milieudefensie

Input Milieudefensie (Friends of the Earth Netherlands)

on

the call for inputs by the Working Group on Business and Human Rights on Investors, ESG and Human Rights

September 30th, 2023

Milieudefensie very much welcomes the opportunity to give input on the questions posed by the UNWG on B&HR. The work of Milieudefensie includes campaigning and lobbying to advance climate and human rights due diligence, which includes climate litigation (Milieudefensie et al. v. Royal Dutch Shell plc.[1]) and advocacy for adequate HRDD legislation on a national, EU- and UN-level. With the immense challenges around the human rights impacts of climate change, robust legislation and business practices on human rights responsibilities for Financial Institutions (FI) is necessary.

In this call for input, we'll specifically focus on the human rights responsibilities of FI's in relation to climate change. We trust our colleague CSO's deliver relevant input on other topics. We will not answer the questions one by one, but will provide input by discussing some of the issues related to our work. We look forward to your findings and are always open to engage in further discussion on the issues addressed in your call for input.

General comments

In your previous report "Taking stock of investor implementation of the Guiding Principles on Business and Human Rights"[2] you already conclude that "despite the trend toward increased ESG investing, human rights are still rarely addressed in a systematic or principled way"[3]. We call upon you to specifically consider the following issues in the update to this report.

Firstly, the nature of the funding instruments offered by FI's (e.g. general corporate loans, project loans, bonds) often determine the way in which human rights are being considered by the FI, and may even incentivize FIs to choose one instrument over another. For example, there are signals that financiers classify loans as general corporate loans instead of project finance, in an attempt to avoid EP (Equator Principles) classification.[4] Additionally, Dept Capital Markets often do not fall under banks' human rights policies, which results in a major gap in FI's respecting human rights.[5] All funding instruments should have strict(er) human rights regulation, standards and policies.

1 https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/
2 A/HRC/47/39/Add.1, 17 June 2021
3 par. 47
4 See for example Equity Generation Lawyers' Human Rights Grievance Complaint to ANZ, 4 April 2023, p. 31
5 See for example recent findings in the "Great Green Investment Investigation": https://www.theguardian.com/business/2023/sep/26/europes-banks-helped-fossil-fuel-firms-raise-more-than-1tn-from-global-bond-markets

Secondly, we signal that the call for input seems to focus on researching certain ESG financing instruments such as sustainability-linked loans and green bonds. ESG financing instruments can increase the likelihood of greenwashing and human rights infringements.[6] We call for robust standards to mitigate this. Additionally, human rights and negative ESG impacts are particularly common in other financing instruments. Those instruments are thus equally important to consider and include in your upcoming report.

FI's under the UNGP framework

Soft law instruments such as the UNGPs and the OESO Guidelines are still very badly respected.[7] Recommendations given to address the governance gap, such as the call by David Boyd to explicitly require the alignment of business activities with major international environmental agreements, such as the UNFCCC and the Paris Agreement[8], underline the need for states to address the governance gap and implement legally binding due diligence instruments which hold corporations accountable when they fail to take necessary steps to prevent dangerous climate change and infringements of human rights.

FI's have been downplaying their responsibility under the UNGP framework, stating they can only be 'directly linked' to adverse human rights impacts.[9] However, as was addressed recently regarding the CSDDD[10], all FI's "have the same responsibility to respect human rights, and creating carveouts or presumptions for the financial sector in the draft Corporate Sustainability Due Diligence Directive would be inconsistent with international standards on business and human rights." This is in line with earlier statements on the level of involvement of FI's in addressing adverse human rights impacts.[11] The recently adopted update to the OECD Guidelines confirm the dynamic nature of the involvement framework[12], as do recent communications about the financiers of Saudi Aramco.[13]

When it comes to climate due diligence and respecting human rights, the recent update on the OECD Guidelines make clear that: 1.) an enterprise contributes to the adverse impact of climate change if the emissions related to its own activities (scope 1 and 2) as well as those

6 see for example Ul Haq, I., & Doumbia, D. (2022). Structural Loopholes in Sustainability-Linked Bonds. *Structural Loopholes in Sustainability-Linked Bonds* (April 29, 2022)

7 See, for example: Study on due diligence, European Commission, Directorate-General for Justice and Consumers, Smit, L., Bright, C., et al., Study on due diligence requirements through the supply chain: final report, Publications Office, 2020, https://data.europa.eu/doi/10.2838/39830, p. 221.

8 Policy brief by David R. Boyd, UN Special Rapporteur on human rights and the environment, *Essential elements of effective and equitable human rights and environmental due diligence legislation, June 2022*

9 Thun Group's "Discussion Paper on the implications of the UN Guiding Principles 13 & 17 in a corporate and investment banking context"

10 OHCHR, Financial Sector and the European Union Corporate Sustainability Due Diligence Directive Statement by the United Nations Working Group on Business and Human Rights, 12 July 2023

11 OHCHR, Response to Request from BankTrack for Advice Regarding the Application of the UNGP in the Context of the Banking Sector; 2017, p. 8

12 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 8 June 2023, Chapter II Commentary 16: "For the purposes of this recommendation, 'contributing to' an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions. An enterprise's relationship to adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring."

13 Letter to Saudi Aramco, p. 7: "A financial business can move from being directly linked to an adverse human rights impact to contributing to that impact if it does not take action to prevent or mitigate the business relationship to which it is directly linked, including by undertaking human rights due diligence. Therefore, the alleged involvement of financial institutions in the financing of Saudi Aramco's activities could be in violation of

related to its value chain and products (scope 3) are not Paris aligned. This requires amongst other things an absolute scope 3 emission reduction target (covering scope 1, 2, 3 of clients or investee companies). 2.) An enterprise may also be involved in an adverse climate impact if an entity within its value chain does not meet its climate change-related duties. The level of an enterprise's involvement is dynamic in nature and can range from being directly linked to contributing. 3.) Both levels of involvement may bring far-reaching responsibilities, requiring enterprises to prevent or mitigate the adverse climate impact. Even if an enterprise is only directly linked, it should use its leverage and may ultimately be required to terminate a business relationship responsibly.

FI's should use their leverage to stop their own and/or their business partners' activities that contribute to adverse climate and human rights impacts. Leverage may include engagement with credible[14] objectives, timelines and escalation mechanisms. For example, FI's may ask for environmental covenants before providing loans or buying corporate bonds[15]. By analogy and in line with the OECD Guidelines (2023), FI's could make their products and services contingent on the adoption, implementation and progress towards credible Paris-aligned transition plans.

international human rights law and standards."

14 For example, a report by Greenpeace "The Dirty Dozen The Climate Greenwashing of 12 European Oil Companies" implies that engagement is not effective with fossil fuel companies. Furthermore, ⅘ of investors do not believe that engagement/stewardship is effective.

15 Lütkehermöller et al., September 2020. Unpacking the finance sector's climate-related investment commitments. New Climate Institute, p. 15