

Response to the call for inputs: Extractive sector, just transition and human rights

Both ENDS, Netherlands, 15th May 2023

By: Murtah Shannon, Marius Troost, Pieter Jansen, Anne de Jonghe

Contact details: a.dejonghe@bothends.org

Questions

State duty to protect human rights

1. How can States better advance human rights-compatible energy transition laws and policies that ensure responsible business conduct in all aspects of energy transition efforts and programs (e.g., including, but not limited to, design, approval, financing, implementation, and reporting of energy transition programs)?

States have the position to help build leadership around the much needed shift to providing renewable energy to the poor. States have the opportunity to legally organize what financial institutions can invest in, ie, excluding fossil fuels. States should create legal frameworks for financial institutions, first and foremost public financial institutions such as development banks and government funds, that regulate what these institutions can and can not invest in.

Financing institutions, although important actors in determining where and what business can operate, need to be included in human rights and due diligence obligations. Financial institutions should be obliged to ensure their clients comply with due diligence and transparency laws as well as human rights provisions. Currently, financial institutions are only to a limited extent responsible for the 'end-user' of their financial products. The protection of human rights, beyond a State's borders, needs to include responsibility for financial institutions that includes the entire financial value chain, and the 'end-users' of financial products. Strong transparency laws and policies are of key importance in relation to financial institutions to know where finance ends up. Development banks finance many financial intermediaries, and do not disclose information on where their funds end up. Transparency should be required, at the least from public financial institutions.

Large scale energy infrastructure projects often lead to reallocations and distortions in public finance budgets in other sectors. e.g. Apart from environmental risks and waste disposal problems, nuclear energy production requires a very expensive, highly secured and controlled centralization of energy production. Safety enhancements or upgrading extend the life of a very expensive energy source. This would run counter the objective to access energy for the poor.

2. Are you aware of any measures, both mandatory and voluntary, at national, regional, and international levels to foster business respect for human rights in the extractive sector, especially in the context of energy transition plans, programs and activities? If so, are these measures effectively enforced and do they provide the necessary coverage in light of evolving circumstances, including energy transition plans? Is greater clarity necessary in some areas of law and policy? What measures may reasonably correct this situation?

Binding due diligence laws are currently being developed at the Netherlands and EU level, which can potentially provide an important judicial basis for (NL/EU) enterprises to foster respect for human rights in their activities abroad. However, there is strong evidence that key elements of these laws will be watered down, making the laws ineffective and largely redundant. Key elements that must be included in these laws are: 1) insuring punitive measures for corporations and financial institutions that found willingly aiding human rights abuses, including those committed by downstream (sub)contractors, 2) Requiring ex- ante and post public transparency with regards to all documentation pertaining to human rights assessments and mitigation in relation to their business activities (i.e. Human Rights Assessments, Resettlement Plans, Livelihood Rehabilitation Plans, Social and Environmental Action Plans etc.), 3) Providing legal support facilities for victims of human rights abuses seeking to hold perpetrators accountable under these laws.

3. What mechanisms or processes should exist at the State level (e.g., inter-ministerial committee, ex ante human rights impact and risk assessment) to assess and ensure that extractive sector operations, including the production and distribution of transition minerals, do not impact negatively human rights? Are these measures effectively enforced and do they provide the necessary coverage in light of energy transition plans, programs and activities?

States should assure that sufficient legal mechanisms are in place to regulate the conduct of their businesses operating abroad in accordance with the UNGP's. As stated above, these mechanisms should: 1) include punitive measures for corporations and financial institutions that found willingly aiding human rights abuses, including those committed by downstream (sub)contractors, 2) Require ex-ante and post public transparency with regards to all documentation pertaining to human rights assessments and mitigation in relation to their business activities (i.e. Human Rights Assessments, Resettlement Plans, Livelihood Rehabilitation Plans, Social and Environmental Action Plans etc.), 3) Provide legal support facilities for victims of human rights abuses seeking to hold perpetrators accountable under these laws.

5. Do current concessions, contracts, and bilateral investment treaties in the extractive sector aid or constrain domestic regulatory space available to States to meet their international human rights obligations in the context of the energy transition? What further changes in key provisions and licensing/procurement processes are desirable to advance energy transition in alignment with the UNGPs?

Finance should be more in balance with local financing potential to invest in renewable energy. To realize all the climate ambitions governments and IFIs pool together as much finance as they can and try to attract money from capital markets, including the offering of public private partnerships. However, knowledge about PPPs is lacking in most governments and therefore carries the tremendous risk that PPPs facilitate and enable the private partner to earn profit at the expense of the public interest instead of generating profit for the society as a whole.

Transparency

6. What are the gaps in the development and implementation of existing National Action Plans, legislation, and domestic, regional, or international frameworks (e.g., the Paris Agreement or

climate change laws) on business and human rights, particularly in relation to the extractive sector, which if addressed will advance a just and human rights-based energy transition?

Sand and aggregate mining is notoriously under-regulated despite accounting for the largest volume of solid materials that are extracted globally. These sectors are of pivotal importance to the energy transition, whether it be for the building renewable infrastructures such as hydro-power dams or solar panels, or through the dredging and reclamation activities required for offshore developments such as wind. Where sand mining often differs from other extractive industries is the short-term nature of extractive activities and the mobility of extractive actors, particularly marine dredging and reclamation projects. The dynamism of these activities makes it particularly challenging to hold extractive actors accountable in the case of environmental or human rights violations resulting from their operations. As such there is an urgent for stringent regulations of sand value chains and the dredging industry, as recognized by the UNEA Resolution No. UNEP/EA.4/Res. 19 on Mineral Resource Governance.

7. How can energy transition policies, programs, plans and activities in one State have adverse human rights impacts outside of their territory or jurisdiction (including supply chain issues and sourcing)? What measures may reasonably correct this situation?

The ambition in the Global North to decarbonize its economies will massively increase the demand for scarce resources. The transition from fossil fuels to renewable sources of energy will increase the demand for so-called 'energy metals'. For many countries in the Global North, a significant portion of these metals will have to be sourced from abroad. Recently, we have already seen attempts by Northern governments to secure their supply of energy metals by engaging with third countries and for example in the European Union's Critical Raw Materials Act.

These metals will have to come from somewhere, however. And there is no such thing as clean mining: mining for metals is per definition a high impact activity, with significant negative effects for the localities where these have to be sourced. Mining is often accompanied by land grabbing, forced relocations, environmental degradation, health problems, loss of livelihoods and water shortages. It is therefore of the highest importance that the rights of the communities and regions affected by these activities are protected, through rules and regulations like laws and international agreements including key principles for ensuring these rights such as Free, Prior and Informed Consent (FPIC) and 'do no harm'.

https://www.bothends.org/uploaded_files/inlineitem/BothENDS_legal_opinion_27-01-2014.pdf

8. How can States harness the potential of energy transition to accomplish important policy objectives related to human rights, such as achieving local empowerment, gender equality, protection of the environment, mitigation of climate change and realising the Sustainable Development Goals?

States need play their role in regulating business and financial institutions. The energy transition is an opportunity for democratic decision making and re-building public services, where energy can come back into public ownership instead of private corporations, investors and financial institutions. Financial institutions need to have a legal obligation on ensuring their clients, and across their value chain, comply with human rights laws and environmental protections.

Corporate responsibility to respect human rights

10. Are human rights provisions, for example in existing concessions, contracts, and bilateral investment treaties, effective in encouraging businesses in the extractive sector, including investors, to respect all internationally recognised human rights? If not, what should be done to strengthen their efficacy?

With regards to marine sand mining, the effectiveness of human rights provisions are severely hampered by a lack of transparency pertaining to contracts and agreements between marine contractors and investors, particularly private banks. Existing CSR frameworks such as the UNGP's, OECD guidelines and Equator Principles are unspecific and/or limited with regards transparency. As a consequence, key details pertaining to human rights (such as those detailed in Environmental and Social Action Plans) are often protected by Non Disclosure Agreements, making it impossible for third parties to assess the validity of data or monitor the implementation of human rights provisions. This can easily be remedied by requiring that project counterparts (contractors, investors etc.) make publicly available all information relating to human rights impacts and mitigation measures.

With regards to development finance, the effectiveness of human rights provisions in contracts is hampered by both a lack of transparency as described here above, as well as DFIs position to work with clients towards compliance of their rules and regulations. Clients of DFIs can continue to receive funding from DFIs, as long as they can demonstrate via documents that they work to improve their compliance. In practice, this leads to many cases where DFI finance ends up in projects that do not comply with DFI's own rules and regulations. Another opportunity is in the mechanisms that monitor human rights provisions. In the case of development finance institutions, they rely heavily on information provided by their clients for their monitoring procedures. This information is often biased and does not uncover incompliances with the provisions. Additionally, transparency of monitoring reports is lacking.

Access to remedy

15. What measures and mechanisms should be provided by extractive sector legislation, bilateral investment treaties, concessions, and contracts to allow individuals or communities affected by extractive activities to seek effective remedy for business-related human rights abuses? What remedies are best suited for this sector?

There is an urgent need for binding international legal mechanisms, such as binding treaties, that regulate the activities of extractive sectors and include responsibilities for remedy.

18. Are current dispute resolution provisions and frameworks in the extractive sector “fit for purpose” to address complaints related to human rights abuses linked to extractive activities and energy transition projects? If not, what are the alternatives for a legitimate, transparent, and effective dispute resolution system to address such complaints?

NCP complaints filings are extremely cumbersome and time consuming, and their outcomes are non-binding, rendering them largely obsolete with regards to preventing human rights abuses. There is an urgent need for binding international laws that regulate the conduct of extractive industries abroad.

Good practices and other comments

20. What specific renewable energy policies, practices and safeguards should be adopted by States and business so that energy transition does not have adverse effects on human rights?
Marius

In the energy transition, it is key to ensure that everyone is able to make the transition and that historically unbalanced and unfair relationships between the Global North and South are made fair. This means introducing safeguards so that renewable energy projects in the Global South come to the benefit of the local communities, not that of international business particularly from the Global North. These safeguards could take the form of requirements for projects of transparency (see FPIC), ownership and local content. Local communities should have the right to say no to projects that can lead to human rights abuses or environmental degradation.

Governments in the Global North need to introduce policies that cement these safeguards into their financing and development cooperation instruments. For example, through their export credit agencies (ECAs) Global North governments help support large scale infrastructural projects abroad. Traditionally, this has mostly meant fossil fuel projects, but there is an increased interest in renewable energy projects as well as mining. This should not lead to a new form of ‘green extractivism’; laws and regulations need to secure human rights in the case of renewable energy projects in the same way as is the case with fossil fuel projects.

21. Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National Human Rights Institutions that would help further advance a just and human rights-based energy transition in the extractive sector? Any other comments or suggestions about the forthcoming report are also welcome.

Sand and aggregate mining is notoriously under-regulated despite accounting for the largest volume of solid materials that are extracted globally. These sectors are of pivotal importance to the energy transition, whether it be for the building renewable infrastructures such as hydro-power dams or solar panels, or through the dredging and reclamation activities required for offshore wind developments. Where sand mining often differs from other extractive industries is the short-term nature of extractive activities and the mobility of extractive actors, which is particularly true for marine dredging and reclamation. The dynamism of these activities makes it particularly challenging to hold extractive actors accountable in the case of environmental or human rights violations resulting from their operations. As such there is an urgent for stringent regulations of sand value chains and the dredging industry, as recognized by the UNEA Resolution No. UNEP/EA.4/Res. 19 on Mineral Resource Governance.