooperative solutions.

Recommendations on due diligence requirements

The Netherlands should:

- Clarify the human rights due diligence requirements for MNCs incorporated in the Netherlands, including for mailbox companies, as indicated by the UNGPs and OECD Guidelines for Multinational Enterprises. Due diligence measures should be adequate enough to demonstrate that all reasonable efforts have been taken by the company to become aware of and prevent negative human rights impacts from operations in which the company is involved (including subsidiaries and supply chain). The requirements for mailbox companies must be tailored in such a way that lack of substance would lead to the involvement of other parts of the corporate group to show that the MNC of which the mailbox company is a part fulfills the human rights due diligence requirements.
- Require by law that MNCs, including mailbox companies, incorporated in the Netherlands undertake specified human rights due diligence measures in respect of all their foreign operations (including subsidiaries and supply chain), with particular attention to high-risk areas and activities such as the operations of the extractive industry sector.
- Ensure MNCs, including letterbox companies, incorporated in the Netherlands publicly report on the human rights due diligence measures – such as adequate impact assessments – undertaken in respect of all their foreign operations (including subsidiaries and supply chain).
- Provide substance to the reporting requirements and ensure comparability between the reports of different companies. Disclosure of impact assessments should include non-technical summaries to be shared with local stakeholders, amongst others. The reporting requirements for mailbox companies must be tailored in such a way that lack of substance would not form a justification for non-reporting but lead to the involvement of other parts of the corporate group to fulfil these requirements.

- Increase efforts at European Union (EU) level to create a level playing field across EU countries regarding the requirements on human rights due diligence and human rights due diligence reporting.

Recommendations on transparency

Apart from public reporting requirements related to human rights due diligence, the Dutch government should expand other disclosure rules in order to make them beneficial for stakeholders other than shareholders and creditors:

- Adapt Book 2 of the Dutch Civil Code so it includes more regulations in the area of annual reporting, for example by requiring that companies include information in their annual report on the (international) judicial and organisational structure, and specify how the organisational structure fits the judicial structure.
- Adapt the Commercial Register Law (Handelsregisterwet) so it requires companies to deposit information on the company structure at the Chamber of Commerce, and specify who is connected to the organisation and what the international company network looks like, from time to time. This should also provide insight into possible ownership and control of Dutch companies over foreign companies. The information should be available free of charge.
- Amend Book 2 of the Dutch Civil Code to ensure that private, non-listed companies should be required to disclose the direct and ultimate beneficial owners who have a total interest of 5% or more. Public listed companies, although they cannot be required to know all shareholders at all times, should nevertheless be required to disclose any share interest of 3% or more. These shareholders should also be required to disclose the ultimate beneficial owners.
- Disclosure of all payments to governments, including state and local government. Most of the information foreseen under county-by-country reporting (CBCR) is already reviewed by the financial authorities such as the Dutch Central Bank in order to classify the incorporations of MNCs under the European System of Accounts 2010. However, it is not publicly available. CBCR should also apply to mailbox companies incorporated in the Netherlands.

6.6.2 Remedial measures

Recommendations on access to justice

The Dutch government should ensure that people whose human rights are harmed by the overseas operations of MNCs (including mailbox companies) incorporated in the Netherlands can access judicial and effective non-judicial mechanisms in the Netherlands, in cases where they cannot access effective remedy in their own state.

Current practical and judicial obstacles for foreign plaintiffs need to be removed, amongst others by:

- Establishing a legal aid fund in relation to foreign direct liability cases to guarantee that foreign plaintiffs' lack of money does not preclude access to justice in the Netherlands.
- Expanding the Dutch disclosure rules and include a phase in the legal procedure in which both parties are required to make public all the relevant information. An expansion should lead to a situation in which first the parties, and then the judge, can assess (on the basis of the facts) to what extent a parent or other part of an MNC linked to human rights violations can be held liable.
- Introduce legislation that enables accountability and liability of parent companies for the conduct of its foreign constituency parts.

In order to ensure that the Dutch Public Prosecutor investigates and prosecutes corporate criminal activities of MNCs abroad, including mailbox companies, incorporated in the Netherlands, the Dutch government should:

- Specify that companies incorporated in the Netherlands for tax purposes, regardless of the level of activity in the Netherlands, have the Dutch nationality and as such can be prosecuted on the basis of the nationality principle for criminal activity resulting in environmental and human rights harm, including for crimes committed abroad or which have consequences abroad.
- Ensure the Public Prosecutor has sufficient capacity and resources to investigate and prosecute corporate criminal activities of MNCs abroad (including mailbox companies) incorporated in the Netherlands

To increase the effectiveness of non-judicial mechanisms for addressing the negative human rights impact of MNCs (including mailbox companies) incorporated in the Netherlands, the Dutch government should:

- Ensure that the NCP is open for complaints against letterbox companies about human rights and environmental harm conducted by entities within their corporate structure, and provide the NCP or another institutions with a mandate to undertake proactive, independent investigations of companies' operations abroad.



Private Gain – Public Loss

Mailbox companies, tax avoidance and human rights

Business activities worldwide have the potential to negatively impact on human rights. This is especially the case in high-risk sectors such as the extractive industry. This report examines the human rights record of nine extractive industry companies incorporated in the Netherlands and discusses the Dutch state's responsibility regarding the human rights of the people affected by these business enterprises. We focus on two distinct but related areas in which extractive MNCs impact human rights: (1) MNCs avoiding taxes and the destructive loss of revenue that could have been used for the state duty to fulfill human rights and (2) the negative human rights impact resulting from companies' operational activities, namely the extraction of resources.

The Netherlands is one of the biggest players in the international tax avoidance industry. The country hosts 23 500 mailbox companies typically used for fiscal planning. Most of the world's largest extractive companies maintain financial holding companies in the Netherlands that have ownership and/or control relationships with operations in several high-risk environments. This research shows that the nature of business activities and company structures of extractive industry companies in the Netherlands point to tax avoidance and related revenue losses in poor countries. This undermines obligations of host states to protect and fulfill human rights.

Second, all researched MNCs have been involved in human rights controversies in countries of operation. As a home or conduit state that offers direct parents and holding companies of subsidiaries associated with these human rights controversies investment protection and fiscal benefits, the Netherlands has a responsibility to address these violations by trying to prevent this structural problem and provide access to justice for its victims. The report concludes that the Netherlands fails to regulate the human rights impact of MNCs located in its territory. The Dutch state should proactively introduce (legal) measures to prevent the negative footprint of these companies abroad, and provide remedy to victims of corporate-related abuses.



This Project

This paper is part of series of publications analysing the impact of Dutch foreign and economic policy on sustainable development and public interests. The series is part of a project entitled 'Private Gain, Public Loss' in which policies aiming to attract foreign business or investment to or through the Netherlands (the so-called 'vestigingsbeleid', or business location policy) is analysed in the framework of development policy and human rights coherence.