Investors, ESG and Human Rights

October 2023

ClientEarth’s response to the UN Working Group’s call for input

# Background

ClientEarth is a charity that uses the power of the law to protect people and the planet. We are international lawyers finding practical solutions for the world’s biggest environmental challenges. From our offices in London, Brussels, Warsaw, Berlin, Madrid, Beijing, Luxembourg and Los Angeles, we work on laws throughout their lifetime, from the earliest stages to implementation and enforcement.

ClientEarth’s Accountable Finance initiative analyses the legal duties of a wide spectrum of actors in the financial system – including regulators, companies, investors, banks, insurers, pension schemes and asset managers – to consider, manage and report their risks and impacts associated with climate change and the environment.

We welcome the opportunity to contribute to the UN Working Group’s work in this area.

# Responses

*Red text indicates questions not answered by ClientEarth*

**General**

1. **What do you understand Environmental, Social, and Governance (ESG) in finance to mean? How are human rights standards and frameworks considered by investors, if at all, in ESG?**

As the UN Working Group has confirmed many times, the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. This includes all financial institutions, and the financial sector has a particularly important role in ensuring human rights are respected consistently with the Guiding Principles.[[1]](#footnote-2) Accordingly, **all financial institutions should integrate respect for human rights and planetary boundaries into their policies, due diligence procedures, pre-investment and investment processes, and investment stewardship**. They should identify when they may cause, contribute to or be directly linked to adverse human rights and environmental impacts, and take adequate prevention, mitigation and (where appropriate) remediation action accordingly, together with actions to use or increase their leverage (where relevant).[[2]](#footnote-3) Although this question is focused on “ESG in finance”, it is important to note at the outset that this responsibility applies to all financial institutions regardless of whether they, or their investment products and strategies, are labelled as “ESG”, “sustainable” or similar.

It is also essential to acknowledge that respect for human rights, and human rights due diligence covers environmental issues. Given the evidence of environment-related impacts on human rights, “human rights due diligence” should always be considered to refer to “human rights and environmental due diligence”. This has always been the case, but there is growing recognition that a healthy and safe environment is a necessary prerequisite of the full enjoyment of wide range of human rights.[[3]](#footnote-4) Moreover, the recognition of a freestanding human right to a healthy environment[[4]](#footnote-5) means that adverse impacts on the environment should be avoided regardless of whether there is an immediate or obvious effect on the human rights of an identified individual or group of people. Where we refer to respect for human rights in this response, therefore, we include respect for planetary boundaries. Where we refer to preventing and addressing human rights impacts, we include human rights and environmental impacts.

Against that context, **in order for “ESG in finance” to support, rather than undermine, respect for human rights standards and frameworks, claims by investors and their investment products to implement an “ESG” or “Sustainable” approach must entail respect for human rights and planetary boundaries in compliance with the framework established by the UN Guiding Principles.[[5]](#footnote-6)** This principle is recognised to some extent in the human rights-related safeguards built into the definitions of sustainable investment adopted in emerging EU legislation, such as the EU Taxonomy and Sustainable Finance Disclosure Regulation, but this is only a partial solution to a broader issue.

In the context of climate change specifically, this principle requires the adoption of an investment approach that is aligned with the transition to a low carbon economy necessary to deliver the goals of the Paris Agreement (i.e. consistent with achieving net zero by 2050 in line with credible emission pathways that limit warming to 1.5°C with no/low overshoot, with global emissions declining 50% by 2030[[6]](#footnote-7)). This approach to climate related human rights harm has been recognised generally by the UN Working Group in its 2023 Information Note on Climate Change and the Guiding Principles.[[7]](#footnote-8) The principle is also respected in some, but not all, transition plan regulation and guidance. The transition plan disclosures required pursuant to the climate European Sustainability Reporting Standard (ESRS) under the EU’s Corporate Sustainability Reporting Directive, for example, require reporting entities to disclose how their targets are compatible with limiting warming to 1.5°C in line with the Paris Agreement (and this concept of alignment is repeated throughout the climate ESRS). Similarly, the UN Expert Group on the net zero commitments of non-state entities (UN HLEG) recommends that net zero pledges should contain interim targets and plans to reach net zero in line with IPCC or IEA net zero greenhouse gas emissions modelled pathways that limit warming to 1.5°C with no or limited overshoot[[8]](#footnote-9). Unfortunately, other emerging frameworks are “ambition-neutral” and / or less prescriptive about the alignment of transition plans with the Paris Agreement goals.[[9]](#footnote-10)

As the UNFCCC Race to Zero campaign notes, transition plan regulation of this nature is rapidly emerging worldwide.[[10]](#footnote-11) However, such regulation is often framed or understood as relating to corporate practice on an “ESG” issue, and not as being linked to the fundamental responsibility of businesses (including financial institutions) to respect human rights. In our view, this distinction between “ESG” corporate practice, transition plan standards and the UNGP is unhelpful: in order to support compliance with the UN Guiding Principles, the transition plans of all entities should meet the standards set out above for alignment with international climate goals and credible net zero pathways. A non-aligned plan does not effectively mitigate the risk that an entity contributes to climate related adverse human rights impacts.

If this principle is not borne out in practice, the widespread labelling and marketing as “ESG” or “sustainable" of investment options that do not respect human rights or sustainability thresholds (such as 1.5°C) will distract from and impede necessary developments in the financial sector by (misdirecting) financial flows towards “non-compliant” investments. In this situation, retail investors with genuinely held sustainability preferences are also likely to be misled (implicating fair client communication and consumer protection rules in many jurisdictions).

However, “ESG” is interpreted in many different ways in the financial sector and often misunderstood. To highlight two significant misconceptions: (1) ESG investing (and ESG rating) is often more concerned with the risk posed by ESG factors to a financial institution’s or product’s financial returns and the management of that risk, and not with the impact of investment activity on people or the environment[[11]](#footnote-12); and (2) high performance in terms of a particular ESG factor or factor(s) is not generally understood to require or indicate compliance with the UN Guiding principles or respect for human rights and environmental thresholds more broadly[[12]](#footnote-13) (although this may change in light of the “minimum safeguards” concept emerging in EU legislation[[13]](#footnote-14)). These misunderstandings, and others, pose a serious challenge to the widespread adoption of the principle set out above.

1. Which are the main types of investors using ESG approaches, for example, in decision-making or engagements? On what basis are they making decisions on human rights, climate change and other related matters?
2. To what extent do ESG approaches present constraints or opportunities for investors and businesses overall?
3. **What responsibilities and capacity do ESG index and data providers have regarding the assessment of adverse human rights and environmental impacts, and how can ESG indexes and research products be improved to align with the UNGPs approach?**

It is important to note at the outset that index and data providers have their own human rights responsibilities just like any other business enterprise, and as such must prevent, mitigate and, where appropriate, remedy the human rights impacts with which they are involved (UN Guiding Principles 11 and 14). This basic principle applies to all index and data providers regardless of whether they or their products are labelled as “ESG”, “sustainable” or similar, and regardless of the methodologies that they apply. The rest of our response to this question raises more specific points.

Market indices play a key role in investment fund portfolio construction, particularly for “passive” fund strategies. Many indices (including but not limited to those labelled as “ESG”, “sustainable” or similar) apply human rights related exclusions or screens. A common approach is to exclude “*companies involved with controversies related to the UN Global Compact principles*”.[[14]](#footnote-15)

It is essential that such exclusions are effectively implemented in practice, and that the action taken by the index provider is effectively fed through into portfolio adjustments within investment funds using the index as a reference. Failure to do so puts investors interests at risk, and could result in communications and promotion of the index (and funds based on it) being misleading. However, we observe many instances in practice where the securities included in an index are hard to reconcile with the exclusions set out in the methodology, making this a key area for improvement.

It is key to this process that indices are genuinely responsive to new or ‘live’ human rights controversies and that clear communication is provided to clients regarding the implications. An example of this in practice is the removal of Adani Enterprises from Dow Jones sustainability indices following allegations of stock manipulation and accounting fraud at the company.[[15]](#footnote-16) MSCI was also urged to drop Adani bonds from its indices on the same basis.[[16]](#footnote-17) Similarly, the result of the recent communication[[17]](#footnote-18) by UN human rights experts to Saudi Aramco expressing their “*most serious concern regarding the adverse impacts on human rights caused by activities such as the exploitation of fossil fuels which contribute to climate change […] and how Saudi Aramco’s actions may contribute to undermining the Paris Agreement and international cooperation in the face of the existential threat to human rights posed by climate change*” should be that many indices operating human rights controversy-related exclusions automatically exclude Saudi Aramco and other key fossil fuel expander companies at the next opportunity for adjustment. Funds basing their investment portfolios on the index should follow suit.

Index providers should have the necessary infrastructure and processes in place to identify, react to and communicate this controversy to clients, and the necessary adjustments should not be contingent upon third party intervention from rights holders, CSOs or other stakeholders. If this process breaks down, index providers fail to meet the terms of their own methodologies, let alone their own human rights obligations. The result is a systematic failure in the investment industry (particularly among passive funds) to respond to the controversy as dictated by fund and human rights norms.

Though these principles apply regardless of how indices and funds are labelled, additional considerations apply to indices and funds labelled with terms such as “ESG”, “sustainable”, “green” or “ethical”. The burden on such indices and funds is not only to abide by their own terms, and meet their own human rights obligations, but to adopt a robust approach to environmental and human rights harms that is consistent with their labelling and marketing and stands up to objectively rooted external scrutiny. In practice, however, many indices and funds labelled ESG, green or even “low carbon” contain securities issued by companies which appear inconsistent with both the label and the fund or index’s own terms. For example, we have identified “low carbon” indices that include coal producers despite professing to operate a thermal coal exclusion policy.[[18]](#footnote-19) This inconsistency is then repeated at the fund level. Similarly, examining the shareholdings in Saudi Aramco reveals that many funds labelled as “ESG” or “Sustainable” hold shares in the company.

In our view, it should not be possible for a company whose fossil fuel expansion business model is incompatible with meeting the Paris climate goals and/or the subject of serious human rights concern from the UN to be considered either “Sustainable” or suitable for inclusion in an “ESG” fund strategy. The same issue arises for those industries heavily implicated in (often) illegal deforestation and associated human rights abuses, such as factory-farmed beef.[[19]](#footnote-20) The case is more compelling still where inclusion of the company appears incompatible with the fund’s own terms.

In such cases, there is a significant risk that sustainably-minded investors are misled, resulting in a misdirection of capital towards harmful activities in a system which should guard against the unwitting allocation of capital to activities associate with human rights and environmental harm.[[20]](#footnote-21) It is vital that rigour in this area is introduced through transparency requirements, minimum human rights criteria for labelled indices, and robust regulatory enforcement when things go wrong.

**State duty to protect human rights**

1. What State, regional, and international mechanisms and regulations exist to promote or restrict investment/financing using an ESG approach that takes human rights into account and how do they align with the UNGPs? How do these mechanisms and regulations promote or inhibit business respect for human rights consistent with the UNGPs?
2. To what extent do current regulations ensure adequate information and disclosure for investors adopting an ESG approach to understand human rights impacts of businesses?
3. **How can States encourage and regulate accurate communication of ESG practices by businesses and investors to prevent misleading or unsubstantiated claims regarding respect for human rights?**

Rules regulating the labelling of investment products, services and institutions as “ESG”, “sustainable”, “low-carbon” and the like can play an important role in promoting the clear and accessible communication of sustainability and ESG credentials if the rules support the principle explained in *General: Q1* above. However, labelling rules can also cause confusion and generate misleading claims if an “ESG” or “sustainable” label is able to apply to a product, service or institution which, though it may promote *certain* sustainability factors, is also responsible for adverse human rights or environmental impacts and or damage to *other* sustainability factors. Similarly, unsubstantiated or exaggerated positive impact claims (including via labelling) are likely to mislead.[[21]](#footnote-22) Legal concepts such as the “minimum safeguards” built into EU sustainable finance regulation may help address this risk, but it is important that any labelling regimes are carefully designed.

These risks are reflected in widespread concerns about “greenwashing” within sustainable finance. Concerns related to labelling are among those recognised by ESMA in its 2023 *Progress Report on Greenwashing* (see para. 58).[[22]](#footnote-23) Specific concerns frequently arise in relation to the marketing of: (a) green bonds, the proceeds of which are then applied to “non-green” activities or business models; and (b) sustainability-linked bonds that are issued by companies responsible for serious harm, including fossil fuel companies,[[23]](#footnote-24) and which have been found to contain structural loopholes that can undermine their sustainability commitments.[[24]](#footnote-25) ClientEarth, in collaboration with the Asia Investor Group on Climate Change, has published a guide on greenwashing for Asia’s finance industry which, among other things, provides a “typology” of greenwashing cases, which may be a useful source of further information.[[25]](#footnote-26)

Just as important as labelling rules are general purpose “anti-greenwashing rules” which mandate clear communications on sustainability and human rights matters that are evidence-based and can stand up to objective scrutiny. Open-textured rules of this nature may play a valuable route to accountability for misleading communications on these matters. In the UK, for example, the Financial Conduct Authority has consulted on the introduction of an anti-greenwashing rule to accompany investment labelling rules.[[26]](#footnote-27) In the US, the Securities and Exchange Commission (**SEC**) has recently adopted new rules targeting greenwashing by investment funds by requiring funds referencing ESG factors in their name to ensure that 80% of their portfolio assets align with these factors.[[27]](#footnote-28) It should also be noted that it should be already possible for regulators and affected stakeholders to take action under existing “fair client communication rules” which, though expressed broadly in terms of the obligation not to mislead, are as capable of applying to misleading sustainability or human rights claims, as to claims of any other nature. Regulators that fail to deploy these powers effectively may in some cases be guilty of a dereliction of duty if they fail to do their utmost to correct market failure.

It is important that, under labelling and anti-greenwashing rules, financial institutions are held to account both: (i) for not doing what they say they will do (e.g. not applying a human rights due diligence or exclusionary screening approach that they promised to investors in investment fund marketing); and (ii) when their ESG or human rights claims cannot stand up to any meaningful external scrutiny based on how such claims are likely to be understood by stakeholders (i.e. in relation to environmental harm and / or compliance with the UN General Principles: see our response to *General:Q1*).

It is also essential that regulators are empowered, mandated and resourced to enforce compliance with labelling and anti-greenwashing rules. Without this, the impact of the legal framework will be compromised in practice.

We recommend contacting the UN Race to Zero campaign for an understanding of best regulatory practice.

1. How can policies, programs, plans and activities in one State concerning regulation of investors in relation to human rights have potential or actual adverse or positive human rights impacts outside of their territory or jurisdiction?
2. **How can States better advance human rights-compatible regulation and policies concerning investors and financial institutions generally in a manner that fulfils their international legal obligation to protect human rights?**
* As recognised by the UN Working Group in relation to the EU Corporate Sustainability Due Diligence Directive[[28]](#footnote-29), states must implement mandatory human rights and environmental due diligence legislation with full inclusion of the financial sector so as to support, rather than undercut, compliance with the UN Guiding Principles and OECD Guidelines.
* Investors (i.e. financial institutions) of all types should be required to adopt and implement transition plans which are aligned with the goals of the Paris Agreement and the latest climate science to ensure that they address and do not exacerbate their contribution to climate-related human rights issues through investment activity. The regulatory framework should ensure alignment with credible pathways to net zero by 2050, include strong accountability measures, and facilitate assurance of transition plan disclosures to help uphold the rigour of plans developed and disclosed by institutions. Transition plan requirements should be explicitly rooted in the responsibility to respect human rights, in order to link them with the tried and tested methods and guardrails in the UN Guiding Principles. See further our response to *Corporate responsibility: Q3.*
* States should develop the legislative framework for domestic listing authorities and stock exchanges to impose checks and controls in relation to adverse human rights and environmental impacts (and associated disclosure requirements) at the point companies apply for access to domestic capital markets. See further our response to *Corporate responsibility: Q13*.
* See also our response to *State Duty: Q3* in relation to effective labelling and anti-greenwashing rules.
* Please see further:
	+ ClientEarth’s submission[[29]](#footnote-30) to the UK Government’s call for evidence in relation to the 2022/23 update to its green finance strategy for further suggestions of supporting policies and regulations, albeit in the UK context and with a particular focus on climate change.
	+ ClientEarth’s UK general election 2024 manifesto proposals[[30]](#footnote-31) for additional commentary regarding the need for mandatory science-aligned transition plans, and human rights and environmental due diligence laws in the UK.

**Corporate responsibility to respect human rights**

1. To what extent are investors aware of their responsibility to respect human rights? Are some types of investors more likely than others to align their practices with the UNGPs? Does it depend on the type of investor?
2. How effective are international instruments, institutions and guidance that promotes HRDD, such as by the UN Global Compact, Equator Principles, Principles of Responsible Investment, Investor Alliance for Human Rights, Business for Social Responsibility and other entities, effective in increasing awareness of human rights impacts among investors and other businesses? Please provide examples of participation, integration, or adherence of investors in these instruments and bodies.
3. **How should investors integrate human rights considerations throughout the investment process, including when constructing, underwriting, and/or investing in an ESG product or service? How do these steps vary for different asset classes?**

As noted in our response to *General: Q1*, all financial institutions should integrate respect for human rights and planetary boundaries into their policies, due diligence procedures, pre-investment and investment processes, and investment stewardship. Although this question is focused on “ESG products”, it is important to note at the outset that this fundamental responsibility applies to all financial institutions and products regardless of whether they are labelled as “ESG”, “sustainable” or similar.

We refer generally to the detailed discussion in A/HRC/47/39/Add.1 and the guidance provided in the OECD’s Responsible business conduct for institutional investors (2017) guidance on this topic, and note that a wealth of guidance on this topic exists, including in relation specifically to climate change.

That said, we wish to emphasise the specific point in relation to climate change related human rights impacts that investors (i.e. financial institutions) of all types should be required to adopt and implement transition plans which are aligned with the goals of the Paris Agreement and the latest climate science. Their transition plans should comprehensively address the institution’s investment activity based on theories of change for each asset class that are credible and explained in disclosure, they must be time bound with interim milestones, progress must be reported and investors must be accountable for the alignment of their plan, its credibility (on paper) and its implementation – essentially steps in line with the tracking steps in UN Guiding Principle 20. Among other things, a credible plan should include a policy not to fund or service fossil fuel expansion known to be inconsistent with Paris Agreement goals (at the project or corporate level), in line with the recommendations of the UN HLEG.

There is a high risk that any ESG or sustainability claims by an investor without such a plan in place are misleading in that they distract from and obscure the contribution of the investor to climate-related harms, while giving the impression of sustainability. See further our response to *General: Q1*.

1. To what extent do investors assess human rights risks and adverse impacts using a risk to right-holders lens as being separate from ESG materiality considerations or as part of a double materiality assessment? Are these integrated into an ESG approach and, if so, how? Please provide examples of practices.
2. **What does appropriate investor action entail in the event that a client or portfolio company causes or contributes to a potential or actual adverse human rights impact?**

See our response to *Corporate responsibility: Q6.*

1. **What leverage do investors have to address human rights and climate change issues, and how does it differ based on asset classes and investment types? How does investor leverage differ based on asset classes, stocks and bonds, and lending?**

We note that, in addition to building and using their leverage to influence other actors to prevent, mitigate and address negative human rights impacts with which they are directly linked, or to which they contribute, through their investment activities, investors may be required to play a direct role in remediating negative human rights impacts to which they contribute, or which they cause.[[31]](#footnote-32) It is, therefore, important that, in addition to using the types of leverage outlined below, investors develop and maintain processes for remediation.[[32]](#footnote-33)

Notably, there is known to be a continuum between contribution and linkage. An investor’s place on that continuum may depend on the extent to which they have enabled, encouraged, or motivated human rights harm by a borrower, investee or client, the extent to which they could or should have known about such harm; and the quality of any mitigating steps the investor has taken to address the harm. Failing to deploy leverage could therefore cause an investor to move from being linked to a harm to contributing to it.[[33]](#footnote-34)

The leverage available to investors will vary depending on the type of investor, asset class and financial instrument concerned. In all cases, as has been recognised by the UN PRI[[34]](#footnote-35), investors should use the full extent of their leverage to comply with their human rights responsibilities where they cause, contribute or are directly linked to adverse human rights impacts. This includes using all tools available in relation to capital allocation and investment screening, forceful and escalatory (where necessary) stewardship, voting and filing resolutions, collaborating in multi-stakeholder initiatives and (ultimately, where building and deploying leverage is impossible or futile, and a rationale has been identified) responsible divestment. It also includes dialogue with policy makers to support policy interventions that address human rights harms.

We have provided some non-exhaustive examples of the types of leverage various categories of investor may deploy below. Several of the examples of leverage apply specifically in the context of the adverse human rights impacts associated with climate change (and in this context based on the principle that Paris-alignment is essential to addressing such harms[[35]](#footnote-36)), but many apply in relation to other human rights and environmental harms:

**Banks:**

* + When providing any service e.g. advisory, loan financing or arranging / underwriting bond or equity issuances:
1. can set sector-specific financing policies that say they will not finance activities that are not Paris-aligned, for example projects and companies involved in projects for fossil fuel expansion (see [SBTi fossil finance paper](https://sciencebasedtargets.org/resources/files/The-SBTi-Fossil-Fuel-Finance-Position-Paper-Consultation-Draft.pdf) as an example which, among other things, would require investors to “*establish a policy to immediately cease new financial support to companies and projects that add to the unabated capacity of fossil fuel assets*”. See Table 1 on p.3). Similar principles would apply to projects and companies known to be misaligned with other planetary boundaries, or which are unable to demonstrate adequate respect for human rights.
2. can include in client risk management / due diligence processes a requirement for clients to provide and then implement a credible Paris-aligned transition plan, with the threat of withdrawal of financing or services from clients that fail to provide or implement such a plan.
	* When providing loans specifically:
3. should undertake human rights and environmental due diligence, set clear expectations regarding compliance with the UN Guiding Principles, impose appropriate financing conditions and otherwise exert their leverage over borrowers prior to providing financing.[[36]](#footnote-37)
4. can subject the terms of financing to changes depending on whether the borrower achieves pre-defined climate objectives to incentivise a “whole-of-firm” climate transition to net zero. Such loans have generally been labelled as “sustainability-linked” to date (see [Sustainability-Linked Loan Principles](https://www.lsta.org/content/sustainability-linked-loan-principles-sllp/)).

If a borrower fails to meet any one or more of those targets, then the borrower will be penalised – most commonly via an increase in the relevant interest rate from the point of failure onwards. On the other hand, meeting such targets can be incentivised through the promise of a reduction in the relevant interest rate from the point of success onwards.

1. can draft events of default such that acceleration of repayment will be triggered in certain circumstances linked to adverse climate-related human rights impacts. Such trigger events could include, for example, failure to provide to the bank a Paris-aligned climate transition plan by a particular date, failure to achieve relevant transition plan interim milestones or meet a pre-defined climate objective (see (1) immediately above), engagement in a new fossil fuel expansion project or exclusion from a relevant ESG index following a climate-related human rights controversy. These events of default can be supported by covenants requiring the periodic reporting of certain prescribed information from the borrower to the bank.[[37]](#footnote-38)
2. can include an appropriately drafted illegality clause allowing for the termination of a lending facility where the borrower is the subject of an adverse climate-related regulatory penalty (e.g. in relation to greenwashing).[[38]](#footnote-39)
	* Have stronger leverage when acting together with other banks (e.g. multiple banks in a syndicated loan) to make additional demands of clients to ensure they are credibly aligning with the Paris Agreement.

**Bond investors:**

* + Provide sizeable capital which is essential for companies’ cashflow, and therefore have significant leverage over investee companies and their practices.[[39]](#footnote-40) Bond investors can use the leverage they have to set expectations of management as conditions for providing capital at both debt origination and on an ongoing basis, including as regards the investee’s respect for human rights in line with the UN Guiding Principles.[[40]](#footnote-41)
	+ Have particularly strong leverage: (i) when the company is issuing the bond and seeking to raise capital from the investor; and (ii) when the company is seeking to refinance - or roll over - that debt, and is therefore asking the investor to reinvest.[[41]](#footnote-42) The investor has the opportunity to place conditions on that reinvestment.[[42]](#footnote-43)
	+ May be able to exercise some of the same influence in relation to government and sovereign bonds.[[43]](#footnote-44)
	+ Have the (currently untapped[[44]](#footnote-45)) potential to require, as a condition of financing, that the bond documentation include covenants which set out commitments or restrictions (for example regarding harmful practices or activities) with agreed targets (for example in relation to actual emission reductions)[[45]](#footnote-46) with consequences of breach (for example penalties or repayment of the debt).[[46]](#footnote-47) Such covenants can provide an accountability mechanism so that the investor can hold the issuer to account over the life of the bond.

**Equity investors (including investors in listed equities):**

* + Should formalise and communicate their human rights expectations with portfolio companies, potential investees and where relevant their external asset managers prior to making investment decisions.[[47]](#footnote-48)
	+ Can conduct human rights and environmental due diligence or research prior to investment and use the results to inform capital allocation decisions and investment screens, exclusions and tilting / weightings either in relation to high risk sectors or activities or particular human rights or environmental impacts that are identified. This may include testing a potential investee’s processes for human rights compliance.[[48]](#footnote-49) This may reduce the risk of the investor causing, contributing or being directly linked to a harm. On a coordinated basis in relation to primary capital raising, there are potential knock-on implications for access to capital for companies with a poor human rights record.
	+ When a large or controlling stake in an investee company is taken (such as in private equity strategies) may in some cases be able to impose human rights and environmental criteria and controls in investment negotiations with company management, and / or exert influence through presence on the company board post-investment.[[49]](#footnote-50)
	+ Can use forceful engagement to encourage companies to improve their human rights and environmental practices. However, it is crucial that such engagement is meaningful, based on clear criteria for prioritisation and escalation, has defined milestones, and that progress is measured and reported.[[50]](#footnote-51) For asset owners, engagement with external asset managers (including criteria for their selection, appointment and monitoring) is key so that they can use their leverage as clients of the asset manager to drive improvements in the human rights and environmental approach taken to managed investment portfolios.[[51]](#footnote-52)
	+ Can make effective use of ownership rights, including voting rights. Proposing or supporting shareholder resolutions in relation to human rights and environmental topics may be essential to encourage companies to improve their compliance with the UN Guiding Principles and / or their responses to identified human rights or environmental impacts, and to protect long term value in the interests of investors.[[52]](#footnote-53) A clear policy on voting on human rights and sustainability issues and effective implementation of the policy in practice are essential tools. Clear disclosure of voting positions, rationales and results are also important to investors and other stakeholders monitoring the rigour and impact of the investor’s approach.
	+ In some cases may need to turn to responsible / selective divestment where there are no other effective opportunities to exert leverage or efforts have failed (or where applicable exclusions or investment policies dictate).[[53]](#footnote-54) In some cases where a corporate’s core business activity is known to contribute to human rights harms and / or jeopardise planetary boundaries, it may be appropriate to exclude certain activities from investment and divest existing holdings if businesses cannot be persuaded to transition (see [SBTi fossil finance paper](https://sciencebasedtargets.org/resources/files/The-SBTi-Fossil-Fuel-Finance-Position-Paper-Consultation-Draft.pdf) as an example). This may apply equally to other types of investor and asset class, in line with the OECD’s guidance on considering divestment and exclusion for institutional investors.[[54]](#footnote-55)

In all cases, the ability of investors to exert leverage through collaborative initiatives and through policy engagement / advocacy to create a favourable legal / policy environment should be remembered. This may be more important for investors that lack leverage over investee companies due to the nature of their investment strategy (e.g. passive investment in listed equities through minority shareholdings). Equally, lobbying activity which appears inconsistent with human rights or environmental improvements should be carefully scrutinised.

In relation to the exercise of ownership rights by equity investors, however, there is concerning evidence that the largest asset managers in the world are hesitant to back action-orientated resolutions on environmental and social issues and may be impeding progress. In its 2022 *Voting Matters* report, for example, ShareAction found that, on average, the four largest asset managers in the world supported just 20% of environmental and social resolutions. Their support for environmental resolutions at energy companies fell between 2021 and 2022, and they were found to vote more conservatively than the advice of their proxy advisors (ISS and Glass Lewis).[[55]](#footnote-56) In this area the risk that investors are not fully using available leverage appears to be high. Scrutiny in this area should also cover investors’ (un)willingness to oppose routine / traditional votes on company accounting and director reappointment etc. when human rights failings are identified. In the climate context, there are suggestions that investors rarely vote against the directors of climate laggards identified by the CA100+ investor coalition, even when the polluting companies refuse to act.[[56]](#footnote-57)

1. **What provisions can be included in contracts or investment agreements to encourage respect for human rights? Can technological devices like Blockchain assist in this regard?**

To take one specific example, human rights, sustainability and environmental requirements could be built into the investment mandate between asset owners and their external asset managers, to empower and require the asset managers to exert leverage over companies in line with such requirements, whereas they currently cite inconsistency with financial return objectives as a barrier to more progressive engagement. The UK Asset Owner Roundtable recently announced a research project on voting alignment between asset owners and their asset managers, in response to concerns that short term interests are delaying action on climate change to the detriment of the long term interests of pension funds.[[57]](#footnote-58) Ultimately, development of the contractual relationships involved may be a useful tool to promote the desired alignment.

1. **In what circumstances should investors refrain from making ESG-related investments in view of potential risks of adverse human rights impacts?**

See out comments in *Corporate responsibility: Q6* regarding the adoption of policies against financing or servicing activities known to be incompatible with the Paris Agreement climate goals, or other planetary boundaries.

1. **How can investors best provide transparency in their disclosures about their practices which are, or are not, in alignment with the UNGPs?**

We refer the Working Group to BankTrack’s [Global Human Rights Benchmark 2022](https://www.banktrack.org/download/global_human_rights_benchmark_2022/global_human_rights_benchmark_2022_2.pdf) in relation to human rights related reporting by banks. Among various issues observed in the report is the fact that reporting on the occurrence of *specific* human rights impacts is very poor. BankTrack found that the majority of banks (31 out of 50, or 62%) did not achieve any score on this criterion (76% in the 2019 benchmark). It is essential that disclosure enables the adequacy of a financial institution’s response to particular occurrences of human rights impacts to be assessed, and this needs to be improved.

The OECD Guidelines for Multinational Enterprises (as updated in 2023), provide that companies should disclose *“the enterprise’s identified areas of significant impacts or risks, the adverse impacts or risks identified, prioritised and assessed, as well as the prioritisation criteria*” (Section III, para. 3(d)) and “*the actions taken to prevent or mitigate the risks or impacts identified*” (Section III, para. 3(e)). The clear implication is that enterprises should disclose not just the policies and processes they have in place to identify and address negative human rights impacts, but the high risk areas in their business operations, any specific human rights risks identified, any specific occurrences of such risks, and the response of the enterprise. This is necessary to comply with UN Guiding Principle 21, and the “know and show” principle explained in the commentary to it.

*See further our response to State Duty: Q3*. It is essential that investors: (a) do what they say they will do in relation to human rights, the environment and UN Guiding Principles compliance; and (b) understand the implications of any public claims about adherence to the UN Guiding Principles, Paris- or net zero-alignment etc. If their practices / investments are demonstrably inconsistent with such claims, they risk misleading their clients and stakeholders and the associated legal risks related to greenwashing.

In the context of climate change, it is also important that investors disclose transition plans which are aligned with credible net zero pathways and that their disclosures are sufficiently detailed and rigorous to enable a detailed assessment of what they plan to do, what they go on to do in practice (i.e. implementation), and whether it is sufficient. See our comments elsewhere in this response regarding the human rights implications of failing to develop and implement a Paris-aligned transition plan.

1. **Explain the differences and similarities of ESG approaches, including their approaches to human rights risks, with the human rights-based approach set out by the UNGPs?**

See our response to *General: Q1*.

1. Is the role of consultation with stakeholders, such as the local communities, women and Indigenous peoples, the same for an ESG approach and an approach set out by the UNGPs and, if not, in what way do they differ? What expectations and/or challenges do investors face in undertaking meaningful stakeholder consultation?
2. How should investors take gender-responsive, disability-responsive, and intersectional-responsive approaches? How should investors take a heightened human rights due diligence approach in conflict affected areas?
3. **Are there any roles which stock exchanges could play in ensuring investors, and the businesses in which they invest, respect human rights?**

In relation to both ESG and human rights, there is huge focus on implementing effective disclosure and due diligence rules which apply to listed companies. As we have commented elsewhere[[58]](#footnote-59), however, stock exchanges and listing authorities are missing the opportunity to intervene at the point when they have most leverage over regulated companies – when companies apply for access to the world’s capital markets. By acting as effective gatekeepers and integrating environmental and human rights requirements *at the point companies apply to list securities on the market*, listing authorities and stock exchanges could use the full extent of their leverage to control the exposure of investors to human rights and environmental harms caused by companies benefiting from market access.

In practice, despite listing authorities and stock exchanges having typically having powers to intervene in a listing to protect investors from detriment, listing requirements appear as a rule to be applied in a relatively formulaic manner. Companies with damaging (in environmental or human rights terms) business models are routinely able to list their securities, attracting new capital investment. It falls to rightsholders and CSOs to challenge this state of affairs from the “outside” if listing authorities and exchanges do not use the full extent of their gatekeeping powers.

This dynamic can be seen in the strong recent opposition to the plans of JBS, the world’s largest meatpacking business, to IPO on the New York Stock Exchange. CSOs including Mighty Earth and Rainforest Action Network have filed complaints about the listing with US regulators, citing human rights and environmental concerns, illegality and deforestation in the supply chain and associated greenwashing.[[59]](#footnote-60) The complaints call on the SEC to consider whether the IPO should be given approval to proceed given the concerns identified.

At one extreme, listing authorities and exchanges could refuse market access for companies known to cause or contribute to severe human rights and environmental harms, and there have been calls in some jurisdictions to ban fossil fuel listings specifically.[[60]](#footnote-61) Regulators could also treat such listings as “high risk” and impose proportionate conditions on the company before it is permitted to list. For example, by requiring the company to demonstrate an effective human rights framework and concrete plans to address any known human rights impacts. In the climate context, fossil fuel companies could be required to produce Paris-aligned transition plans.

Regulators also have a key role in prospectus approval in many jurisdictions. In the UK and EU, for example, prospectus are required to contain the information investors need to make informed investment decisions, and must disclose risk factors and explain their materiality and how they affect the business. It is at least arguable that, under such requirements, regulators must ensure that human rights and environmental harms, and the related risk to the company, are fully and transparently disclosed to investors prior to listing, and hold up approval of any marketing documents that do not meet this test. Where any omissions are misleading, the company and preparers of the prospectus may also be liable to investors that suffer loss as a result. However, in the event that these rules are not applied rigorously in practice, new explicit legal requirements may help enhance the approach taken by regulators to human rights and environmental issues arising at prospectus approval.

Any requirements of this nature could be supported by guidance for applicant companies to help them adapt, which explicitly covers established human rights frameworks and processes.

**Access to remedy**

***State-based judicial and non-judicial mechanisms***

1. What steps have States taken to investigate, punish, and redress business-related human rights abuses connected to investors, and how effective are they? What challenges and opportunities for participation by affected stakeholders and/or redress have you observed?
2. Please provide examples of cases submitted to State-based judicial and/or non-judicial mechanisms regarding investors in the context of business-related human rights and environmental abuses. How effective are these in providing remedies to the victims and how can they be improved?

***Non-State based mechanisms***

1. What remediation responsibilities should investors have? Should these responsibilities vary depending on the nature of the responsibility e.g. cause, contribute to, or be directly linked to the adverse human rights impact? Should it vary depending on the sector invested or the type of investment activity?
2. **What measures and mechanisms, including grievance mechanisms, should be provided at the investment-level that enable individuals or communities affected by the business in which the investor has invested (e.g. the portfolio company) to report adverse human rights impacts to the investor and seek effective remedy for human rights and environmental abuses? How effective are these in providing remedies to the victims? Please provide examples of business or industry association actions in this area.**

Investors should provide an effective grievance mechanism, but this represents a failing in practice in the financial sector.

We refer the Working Group to BankTrack’s [Global Human Rights Benchmark 2022](https://www.banktrack.org/download/global_human_rights_benchmark_2022/global_human_rights_benchmark_2022_2.pdf) which noted that at the time only 2 out of 50 banks analysed had set up a grievance mechanism (although this appears to have improved since then).

An example of why grievance mechanisms at the investor level are so necessary is a human rights complaint submitted by Tiwi Islanders to [15 banks and export credit agencies](https://equitygenerationlawyers.com/human-rights/#banks) and [20 superannuation funds](https://equitygenerationlawyers.com/human-rights/#super) for financing or investing in Santos, in light of its Barossa offshore gas project. The [summary of responses received](https://equitygenerationlawyers.com/human-rights/#responses), with all banks dismissing or not responding to the requests in the grievance and a lack of information sharing with the complainants, show the ineffectiveness of these current grievance processes.

**Good practices**

1. Please provide examples of any good practices, tools, guidance, policies, etc., regarding the integration of the responsibility to respect human rights by investors, including examples of investors actively preventing or mitigating (including by using leverage or undertaking a responsible exit) any adverse human rights and environment impacts of the businesses in which they invest.
2. **Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National Human Rights Institutions that would assist in ensuring that investors act compatibly with the UNGPs?**

For investors in relation to climate-related human rights impacts: in light of the recent [UN Communications](https://spcommreports.ohchr.org/TmSearch/RelCom?code=SAU%203/2023) regarding Saudi Aramco’s financiers and the human rights impacts associated with an oil and gas company expanding fossil fuels (i.e. companies that are not Paris-aligned), ClientEarth suggests that a red line should be recommended that investors should not finance / invest in projects or companies involved in projects which pursue fossil fuel expansion. This would help ensure they are not contributing to those impacts and are using their leverage over the company to prevent those impacts. The Science Based Targets Initiative (SBTi) has recently [proposed](https://sciencebasedtargets.org/resources/files/The-SBTi-Fossil-Fuel-Finance-Position-Paper-Consultation-Draft.pdf) such a policy for financial institutions, as the best available science shows that warming will not be limited to 1.5°C if further fossil fuel expansion is permitted.

Similar principles would apply in relation to investments known to be incompatible with other planetary boundaries, the breaching of which would be associated with human rights impacts. A recent study has shown that six of the nine known planetary boundaries are already transgressed.[[61]](#footnote-62) Investors in any business activity known to contribute to the breaching of these boundaries must consider the consistency of the investment with both their human rights obligations and any “sustainability” claims they have made.

**Any other comments or suggestions about the forthcoming report are also welcome.**

We note that the current report expressly excludes insurance companies from its scope. However, it is vital that the Working Group in future considers the implementation of the UN Guiding Principles and the relationship between ESG and human rights within the insurance sector, as the provision of insurance cover to businesses which are not acting in conformity with the UN Guiding Principles can play a crucial role in enabling those businesses to operate in ways that have actual and potential adverse human rights and environmental impacts.[[62]](#footnote-63) In addition, there is a concerning lack of transparency in the insurance sector, as insurers typically do not disclose their relationships with companies and projects that pose serious human rights and environmental risks, and in particular do not disclose the kind of information on the significant adverse impacts or risks identified, prioritised and assessed outlined in our response to question *Corporate responsibility: Q9* above. This makes it difficult for stakeholders to engage with insurers on their due diligence processes and on the adverse impacts which they contribute to or to which they are directly linked.

**If you wish to discuss anything in this submission, please contact:**

Robert Clarke

Lawyer

rclarke@clientearth.org

[www.clientearth.org](http://www.clientearth.org)

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Beijing** | **Berlin** | **Brussels** | **London** | **Los Angeles** | **Luxembourg** | **Madrid** | **Warsaw** |
| ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a non-profit limited liability company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered foundation in Poland, Fundacja “ClientEarth Prawnicy dla Ziemi” , KRS 0000364218, NIP 7010254208, a registered delegation in Spain, Fundación ClientEarth Delegación en España, NIF W0170741C, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836, a registered subsidiary in Japan, Ippan Shadan Hojin ClientEarth, corporate number 6010405022079, a registered subsidiary and company limited by guarantee in Australia, ClientEarth Oceania Limited, company number 664010655​. |

1. See, for example, [Statement-Financial-Sector-WG-business-12July2023.pdf (ohchr.org)](https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Statement-Financial-Sector-WG-business-12July2023.pdf). [↑](#footnote-ref-2)
2. See UN Guiding Principles 11 and 19 and the detailed discussion in [A/HRC/47/39/Add.1](https://www.ohchr.org/en/special-procedures/wg-business/reports). [↑](#footnote-ref-3)
3. In 2019, for example, the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment noted that “*Climate change is having a major impact on a wide range of human rights today, and could have a cataclysmic impact in the future unless ambitious actions are undertaken immediately. Among the human rights being threatened and violated are the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self -determination, development and culture*.” (see para. 26 of A/74/161). [↑](#footnote-ref-4)
4. See A/HRC/48/L.23/Rev.1. See also paras. 4 and 5 of [Information-Note-Climate-Change-and-UNGPs.pdf (ohchr.org)](https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf). [↑](#footnote-ref-5)
5. And elaborated by the OECD in its Guidelines for multinational enterprises (updated in 2023 and available [here](https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en)) and 2017 guidance for institutional investors on responsible business conduct, available here: [RBC-for-Institutional-Investors.pdf (oecd.org)](https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf). [↑](#footnote-ref-6)
6. See p.15 of UN Expert Group’s [report](https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf) on the net zero commitments of non-state actors. [↑](#footnote-ref-7)
7. The UN Working Group’s 2023 Information Note on Climate Change and the Guiding Principles is available [here](https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf). [↑](#footnote-ref-8)
8. See FN3. [↑](#footnote-ref-9)
9. The IFRS S2 climate disclosure standard (available [here](https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s2-climate-related-disclosures/)) developed by the International Sustainability Standards Board (ISSB) requires, in para. 14, entities to disclose information about “*any climate-related transition plan the entity has, including information about key assumptions used in developing its transition plan, and dependencies on which the entity’s transition plan relies*”, without specifying that the transition plan disclosed should be aligned with 1.5°C or any other temperature pathway or goal. Similarly, the Disclosure Framework published by the UK’s Transition Plan Taskforce in October 2023 (available [here](https://transitiontaskforce.net/wp-content/uploads/2023/10/TPT_Disclosure-framework-2023.pdf)) requires entities to disclose, in Disclosure Sub-Element 1.1, the extent to which they have “*taken into account and aligned with any external requirements, commitments, science-based targets, transition pathways, roadmaps, or scenarios*” in developing the Strategic Ambition of their transition plans, without specifying that transition plans should be aligned with particular targets and pathways such as 1.5°C. [↑](#footnote-ref-10)
10. *“Net zero transition plans are also increasingly required, either explicitly, or as part of more general disclosure requirements. Such plans – which articulate an organisation’s transition goals, the specific actions they will take, and the accountability mechanisms they will implement to ensure their plans are credible - are a critical tool for helping real-economy firms, with support of governments and the financial sector, to decarbonize their business activities and scale climate solutions”* (Page 14, [R2Z-Pivot-Point-Report.pdf (unfccc.int)](https://climatechampions.unfccc.int/wp-content/uploads/2022/09/R2Z-Pivot-Point-Report.pdf)) [↑](#footnote-ref-11)
11. Cf. para. 15 of [A/HRC/47/39/Add.1](https://www.ohchr.org/en/special-procedures/wg-business/reports). [↑](#footnote-ref-12)
12. See para. 16 of [A/HRC/47/39/Add.1](https://www.ohchr.org/en/special-procedures/wg-business/reports). [↑](#footnote-ref-13)
13. As suggested in paras. 81-82 of [A/HRC/47/39](https://www.ohchr.org/en/special-procedures/wg-business/reports). [↑](#footnote-ref-14)
14. See, purely by way of example, The FTSE ESG Low Carbon Select Index Series index overview, available [here](https://content.ftserussell.com/sites/default/files/ftse_esg_low_carbon_select_index_overview.pdf) (p.3). [↑](#footnote-ref-15)
15. As [reported](https://www.cnbc.com/2023/02/03/sp-to-remove-adani-enterprises-from-sustainability-index.html) by CNBC and others in February 2023. [↑](#footnote-ref-16)
16. [MSCI urged to drop Adani bonds from indices - Adani Toxic Bonds Adani Toxic Bonds](https://adanitoxicbonds.org/2023/03/27/msci-urged-to-drop-adani-bonds-from-indices/). [↑](#footnote-ref-17)
17. The 26 June communication from UN human rights experts to Saudi Aramco is available [here](https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28094). [↑](#footnote-ref-18)
18. See also the civil penalty proceedings commenced by the Australian securities regulator ASIC against Vanguard Investments Australia in relation to claims made about ESG screens applied to the Vanguard Ethically Conscious Global Aggregate Bond Index Fund (Hedged). The fund was marketed to investors seeking an ethically conscious investment screen, including a fossil fuel exclusion mentioned in fund marketing material. However, based on a reference index called Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index, the fund contained securities issued by companies that violated the applicable ESG criteria, including companies with ties to fossil fuels, including ADCOP and Chevron Phillips Chemical Co. LLC: [23-196MR ASIC commences greenwashing case against Vanguard Investments Australia | ASIC](https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-196mr-asic-commences-greenwashing-case-against-vanguard-investments-australia/). [↑](#footnote-ref-19)
19. See, for example, ClientEarth’s complaint to the US OECD contact point regarding Cargill’s failure to adequately address its contribution to soy-driven deforestation and human rights violations in Brazil: [Agricultural giant Cargill faces legal complaint over deforestation and human rights failings in Brazil  | ClientEarth](https://www.clientearth.org/latest/press-office/press/agricultural-giant-cargill-faces-legal-complaint-over-deforestation-and-human-rights-failings-in-brazil/). [↑](#footnote-ref-20)
20. Note that the European Supervisory Authorities, including ESMA, have recognised this concern. ESMA’s [*Progress Report on Greenwashing*](https://www.esma.europa.eu/sites/default/files/2023-06/ESMA30-1668416927-2498_Progress_Report_ESMA_response_to_COM_RfI_on_greenwashing_risks.pdf)(31 May 2023) recognises that “benchmark administrators” may trigger as well as spread misleading claims, including when “*the actual companies composing a benchmark are different from stakeholders’ expectations, this can create a perception of greenwashing*” (Section 4.5, pp. 47-54). [↑](#footnote-ref-21)
21. On impact claims, see: [Market review of environmental impact claims of retail investment funds in Europe - 2DII (2degrees-investing.org)](https://2degrees-investing.org/resource/market-review-of-environmental-impact-claims-of-retail-investment-funds-in-europe/#:~:text=Our%20headline%20results%20are%20as,a%20substantial%20potential%20legal%20risk.). [↑](#footnote-ref-22)
22. ESMA’s [*Progress Report on Greenwashing*](https://www.esma.europa.eu/sites/default/files/2023-06/ESMA30-1668416927-2498_Progress_Report_ESMA_response_to_COM_RfI_on_greenwashing_risks.pdf)(31 May 2023) is available [here](https://www.esma.europa.eu/sites/default/files/2023-06/ESMA30-1668416927-2498_Progress_Report_ESMA_response_to_COM_RfI_on_greenwashing_risks.pdf). [↑](#footnote-ref-23)
23. See, for example, [Fears rise over ‘greenwash’ bonds | Financial Times (ft.com)](https://www.ft.com/content/178449a7-8897-4359-b23a-e85524c3e227) and the 2023 complaint by Mighty Earth to the SEC regarding the issuance of sustainability-linked bonds by JBS, which Mighty Earth alleged were marketed on the basis of misleading disclosures: [Mighty Earth files complaint with US Securities and Exchange Commission against JBS ‘green bonds’ - Mighty Earth](https://www.mightyearth.org/whistleblower-complaint-to-the-securities-and-exchange-commission-against-jbs/#:~:text=The%20complaint%20cites%20the%20official,97%25%20of%20the%20company%27s%20footprint.). [↑](#footnote-ref-24)
24. World Bank IFC, [*Structural loopholes in Sustainability-Linked Bonds*](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4114616) [↑](#footnote-ref-25)
25. See Table 1 of ClientEarth’s [*Greenwashing and how to avoid it*](https://www.clientearth.org/media/c0ah51z1/v8_clientearth_hires_250423.pdf) (2023) report. [↑](#footnote-ref-26)
26. See FCA Consultation Paper [CP22/20](https://www.fca.org.uk/publication/consultation/cp22-20.pdf), and ClientEarth’s [response](https://www.clientearth.org/latest/documents/response-to-fca-cp22-20-on-sustainability-disclosure-requirements-sdr-and-investment-labels/). [↑](#footnote-ref-27)
27. See [SEC.gov | SEC Enhances Rule to Prevent Misleading or Deceptive Fund Names](https://www.sec.gov/sec-enhances-rule-prevent-misleading-or-deceptive-fund-names). [↑](#footnote-ref-28)
28. See [Statement-Financial-Sector-WG-business-12July2023.pdf (ohchr.org)](https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Statement-Financial-Sector-WG-business-12July2023.pdf). [↑](#footnote-ref-29)
29. ClientEarth’s response is available here: [Update to Green Finance Strategy: Call for Evidence by HM Government (clientearth.org)](https://www.clientearth.org/media/kimpe2qy/update-to-green-finance-strategy-clientearth-response-to-hm-government-call-for-evidence.pdf). [↑](#footnote-ref-30)
30. ClientEarth’s UK general election 2024 proposals are available [here](https://www.clientearth.org/media/cddjgfod/uk-manifesto-2023.pdf). [↑](#footnote-ref-31)
31. See para. 20 of [A/HRC/47/39/Add.1](https://www.ohchr.org/en/special-procedures/wg-business/reports). See also Figure 1, p.35 in the OECD’s *Responsible business conduct for institutional investors* (2017) guidance, available [here](https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf). [↑](#footnote-ref-32)
32. However, we note that BankTrack has recently found that “*the vast majority of banks (36 out of 50, or 72%) are still reluctant to address the topic of remediation, and fail to show that they are willing to play any role at all in remediating adverse human rights impacts that they are linked to through their business operations*.” See p.44 of BankTrack’s 2022 human rights benchmark, [here](https://www.banktrack.org/download/global_human_rights_benchmark_2022/global_human_rights_benchmark_2022_2.pdf). [↑](#footnote-ref-33)
33. See the comments to this effect from Professor John Ruggie in [Thun\_Final.pdf (business-humanrights.org)](https://media.business-humanrights.org/media/documents/files/documents/Thun_Final.pdf), which are reiterated on the UN Working Group’s July 2023 statement on the financial sector and the EU’s Corporate Sustainability Due Diligence Directive, available [here](https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Statement-Financial-Sector-WG-business-12July2023.pdf). [↑](#footnote-ref-34)
34. See UN PRI, *Why and how investors should act on human rights* (2020), [here](https://www.unpri.org/human-rights/why-and-how-investors-should-act-on-human-rights/6636.article). See also the detailed discussion in [A/HRC/47/39/Add.1](https://www.ohchr.org/en/special-procedures/wg-business/reports) and the guidance provided in the OECD’s *Responsible business conduct for institutional investors* (2017) guidance, available [here](https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf). [↑](#footnote-ref-35)
35. See the UN Working Group’s 2023 Information Note on Climate Change and the Guiding Principles, available [here](https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf). [↑](#footnote-ref-36)
36. We note the comments of John Ruggie, the main author of the UN Guiding Principles of Business and Human Rights, [here](https://media.business-humanrights.org/media/documents/files/documents/Thun_Final.pdf) where he suggests that banks providing loans to companies alleged to engage in human rights abuses ought to require a “*very deep dive by the bank, coupled with the imposition of strict conditions if it decides to go ahead with the loan*.” [↑](#footnote-ref-37)
37. See the comments of John Ruggie referred to in footnote 36 regarding the imposition of “*strict conditions*”. [↑](#footnote-ref-38)
38. In this regard, we note the sustainable finance framework recently introduced by the Bangko Sentral ng Pilipinas and applicable to the banking sector in the Philippines. Circular No. 1149 (Series of 2022) on the ‘*Guidelines on the Integration of Sustainability Principles in Investment Activities of Banks*’ requires banks to refrain from investing in companies engaged in greenwashing and to consider an exit strategy for sustainable investments with high environmental and social risks. See pp. 3 and 5 [here](https://www.bsp.gov.ph/Regulations/Issuances/2022/1149.pdf). [↑](#footnote-ref-39)
39. A useful exposition regarding the scale of bond capital and bondholder influence is provided in the IIGCC Net Zero Bondholder Stewardship Guidance, available [here](https://139838633.fs1.hubspotusercontent-eu1.net/hubfs/139838633/Past%20resource%20uploads/IIGCC-Net-Zero-Stewardship-Guidance.pdf), at p.4 onwards [↑](#footnote-ref-40)
40. Ibid. [↑](#footnote-ref-41)
41. Hoepner, A. et al., *Exit vs Voice vs Denial of (Re)Entry: Assessing Investor Impact Mechanisms on Corporate Climate Transition*, available [here](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4193465) [↑](#footnote-ref-42)
42. Ibid. at p.12 and IIGCC *Net Zero Bondholder Stewardship Guidance*, available [here](https://139838633.fs1.hubspotusercontent-eu1.net/hubfs/139838633/Past%20resource%20uploads/IIGCC-Net-Zero-Stewardship-Guidance.pdf), at p.16-17 [↑](#footnote-ref-43)
43. UN PRI, *ESG Engagement for sovereign debt investors*, available [here](https://www.unpri.org/sovereign-debt/esg-engagement-for-sovereign-debt-investors/6687.article) [↑](#footnote-ref-44)
44. For example, see investor commentary (from Aviva) on the untapped potential of bondholder engagement commentary [here](https://www.avivainvestors.com/en-gb/views/aiq-investment-thinking/2022/01/bondholder-engagement/) [↑](#footnote-ref-45)
45. IIGCC *Net Zero Bondholder Stewardship Guidance*, available [here](https://139838633.fs1.hubspotusercontent-eu1.net/hubfs/139838633/Past%20resource%20uploads/IIGCC-Net-Zero-Stewardship-Guidance.pdf), at p.17 [↑](#footnote-ref-46)
46. Curtis, Q. et al., *Green Bonds Empty Promises*, available [here](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350209), including at p.42, and Corke et al., *Green Bonds Series: Part 4 - When ‘Green’ Bonds go Brown*, [Lexology October 17, 2019](https://www.lexology.com/library/detail.aspx?g=0a6503d3-d4ff-44fc-ab2b-5166c157f630) [↑](#footnote-ref-47)
47. See p.19-21 of the Investor Alliance for Human Rights [*Investor Toolkit on Human Rights*](https://investorsforhumanrights.org/sites/default/files/attachments/2020-05/Full%20Report-%20Investor%20Toolkit%20on%20Human%20Rights%20May%202020c.pdf). [↑](#footnote-ref-48)
48. See p. 21-25 of the Investor Alliance for Human Rights [*Investor Toolkit on Human Rights*](https://investorsforhumanrights.org/sites/default/files/attachments/2020-05/Full%20Report-%20Investor%20Toolkit%20on%20Human%20Rights%20May%202020c.pdf). See also p.13 of the UN PRI’s note [*Why and How Investors Should Act on Human Rights*](https://www.unpri.org/download?ac=11953)*,* and Table 1 in the OECD’s *Responsible business conduct for institutional investors* (2017) guidance, available [here](https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf). [↑](#footnote-ref-49)
49. See the *Investor Actions* table on p.32 of the OECD’s *Responsible business conduct for institutional investors* (2017) guidance, available [here](https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf). [↑](#footnote-ref-50)
50. The Paris Aligned Investment Initiative’s *Net Zero Investment Framework* is one of many sources of guidance on robust engagement: [Net\_Zero\_Investment\_Framework\_final.pdf (parisalignedassetowners.org)](https://www.parisalignedassetowners.org/media/2021/10/Net_Zero_Investment_Framework_final.pdf). [↑](#footnote-ref-51)
51. The UN convened Net Zero Asset Owner’s Alliance has stated that this is one of the most important tools available to Asset Owners in a climate context, and has provided specific guidance on engagement with external asset managers: [16 Elevating Climate Diligence 2.pdf (unepfi.org)](https://www.unepfi.org/wordpress/wp-content/uploads/2021/04/16-Elevating-Climate-Diligence-2.pdf). [↑](#footnote-ref-52)
52. See the *Investor Actions* table on p.32 of the OECD’s *Responsible business conduct for institutional investors* (2017) guidance, available [here](https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf). In a climate / net zero context, see also p.19 of the UN convened Net Zero Asset Owner’s Alliance’s Target Setting Protocol (3rd Ed.), which highlights that “*effectively connecting engagement activities with proxy voting is critical. Where applicable, Alliance members should transparently explain how proxy voting is systematically employed to align with*

*their net-zero commitment. This should include an explanation of how votes are used to hold companies accountable when they are not making satisfactory progress to address climate change or support climate change mitigation*.” [↑](#footnote-ref-53)
53. This approach is endorsed, for example, in the Paris Aligned Investment Initiative’s *Net Zero Investment Framework*. See p.19. [↑](#footnote-ref-54)
54. From p.39 of the OECD’s *Responsible business conduct for institutional investors* (2017). [↑](#footnote-ref-55)
55. See the ‘General Findings’ of ShareAction’s 2022 *Voting Matters* study for more information, [here](https://shareaction.org/reports/voting-matters-2022/general-findings). [↑](#footnote-ref-56)
56. As reported by Reuters [here](https://www.reuters.com/sustainability/investors-biggest-climate-pressure-group-dont-like-pressure-2023-06-12/). See also Majority Action’s 2023 *Fulfilling the Promise* report (available [here](https://www.majorityaction.us/climate-action100-report-2023)) which found that the majority of key Climate Action 100+ investor-signatories supported 90% or more of the directors at US-based focus companies, despite the identification of climate-related failings. [↑](#footnote-ref-57)
57. [UK Asset Owners’ Voting Alignment Review Attracts Big Managers  – ESG Investor](https://www.esginvestor.net/uk-asset-owners-voting-alignment-review-attracts-big-managers/). [↑](#footnote-ref-58)
58. See ClientEarth’s [position paper](https://www.clientearth.org/media/gayhuw25/uk-listing-rules-position-paper-july-2022.pdf) on the UK listing rules and climate change (July 2022). [↑](#footnote-ref-59)
59. As reported by Reuters [here](https://www.reuters.com/business/environment/environmental-activists-pressure-us-regulators-halt-jbs-listing-2023-08-23/). [↑](#footnote-ref-60)
60. See, for example: [Lib Dems propose ban on new listings of fossil fuel companies on LSE | Oil and gas companies | The Guardian](https://www.theguardian.com/business/2021/aug/26/lib-dems-propose-ban-on-new-listings-of-fossil-fuel-companies-on-lse-london-climate-change) [↑](#footnote-ref-61)
61. [Earth beyond six of nine planetary boundaries | Science Advances](https://www.science.org/doi/10.1126/sciadv.adh2458). [↑](#footnote-ref-62)
62. For example, see the OECD specific instance brought by Inclusive Development International and 10 Ugandan and Tanzanian organisations against the insurance broker Marsh in February 2023 in relation to its role as insurance broker for the East African Crude Oil pipeline, which alleges that Marsh contributed to serious adverse human rights and environmental impacts: [Inclusive Development International et al. vs. Marsh - OECD Watch](https://www.oecdwatch.org/complaint/inclusive-development-international-et-al-vs-marsh/). [↑](#footnote-ref-63)