

ClientEarth Submission

UN Working Group on Business and Human Rights: call for inputs on the extractive sector, just transition and human rights

Introduction

ClientEarth welcomes this opportunity to provide input on the extractive sector, just transition and human rights. This submission aims to support the Working Group in providing guidance to States, business enterprises and other key stakeholders on how to best design and implement just, inclusive and rights-based energy transition programs, investments and projects that advance the UNGPs. To that end, we have organised our response into two sections that address some of key questions posed in the consultation.

Questions 1, 3 and 7

Firstly, we note that there is a well-documented link between the physical impacts of climate change itself and human rights. UN High Commissioner for Human Rights, Michelle Bachelet, has stated that:

“[T]he global climate emergency presents perhaps the most profound planet-wide threat to human rights that we have seen since World War II. From the right to life, to health, to food, water and shelter, to our rights to be free of discrimination, to development and to self-determination, its impacts are already making themselves felt.”¹

Accordingly, we consider that in order to comply with their obligations to uphold human rights, States must clarify in law the duty of corporations operating within their jurisdiction to conduct climate due diligence and to align their business practices with the goals of the Paris Agreement. The attached submission, previously sent to an ex-member of the Working Group, sets out why we consider that the business responsibility to respect human rights requires (among other things) that business enterprises’ activities are aligned with the goal of the Paris Agreement on Climate Change.

Overall, State climate policies and corporate transition plans that are based on the best-available science (including those adopted by the mining and oil and gas sectors) should reduce fossil fuel-related impacts of the extractive sector on the environment and human rights, as all credible Paris-aligned pathways imply a significant reduction in the overall production of fossil fuels.² However, demand for raw materials will remain, and could substantially increase in some cases without adequate regulation. Energy transition policies and programs aiming at achieving net zero emissions must therefore ensure that the overall impact of the extractive sector on the environment and human rights stays within safe limits, while also upholding best practices and providing a just transition for affected workers and communities.

We consider that there are several steps for States to meet their human rights obligations when putting in place such type of policies:

- (i) **Demand reduction and limiting over-production** of goods dependent on fossil fuels and critical raw materials, particularly in high-consuming regions, is critical to mitigating human rights abuses

¹ UN High Commissioner for Human Rights, Michelle Bachelet, Statement on Human Rights Day (10 December 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25403>

² United Nations Environment Programme (2022). Emissions Gap Report 2022: The Closing Window — Climate crisis calls for rapid transformation of societies. Nairobi. <https://www.unep.org/emissions-gap-report-2022>

and environmental harms associated with the extractive sector across jurisdictions, while also having the potential to deliver increased wellbeing for all. This is not only an effective complement to due diligence processes (see response to question 2), but also a prerequisite to ensure production and consumption of raw materials stay within planetary boundaries. Developing strategies to reduce demand is already an established field of academic and policy research. This is becoming increasingly prevalent in debates around policy development.³ States can achieve demand reduction by setting science-based and sector-specific resource use reduction targets (especially in high CRM and other metal-intensive sectors such as mobility / transport and construction), applying 'avoid-shift-improve' and 'essential use' policy interventions to key resource-intensive sectors (e.g., promoting urban densification and public transport, advocating for essential use in chemicals sector), and implementing other sufficiency- and demand-oriented policies to reduce energy and resource demand (see, e.g., IPCC AR6 WGIII Report Ch. 5). Policymakers should also promote circular economy principles by incentivising the recycling and reuse of materials in order to reduce the demand for primary CRMs.

- (ii) **Adoption of mandatory due diligence requirements including mandatory credible climate transition plans** is key to prevent and address human rights and environmental harms often associated with the extraction of oil, gas and minerals, such as deforestation, water and soil pollution and associated health issues, greenhouse gas emissions and the displacement of local populations (see more details in response question 2).
- (iii) **Maintenance and enforcement of existing social and environmental laws** is also of paramount importance. States should not adopt a deregulatory approach, allowing businesses to sidestep human rights and environmental impact assessment and public consultation requirements in existing laws to advance, e.g., renewables or new CRM projects. At a minimum, full enforcement of these laws (and applicable international standards) must persist, including to promote public acceptance of projects. Meaningful engagement with local communities and comprehensive spatial planning covering all potential land, resource, protection needs (e.g., mining, agriculture, energy production, water, nature protection and restoration, etc.) is needed to properly balance competing priorities and anticipate environmental and human rights impacts. Instead of fast tracking permitting procedures, relevant permitting and planning authorities must be sufficiently resourced to effectively perform their mandates.
- (iv) **Transparency and appropriate involvement of all stakeholders** in the decision making process is another crucial element to ensure a 'just' transition. Effective institutional framework and governance mechanisms overseeing and advising on the implementation of such policies and programmes should include environmental or human rights reviews within their ambit and ensure civil society organisations have a role to play.

Questions 2, 7, 11 and 13

Mandatory due diligence requirements

Voluntary measures on human rights, social and environmental due diligence have so far failed to significantly change the way companies, including in the extractive sector, manage and prevent environmental and human rights adverse impacts throughout their value chains.⁴ As a result, adoption of mandatory corporate due diligence, including mandatory climate transition plans aligning company business plans and strategies to the goals of the Paris Agreement, is key to ensuring that the extractive sector operates responsibly and respects human rights and the environment.

³ See for e.g. Friends of the Earth, Reduced resource use demand scenarios for EU Foresight Study – methodologies for inspiration, https://friendsoftheearth.eu/wp-content/uploads/2022/11/Reduced-resource-use-demand-scenarios-for-EU-Foresight-Study_methodologies-for-inspiration-FoEE.pdf

⁴ See for example British Institute of International and Comparative Law (BIICL), European Commission study on due diligence in supply chains, February 2020, <https://www.biicl.org/projects/european-commission-study-on-due-diligence-in-supply-chains;>

Several EU Member States have adopted national horizontal and sector-specific due diligence laws, including France, Germany, Norway and the Netherlands.

At regional level, the EU has developed legislation for mandatory due diligence in specific sectors, including in the extractive sector, such as the Conflict Minerals Regulation and the Batteries Regulation.⁵

The EU is also developing a cross-sectoral legislative initiative, the Corporate Sustainability Due Diligence Directive (CSDDD), which, if well designed, has enormous potential to both help achieve the EU's climate goals by spurring action by the private sector, and address adverse impacts of EU's energy transition.⁶ Article 15 of the proposal includes the requirement of mandatory climate transition plans for some companies, and to set emission reduction objectives. Although this is a good first step, we note that it is not sufficiently prescriptive as the current proposal does not require *all* companies to set out absolute greenhouse gas emission reduction targets and does not require specifically the inclusion of downstream (scope 3) greenhouse gas emissions, which constitute the majority of high emitting corporate emissions.⁷

Detailed legislative proposals have not yet been adopted in most other major economies. Research has found that despite demands from investors, the voluntary setting of transition plans is not yet widespread among companies and the quality of transition plans must be greatly improved in order to meet climate goals, with only 0.4% of all companies surveyed by CDP in 2022 having a credible plan that met minimum standards to align with the 1.5 degree temperature goal.⁸

To ensure that transition policies and programs aimed at achieving net-zero emissions and accelerating energy transition are human rights compliant, states must embed strong environmental and human rights due diligence requirements in the legal framework governing these policies and programs. This can be done either by spelling them out, or by referring to existing horizontal or sector-specific due diligence obligations. At a bottom line such policies and programs need to be coherent with existing environmental and human rights obligations, and should not rely on certification schemes that may allow companies to absolve their legal responsibilities.

Structural elements to ensure effective environmental and human rights due diligence

In order for due diligence obligations to be effective in addressing human rights and environmental impacts in the extractive sector while contributing to achieve the Paris goals, it is crucial to promote coherent and consistent implementation of the UNGPs in relation to the following core elements: (i) coverage of both adverse human rights and environmental impacts, including climate change; and (ii) respect of the rights of Indigenous Peoples and local communities (IPLCs) and stakeholder engagement.

(i) Coverage of both adverse human rights and environmental impacts

The significant impact that the extractive sector can have on both human rights and the environment is well documented. Human rights impacts of the extractive sector can include forced displacement of communities, violation of the right to free, prior, and informed consent, restrictions on access to water and

⁵ The EU Conflict Minerals Regulation prescribes due diligence obligations in order to identify and assess risks of adverse impacts of minerals and metals supply chains potentially from conflict-affected and high-risk areas. The forthcoming EU Batteries Regulation builds on the human rights due diligence obligations in the EU Minerals Regulation and clarifies that those due diligence obligations should address the environment and human rights risks of sourcing, processing and trading certain raw materials for batteries manufacturing.

⁶ European Commission, Proposal for a Directive on corporate sustainability due diligence, February 2022, https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en

⁷ See ClientEarth joint policy recommendations on targets and transition plans, https://en.frankbold.org/sites/default/files/publikace/policy_recommendations_on_article_15_csddd_sept22.pdf

⁸ CDP, *Are Companies developing Credible Climate Transition Plans? Disclosure to key climate transition focused indicators in CDP's 2022 Climate Change Questionnaire*, February 2023 available at https://cdn.cdp.net/cdp-production/cms/reports/documents/000/006/785/original/Climate_transition_plan_report_2022_%2810%29.pdf?1676456406

other natural resources, and increased violence and conflict. Environmental impacts can include pollution of air, water, and soil, deforestation, habitat destruction and contribution to climate change impacts which leads to a range of health problems for local communities and the loss of biodiversity.

The full enjoyment of many rights such as the right to food, the right to water, the right to a healthy standard of living and the rights of indigenous peoples are closely tied to the health of their environment. In recent years, there has been increasing recognition of the deep connections between the environment and human rights by governments, courts and international organisations. The UN General Assembly has also recognised access to a clean, healthy and sustainable environment, as a universal human right in a historic resolution that aims to address the human rights impacts of climate change, biodiversity loss and pollution.

An example concerns the bauxite mining that is threatening the Atewa Range Forest Reserve in Ghana. This critical ecosystem is home to over 1,100 plant species and 100 threatened or endangered species. Beyond its rich wildlife, the forest also contains three river systems that provide clean drinking water for five million Ghanaians and plays a key role in sustaining local industries and agriculture.

Due diligence laws implementing the UNGPs must recognise the connection between human rights and environmental protection.⁹ However, approaching environment protection solely through the lens of human rights would leave an important gap in the regulatory framework. This is not sufficient to cover all actual or potential business-related impacts on the environment, in particular those which do not have a clear connection to human rights impacts (e.g., impacts of deep sea mining). Environmental damage can occur without constituting a clear violation of human rights, or without entailing direct or immediate harm to human beings. Both human rights and the environment deserve protection in and of themselves. Therefore, it is critical that due diligence requirements provide for specific environmental protection, including in respect of climate change.

A thorough definition of adverse environmental impact is central to the effectiveness of due diligence obligations and their application to the extractive sector.

The examples above show the breadth of adverse environmental impacts that companies in the extractive sector can cause or contribute to. It is therefore essential that due diligence obligations are linked to a definition of adverse environmental impact that is broad enough to encompass the full range of impacts that could occur in companies' value chains, including downstream (scope 3) greenhouse gas emissions from the extractive sector. At the same time, the definition of environmental impact should not leave too much discretion to business when it comes to deciding which aspects of the environment should be protected.¹⁰

In order to achieve this balance, definition of environmental impact should include both (a) reference to principles of environmental law and provisions of relevant international conventions, where these exist, and (b) a non-exhaustive catalogue of adverse environmental impacts.

- (a) Definition of environmental impact should refer to the principles and normative standards of international environmental law (such as the prevention, precautionary, rectification-at-source and polluter-pays principles). It should also refer to the objectives of international environmental agreements, including the Paris Agreement and the Convention on Biological Diversity. Though often addressed to states, environmental objectives can and should be translated into concrete obligations for companies. In this regard, due diligence legislation should set out clear requirements

⁹ See for example Annex, Part I, points 18 and 19 of the CSDDD proposal, recognising this interconnection in relation to the definition of adverse impacts by linking a list of environment-related impacts (including some of the main environmental impacts that occur in the extractive sector) to specific provisions of human rights conventions.

¹⁰ See for example the French Duty of Vigilance Law, Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034290626>

for companies to align with the goals and objectives set out in these international environmental agreements.

- (b) Definition of environmental impacts should include a broad yet non-exhaustive list of impacts categories. The current fragmented patchwork of international environment instruments does not provide for sufficient coverage of adverse environmental impacts. The list of environmental impacts should thus fill this gap and include, but not be limited to, direct and indirect impacts related to: climate change (including greenhouse gas emissions), air, soil, water and noise pollution (including through disposal of chemicals), hazardous substances and production of waste, loss of and damage to forests and natural ecosystems, loss of biodiversity, and loss of habitats and species.

This twofold approach has been adopted in the ongoing targeted update of the OECD Guidelines¹¹, and the EU Batteries Regulation¹². This is also the approach adopted by the European Parliament Committee on the Environment, Public Health and Food Safety¹³ and the Committee on Legal Affairs¹⁴ on the CSDDD, improving the initial Commission proposal.¹⁵

- (ii) Respect of the rights of IPLCs and stakeholder engagement

While collective land and resource rights, cultural rights, rights to self-determination and non-discrimination or the right to give, withhold and withdraw Free, Prior and Informed Consent (FPIC) are recognized in numerous international and regional human rights instruments and national legislation, adverse impacts on these rights are prevalent across the extractive sector.¹⁶ As described above, IPLCs are exposed to multiple adverse human rights impacts linked to activities in the oil, gas and mining sectors.

At the same time, realizing IPLC's rights is indispensable for protecting biodiversity and the environment in production and processing countries of raw materials. The UN, FAO, the IPCC and scientists have widely acknowledged the expertise and stewardship of IPLCs in protecting the world's biodiversity rich ecosystems, such as primary forests and savannas.¹⁷

Therefore, just transition programs and policies must ensure that the rights of Indigenous Peoples and other groups with collective customary tenure rights are respected. This requires binding obligations on companies and financiers to identify and manage risks on IPLC's rights, including their land and resource rights and the right to FPIC prior to any decision-making to projects or activities that potentially impact them.

¹¹ Chapter VI of the consultation draft on the OECD Guidelines for MNEs and their implementation procedures, <https://mneguidelines.oecd.org/consultation-draft-public-consultation-targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.pdf>

¹² Annex X, Proposal for a regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020 [https://www.europarl.europa.eu/RegData/commissions/envi/inag/2023/01-18/ENVI_AG\(2023\)740776_EN.pdf](https://www.europarl.europa.eu/RegData/commissions/envi/inag/2023/01-18/ENVI_AG(2023)740776_EN.pdf)

¹³ Article 3(b) and Annex, Part II, Opinion of the Committee on the Environment, Public Health and Food Safety, https://www.europarl.europa.eu/doceo/document/ENVI-AD-734465_EN.pdf

¹⁴ Text not yet publicly available. Article 3(b) and Annex, Part II, Opinion of the Committee on Legal Affairs, <https://www.europarl.europa.eu/news/en/press-room/20230424IPR82008/corporate-sustainability-firms-to-tackle-impact-on-human-rights-and-environment>

¹⁵ ClientEarth, CSDDD Factsheet - Environment and Climate, June 2022, <https://www.clientearth.org/media/ggcfpgvt/factsheet-environment-climate-csddd-june-2022-final.pdf>

¹⁶ These impacts are well documented, see for example World Resources Institute (2020), 'Undermining Rights: Indigenous Lands and Mining in the Amazon', <https://www.wri.org/research/undermining-rights-indigenous-lands-and-mining-amazon>, Amazon Watch & APIB (2022), 'Blood Gold', [2022-complicity-in-destruction-v-blood-gold.pdf \(amazonwatch.org\)](https://www.amazonwatch.org/2022-complicity-in-destruction-v-blood-gold.pdf)

¹⁷ FAO (2017), 'Indigenous peoples are key to protecting wildlife and rural livelihoods', <https://www.fao.org/family-farming/detail/en/c/887065>, IWGIA (2022), 'Recognising the contributions of Indigenous Peoples in global climate action? An analysis of the IPCC report on Impacts, Adaptation and Vulnerability', https://lcipp.unfccc.int/sites/default/files/2022-03/IWGIA_IPCC%20Briefing_March%202022_ENG.PDF

The right to FPIC in particular is a powerful tool to ensure that other IPLC rights, such as collective land and resource rights are respected.¹⁸ In situations where the right to FPIC is not sufficiently protected or implemented at state or local level, companies and financiers must not be absolved from their responsibility to respect FPIC in compliance with international standards. This is particularly relevant in conflict-affected areas. In the absence of regulatory protection, FPIC must not simply be replaced by company-led consultation processes and communities must play a central role in the question on how to implement FPIC.

Furthermore, the respect for FPIC must be part of an obligation to meaningfully engage with Indigenous Peoples but also other potentially affected stakeholders for the purpose of risk identification, prevention, mitigation and remediation. Inclusive due diligence means that affected stakeholders have a say in the implementation of due diligence measures (for example related to remediation or risk prevention measures) that affect them.

Importantly, new transition laws and policies present an opportunity to meaningfully operationalise FPIC and strengthen the respect for IPLC rights in practice. This will also be crucial for companies and financiers in order to avoid social conflict and financial costs that may arise when they operate without the consent of IPLCs.

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¹⁸ The right to FPIC is particularly relevant for extractive industry projects where the integrity of Indigenous territory and resources are likely to be affected.