Submission to the UN Working Group on Business and Human Rights

Consultation response

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This submission is made on behalf of the Grantham Research Institute on Climate Change and the Environment at the London School of Economics. It focuses on the climate change-related human rights responsibilities of investors, including both investors' responsibility to avoid contributing to human rights harms associated with climate change and the need to provide finance for 'just transitions' to achieve net zero greenhouse gas emissions. The key message from current and ongoing research at the Institute into these topics is the need for stronger integration between the social and environmental aspects of ESG, particularly in regard to climate action. We believe such integration can be supported through the application of a human rights lens to climate change, in line with evolving international principles and standards.

This submission answers Questions 2 and 3 in relation to the duty of the state to protect human rights; Questions 2 and 6 in relation to corporate responsibility to respect human rights, and Questions 1 and 2 in relation to access to remedies as they are particularly relevant to the research conducted by the Grantham Research Institute. We also provide suggested recommendations in responses to Question 2 in relation to good practices.

State duty to protect human rights

Question 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?

In recent years states have made significant efforts to ensure transparency and availability of data regarding climate risks and opportunities in line with the Financial Stability Boards' Task Force for Climate-related Financial Disclosure recommendations (see Climate Champions, 2022). Many of these developments are tracked in the Climate Change Laws of the World Database, maintained by the Grantham Research Institute. By helping investors to understand emissions profiles and resilience to climate risk, such requirements may in theory support an understanding of human rights impacts. However studies to date suggest that the quality of reporting is poor (see e.g. TCFD, 2022).

Recent years have also seen substantial developments regarding mandatory human rights due diligence legislation, particularly in Europe, which can lead to the collection and consideration of relevant information. In our submission to the UN Special Rapporteur on Climate Change and Human Rights, we provide examples of climate change and environmental legislation that incorporate human rights elements (Higham and Higham, 2023).

Overall, however these two regimes are not yet well integrated. Recent revisions to the OECD Guidelines for Multi-National Enterprises make limited progress towards better integration (see below). The EU proposal for a new Corporate Sustainability Due Diligence Directive (CSDDD) would incorporate both human rights and climate change, however the current design of the legislation leaves several areas of uncertainty regarding the integration of human rights due diligence obligations and obligations regarding climate change. Article 15 of the draft legislation imposes distinct transition planning obligations on selected companies, rather than explicitly incorporating climate change among the environmental impacts regarding which companies must exercise due diligence. This complexity, as well as uncertainty about the relationship between the CSDDD and the rest of the EU's sustainable finance regime, may undermine efforts to ensure that investors adopting ESG approaches take a holistic approach to human rights impacts. It may also lead to increased litigation risk for companies and investors as conflicting views of what is required under the legislation play out in courts (see Higham et al., 2023).

Question 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?

States must introduce specific regulations, or guidance regarding the application of existing regulations, to ensure the integrity of climate-related claims such as claims that entire businesses or products or services are 'climate-neutral' or aligned with net zero. In a recent submission to the UN High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities (HLEG), we recommended that states introduce standards and regulations for net zero commitments that should be sector-specific, include interim targets, and be informed by previous legal cases that establish or identify criteria for credibility (Higham et al., 2022). Such standards could be further strengthened by the recognition that corporate responsibility to respect human rights requires high-integrity efforts to contribute to urgent reductions in greenhouse gas emissions, as well as a responsibility to consider human rights and the just transition in corporate transition plans. The HLEG's final report and recommendations adopt a rights-based approach, providing guidance on aligning net zero commitments with the rights of Indigenous Peoples and on investing in 'just transitions'. We believe states must introduce regulations that are, at minimum, aligned with the HLEG's recommendations.

Forthcoming research on corruption and integrity risks in climate solutions by the Institute in partnership with the law firm DLA Piper (provided by email) also points to a need for regulators and legislators to develop new legislation and guidance regarding the specific application of legal regimes designed to present fraud and corruption to the implementation of climate solutions, particularly carbon markets. Transparency regimes must also include both financial and non-financial information to minimise corruption risks that could derail climate action and contribute to or exacerbate adverse human rights impacts. These measures are important for ensuring the integrity of firm-level actions to mitigate human rights risks resulting from climate change.

Corporate responsibility to respect human rights

Question 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, 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.

While it is certain these instruments may be effective in increasing awareness of human rights impacts generally, we do not believe that they have been effective in clarifying the **climate-related** human rights responsibilities of investors and other businesses, including the need for just transitions. Most international instruments fail to take an integrated approach to human rights and environmental due diligence. Research indicates that maintaining these silos produce worse outcomes for both rights-holders and the environment (Schilling-Vacaflor, 2021). In the submission to the HLEG noted above (Higham et al., 2022), we identify moves towards convergence and recommend that the HLEG seek alignment of standards for corporate net zero emissions pledges and other international instruments focusing on HRDD.

Question 6. 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?

Investors are often one step removed from social and environmental impacts, including those related to climate change, but have significant influence through their investments. Our research at the Grantham Research Institute has highlighted several points of investor leverage and how they can be used to influence just transition outcomes (i.e. combining climate change issues with human and labour rights while also considering social inequalities) (Robins et al., 2022; Curran et al., 2022; Robins et al., 2021). Below, we primarily consider the following main leverage points of investors:

- Climate or net zero strategies (or transition plans)
- Engagement strategies
- Product offering and investment processes (often named 'Implementation' in our research)

Climate and net zero strategies

Human rights and climate change considerations should be central to the strategies of investors, which can send important signals to companies. This can be reflected in their annual statements or in commitments to uphold human rights and achieve net zero in their operations or investments.

We can see examples of commitment to net zero across the financial sector both through initiatives like the Principles for Responsible Investment (PRI) and the Glasgow Financial Alliance for Net Zero (GFANZ). An example from our research was M&G Investments commitment to finance companies “that help achieve a socially just transition.”

Engagement

An important leverage point is how investors engage via their stewardship and active ownership efforts. This could involve:

- Putting in place a formal corporate engagement process to implement human rights and climate change strategies. This could involve individual as well as collective engagement with investees. For example, investees could engage with mining companies to ensure that as they open new or existing mining operations, high human rights standards are upheld.
- Setting clear principles within engagement strategies. The World Benchmarking Alliance has developed a framework of investor expectations on the just transition, offering a good example of how investors can embed social considerations into climate engagement strategies.
- Encourage greater action from businesses through joint engagement initiatives or cross-industry initiatives, such as a joint initiative between Friends Provident Foundation and Royal London Asset Management publishing a paper setting out joint expectations on just transition criteria for businesses in 2020 (See Robins et al, 2021).

Implementation/product offering

One of the most effective ways for investors to exercise leverage is to include climate-related human rights considerations within their product and business development strategies from the outset. This could include:

- Integration of human rights considerations within capital allocation processes.
- Embedding human rights and climate change issues within the design of investment products and solutions.
- Ensuring coherence between the financial and impact performance objectives of the investment.
- Including a thematic lens within idea generation and screening as well as due diligence for investments.
- Assessing investments according to the risks that human rights and climate change issues represent.

Different asset classes lend themselves to different agents that can affect investor attitudes to human rights and climate change issues. The main private asset classes where specific actors can be leveraged can be broadly categorised into: equity or stocks; debt instruments; and asset managers. The selection of equity stakes in companies have a clear selection process with clarity on the agent or agents in charge of the company selection process, which are generally either banks, private equity firms, venture capital firms or very high-net worth individuals or families. Using them as agents of change to consider the companies they choose to have clear human right and climate change issues is likely the most transparent of approaches to affect change. Debt instruments can be broadly categorised into two groups: private bank loans (where the agents are the bank and the company being lent to) and bonds (where the conditions of the bond must be met and verified by a second party). Conditions on the bank loan and bonds can be designed to have clear human rights and climate change issues included. Asset managers often purchase equity through index funds that are curated either by the asset manager themselves or by a third-party data provider. The indexes are created by selecting companies and their respective equities that meet the criteria of the said index. Indexes already exist with criteria that include human rights and climate change issues; these indexes claim to screen companies for human right violations and exclude them. However, there has been extensive recent criticism that these indexes obfuscate the process of selecting companies and exact criteria leading to engagement with this asset class to be the least transparent. Improving the transparency of such processes would help send a clearer and more effective signal to firms, thus more effectively exercising available leverage opportunities. This broad outline of some of the key actors can help to indicate which leverage points can be used with different types of investors for greater inclusion of human rights and climate change issues in their portfolios. A summary of relevant approaches regarding the just transition can also be found below.

3.1 Product offering: approaches to integrate just transition considerations in different asset classes

	Integrated approach	Thematic approach
Public equity	• Consider just transition aspects in security selection. • Engage investees on just transition-related issues.	• Identify companies with a positive social impact in affected regions.
Private equity	• Include just transition criteria in screening of potential investments and due diligence. • Include just transition element in company engagement processes.	• Identify companies with a positive social impact in affected regions.
Listed debt	• Consider just transition aspects in issuer and bond selection.	• Target bonds linked to sectoral and/or regional just transition plans and funding.
Private debt	• Include just transition criteria in pre-investment screening and due diligence. • Include just transition related conditionalities in financial agreements.	• Target loans linked to sectoral and/or regional just transition plans and funding.
Real assets (Real estate and infrastructure)	• Include just transition criteria in screening and due diligence. • Enforce just transition criteria in green real estate and infrastructure strategies, as well as in timber, land and commodity investments.	• Target investment in communities and regions affected by the transition to deliver positive social and environmental impact.
Indirect investments	• Assess the compatibility of the investment strategy and process with just transition objectives in manager selection. • Engage asset managers on including just transition considerations in investment processes.	• Seek specialist impact investment funds that link climate, job quality and community development.

Source: Robins et al, Just Transition Finance Tool for banking and investing activities, ILO and GRI 2022

Access to remedies

Question 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?*

In our Global Trends in Climate Change Litigation: 2023 Snapshot, we provide an overview of global climate litigation cases, including investigations, inquiries and complaints before judicial and quasi-judicial bodies (Setzer and Higham, 2023). Although there are instances of state agencies pursuing investigations into misleading green claims, including several investigations against Deutsche Bank's DWS, we are unaware of any examples framed in human rights terms. One notable exception is the inquiry by the Philippines Commission on Human Rights into the responsibility of the Carbon Majors for human rights impacts of climate change, however that was focused on businesses rather than specifically investors. It has yet to be seen how the final results of the inquiry will be used in further efforts to seek redress for the victims.

Question 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?

The Global Trends in Climate Litigation report and submission to the UN Special Rapporteur noted above also outline the use of human rights arguments in climate litigation against corporations brought by civil society. We include an overview of cases against financial institutions, some of which are framed in human rights terms (see *Notre Affaire a Tous et al v BNP Paribas*). The submission also discusses barriers to climate litigation, including power disparities and socio-economic inequalities, access to scientific expertise, and restrictive interpretations of standing rules.

In a forthcoming article (under review, provided by email) Ekaterina Aristova, Catherine Higham, Ian Higham, and Joana Setzer assessed climate change-related complaints to National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises. We found that although this regime is not targeted at investors, many of the climate-related complaints nonetheless concern financial institutions, emphasising the issue of 'financed emissions'. To date, cases have largely been unsuccessful, but NCPs have recognised that financial institutions should engage with the potential environmental impacts of the projects and organisations to which they provide financial services. One reason for the relative lack of success is that the

2011 guidelines did not take an integrated perspective on climate change and human rights or provide concrete guidance on companies' responsibilities for emissions reductions. This may change with the 2023 update to the guidelines, which is welcome for its more explicit reference to climate change (OECD, 2023). However, the update's efforts to integrate climate and human rights remains solely preambular and does not provide clarity on emission reduction responsibilities to ensure more effective enforcement from NCPs.

It is important to note that not all human rights-based climate change litigation concerns responsibilities to reduce emissions, adapt to climate change, or compensate loss and damage. Recent research indicates a rise in 'just transition litigation' against businesses and states for adverse human rights impacts of initiatives that align with international climate goals. These impacts could be mitigated by more robust HRDD from investors and other businesses financing or carrying out relevant projects, especially relating to critical mineral extraction and fossil-free energy infrastructure, and by clarity from governments that HRDD duties are not absolved in the context of 'green industry'.

Good practice

***Question* 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?

- Investors should adopt the engagement approaches identified above, developing transition plans with integrated human rights considerations, clear targets and alignment with decarbonisation efforts, phasing out services for oil and gas, and immediately ending financing and investment in the exploration and expansion of oil and gas fields and oil and gas production. Related guidelines on phasing out fossil fuel investment are included in the ISO Net Zero Guidelines.
- Governments should align climate-related disclosure regimes and regulation of non-state actors' net zero pledges with the recommendations of the HLEG, taking an approach that explicitly acknowledges the connection between human rights and climate change. Such an integrated approach ensures investors are carrying out their responsibility to address human rights impacts of climate change in the manner most compatible with the United Nations Guiding Principles on Business and Human Rights (UNGPs), and that states are fulfilling their duty to protect human rights from adverse impacts of climate change resulting from the unabated use of fossil fuels.

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