

SUMMARY NOTE

UNGPs 10+ and UN B-Tech dialogue on investment and human rights

Thursday, October 29, 2020

On 29 October 2020, the UN Working Group on Business and Human Rights and the Office of the High Commissioner for Human Rights convened a virtual dialogue with approximately 40 representatives of civil society, national human rights institutions, and academia to inform the [“UNGPs 10+ / Next Decade BHR” Project](#) and [UN B-Tech Project](#). Both projects seek in part to address the role of investors in advancing respect for human rights across emerging human rights themes, with an overlap in the area of new digital technologies.

The objectives of the dialogue were as follows:

- Provide a platform for dialogue between these UN projects and civil society organizations and others working in the area of responsible investment, sustainable finance, and human rights; and
- Identify and discuss participants’ input on: (1) opportunities and challenges for responsible rights-based investment across all sectors; (2) practical examples related to human rights policies, processes, and practices within the investment community; and (3) priorities and recommendations for driving responsible and accountable investment in the next decade.

The two-hour dialogue included:

- The UNGPs 10+ and B-Tech project teams outlining their project objectives and activities, and opportunities for further engagement with each initiative over the coming year.
- An open discussion among all participants covering the following questions:
 - What noteworthy examples, persisting gaps, and challenges exist with regard to investor respect for human rights?
 - What roles have civil society and others played in this area? What challenges or opportunities exist for efforts by civil society and others to advance investor action on human rights?
 - What drivers, investor practices, asset classes, sectors, and/or issues should be prioritized in the next decade in order to advance investor respect for human rights? In concrete terms, how can we achieve meaningful progress in these priority areas?
 - Should we do more to increase investor engagement on access to remedy? Do you have experience with or ideas on how investors should provide or enable remedy for adverse human rights impacts connected to their investments?
 - Do you see value in the business and human rights community – in the context of B-Tech and beyond—addressing the role of early-stage investors like venture capital? If so, how can we make progress in this arena?

The following summary below captures the key themes that emerged during the discussion.

1. *What noteworthy examples, persisting gaps, and challenges exist with regard to investor respect for human rights?*

- **Fiduciary duties versus human rights responsibilities:** Participants noted that human rights considerations are often secondary to investors' fiduciary duties. While there is movement to address this taking place in Europe through the adoption of the EU Sustainability Disclosure requirement, there are still significant barriers in the US. In the US, under ERISA, a fiduciary cannot devote assets (including 'effort') to anything that does not increase the financial standing of pension plan beneficiaries or customers. The US Supreme Court says benefits must be pecuniary. Mainstream investors have used ERISA as their guide since 1974.
- **Traditional forms of ESG investment are not aligned with UNGPs approach to investing:** Participants highlighted that despite the growth of environmental, social, and governance (ESG) investing – such investment practices are often separate or additional to traditional investment practices rather than integral to all investments. To the degree ESG practices take place, these are grounded in a 'risk to business/investment' approach (materiality) rather than risks to people.
- **Limitations of data:** Participants expressed that one of the factors affecting investors' ability to meaningfully engage on human rights relates to data availability and the focus on quantifiable metrics. The quality of ESG metrics and data tends to be poor, especially the "S" domain. At the same time, this presents an opportunity to use human rights standards to strengthen and add rigor and comparability to ESG investing.
- **Human rights risk management:** Participants noted that there is limited internalization of 'human rights risk' among institutional investors when compared to businesses in other sectors. When institutional investors think about their human rights responsibilities, they do appear not to consider contextual risks that could have a bearing on human rights outcomes. One participant pointed to investors in companies that develop artificial intelligence (AI) without questioning where or how AI is being used, e.g., in Xinjiang, China. Similarly, impact investment—although well-intentioned—can result in unintended harms. A common response to concerns raised with impact investors is, "This isn't a giant infrastructure project, so there isn't much risk."
- **Knowledge gap:** In the case of technology investors, particularly venture capitalists (VCs), there is a significant gap in understanding of human rights and how they relate to investment. Participants stressed that efforts to engage VCs must take this into consideration.
- **Resource allocation:** Participants referred to a trend among investors to move from active investment strategies to passive one. This trend is driven by cost considerations, which constitutes a disincentive for investors to engage their portfolio companies.
- **Effectiveness of shareholder resolutions:** Participants noted that one shortcoming of shareholder resolutions on human rights due diligence (HRDD), even those that have succeeded, is that when companies comply out of obligation rather than an internal commitment to respect their human rights, HRDD becomes a tick-box exercise rather than a means for change.

- **Disclosure and transparency:** Participants noted with concern a lack of transparency among investors, particularly regarding ownership. One participant noted that this poses significant challenges in holding private equity investors in sectors such as nursing homes accountable.
- **Building on financial risk due diligence:** One participant highlighted that certain investors have a relatively high degree of leverage and familiarity with due diligence processes, which serves as a foundation to build on. For instance, investors in illiquid assets, such as general partners (GPs) in private equity, conduct robust financial due diligence to assess potential investee companies because they are unable to sell should problems arise. “There is no excuse for disregarding human rights risks given the degree of familiarity with due diligence concepts.” While human rights are currently not considered by these firms, the set-up of these investments lends itself to the business and human rights agenda.
- **Diminished leverage among certain investors or asset classes:** Participants noted that some investors enjoy less leverage to influence portfolio companies’ behaviour:
 - o Most institutional investors get involved in private equity as limited partners (LPs). LPs tie up capital for 7-10 years and give the power to manage the fund to GPs. This is a natural place for a stronger presence of human rights, however, human rights clauses are not included in partnership documents. Moreover, GPs are in a better position to deny LPs that want to place human rights restrictions given the amount of money (LPs) that want to enter private markets.
 - o Fixed income and public equity investors, which constitute the biggest share of capital markets globally, have diversified portfolios with hundreds or thousands of companies. In this context, there is a trend of active to passive investment, which creates a relationship between asset owners and fund managers, making it more challenging for asset owners to know if the due diligence of portfolio companies is sufficient. This challenge is compounded by limitations in corporate performance data. Moreover, fund managers carry out investments on a day to day basis on behalf of “normal citizens,” who are highly disaggregated (e.g., workers’ 401ks). In fragmented systems, like in the US, with over half a million 401Ks plans, leverage is diffuse creating a roadblock.
- **Insufficient examples of responsible investment practice:** Participants noted that investors have varying opportunities for embedding respect for human rights, yet understanding what human rights due diligence looks like across asset classes, the company lifecycle, and investor types remains a challenge for promoting responsible investment. For instance, in private equity, firms make at times thousands of bets on start-ups or early stage companies, often with few successes and many failures. What does appropriate due diligence look like in this context?
- **Lack of grievance mechanisms:** Participants expressed that private investors lack clear-cut accountability mechanisms e.g., for affected communities to raise concerns up to the investor level. Participants expect investors to have in place grievance-type processes that enable civil society to raise human rights concerns. There is an opportunity to make the business case for why such grievance mechanisms may benefit investors, e.g., early warning systems help to prevent litigation after harm occurs.

- **Stakeholder engagement:** Participants highlighted a number of concerns regarding stakeholder engagement among the investment community:
 - o Investors tend to believe that engaging with civil society is the sole responsibility of portfolios companies and are rarely open to receiving stakeholder input.
 - o When issues are raised by civil society, investors will often say that there is insufficient evidence to warrant engaging the company or to divest. In the context of reprisals against human rights defenders, this is especially problematic given the challenges in linking culpability to an individual company. Even without proof of a direct causation, the indirect links are evident as defenders are speaking about the company's project. There is also a tendency to take companies at their word over reports from civil society due to a culture of reluctance to challenge companies for fear of losing access.
- **Labour rights:** When it comes to investor action on human rights, there is a significant gap in terms of efforts to address labour rights (freedom of association and collective bargaining).
- **Apparel sector:** Participants noted that investors have failed to safeguard human rights in the apparel sector by failing to ensure that portfolio companies save for rainy days and by promoting short-term value over long-term sustainability.

2. *What roles have civil society, NHRIs, and others played in this area? What challenges or opportunities exist for efforts by civil society and others to advance investor action on human rights?*

Participants highlighted a number of ways in which they have sought to advance responsible investment, including by:

- **Being a source of knowledge and information:** Participants have shared information on labour rights practices (e.g., specific cases as well as holding trainings for investment teams); amplified the voice of Indigenous Peoples; outlined what human rights due diligence looks like in a specific sector or company; and informed shareholder resolutions on a range of human rights topics.
- **Holding investors accountable for their human rights practices:** Some participants have exposed the relationship between institutional investors and human rights. This includes reports that inform or expose financial actors including investors. For instance, Oxfam report, [*Power, Profits and the Pandemic: From corporate extraction for the few to an economy that works for all*](#), found that top 100 stock market winners have made more than \$3 trillion since the pandemic while 400 million people have lost their jobs.

To further the impact of civil society, NHRIs, and others in driving responsible investment practices, participants highlighted the following priorities for moving forward:

- **Explore new strategies** to advance investor respect human rights. "While we've won some battles through shareholder dialogue and resolution, we are ultimately losing the war. We have garnered good commitments and have raised awareness about human rights risks with investors but we are not seeing the implementation needed to put a stop to human rights abuses."

- **Tailor advocacy strategies by asset class** and identify diverse levers to mobilize action.
- **Activate workers as shareholders** to engage their pensions funds in support of human rights.
- **Identify and track financial flows.** More CSOs should identify who is benefitting and why in order to find effective solutions. This includes supporting communities, workers, and others in ‘following the money’ and pushing for greater corporate transparency.
- **Constructively engage a broader range of investors.** Relatively few CSOs and NHRIs engage directly with institutional investors on human rights. There is a tendency to flock around the same types of investment activities—development finance or project finance—or even specific investors that are followed more closely. There is a need to expand the universe of investors being engaged on human rights. Civil society would benefit from a greater understanding of the investment world and what type of information investors need to effectively act on human rights risks in investments portfolios.
- **Hold investors accountable as human rights duty-bearers** through public campaigning and organizing on the client side (pension funds to press their asset managers).
- **Create channels for remedy** by acting as a through line for the voice of victims of abuse.
- **Continue to provide evidence of corporate human rights abuses,** including by amplifying the interests of rights-holders in corporate boardrooms. Civil society can also elevate risks for business. As civil society elevates risk, the more investors realize these issues are a threat to returns and are incentivized to act.
- **Demonstrate opportunity cost** at a sectoral or systemic level for not engaging in human rights.
- **Increase capacity and resources of NHRIs** to engage in this space.

3. *What drivers, investor practices, asset classes, sectors, and/or issues should be prioritized in the next decade in order to advance investor respect for human rights? In concrete terms, how can we achieve meaningful progress on these priority areas?*

- **Climate crisis:** Climate change and the green transition, especially in context of pandemic. One participant noted that in some Latin American countries, fossil fuel companies and mining projects have been praised as the ones to help society emerge from the economic crisis. Another key priority is addressing the contribution of corporate capture to climate change.
- **Labour rights:** Freedom of association and collective bargaining should be prioritized among investors as fundamental and enabling rights that allow for the fulfilment of other human rights.
- **Digital technologies:** The tech sector must be a priority for responsible investment in the next decade. Technology affects virtually every aspect of life and risks to people are ubiquitous. Increasingly technology is a threat to human rights defenders.
- **Business models:** Engaging and addressing business model-related human rights risks should be a priority for investors. The [Valuing Respect](#) project provides important tools and resources. Finance should flow to where business models are compatible with human rights enjoyment.

- **Focus on outcomes for people:** Investors must move beyond process indicators and look at outcomes on the ground. One way this can be done is by supporting initiatives on the ground that can verify claims, such as human rights impact assessments, auditing, and certification schemes.
- **Demonstrate financial risks of failing to act with due diligence:** A priority should be to demonstrate the opportunity costs for not engaging on human rights—moving away from anecdotal cases to showing systemic risks.
- **Sustainable Development Goals:** The SDGs and the sustainability agenda more broadly are key drivers to explore. It is crucial to have investors promote respect for human rights as the foundation of SDG efforts.
- **Human rights and impact investing:** There is a need to think more deeply about how to anticipate and manage/mitigate negative impacts alongside the positive impact being targeted in the impact investing field. It should also be a priority to explore how the impact investing field evolved from a fringe idea 10-20 years ago to where it is now, with much more robust principles and practices for impact management and a major focus of private market investors. There are also learnings on **responsible divestment**. Impact investors have a mandate to exit and have developed standards and good practice around exit that may inform investor due diligence when divesting.
- **Financialization of the economy:** A priority area of concern is excessive financialization, particularly in the private equity (PE) space. For example, in addition to many high-profile bankruptcies caused of nursing homes, PE ownership of nursing homes had an impact on the loss of lives during COVID. “The pandemic has proved especially deadly in facilities owned or backed by private equity firms.” See report, [*The Deadly Combination of Private Equity and Nursing Homes During a Pandemic: New Jersey Case Study of Coronavirus at Private Equity Nursing Homes*](#).
- **Companies as shareholders:** Tech companies that are serious about human rights are key drivers in their capacity as investors who seek to acquire smaller companies. This could incentivize venture tech companies and general partners to align their practices to the growing human rights commitments and expectations of big tech.
- **Venture capital:** Venture capital firms are key drivers, particularly in the context of tech investments (see questions 5).
- **Embed human rights in Limited Partnership Agreement:** In the context of private equity, human rights considerations/clauses must be integrated into partnership agreements between Limited Partners (e.g., pension funds) and General Partners (private equity firms).
- **Exclusionary principles for high-risk products:** In the tech sector, exclusionary principles for high-risk technologies that reflect human rights standards should be explored in light of the significant adverse impacts associated with dual-use technologies. One consideration is how this may impact the ability of investors to use their leverage over technology companies that produce such tech.
- **Leverage developments in Europe:** Consider how EU development on mandatory human rights due diligence (mHRDD) may be leveraged elsewhere (EU Commissioner Reynders has indicated all companies operating in the EU—not just with their HQ in EU—will be covered in the scope of EU mHRDD). This presents opportunities investors around the world, including in the US.

- **Additional investor guidance and initiatives needed:**
 - o In the context of tech investments, UNGPs are helpful yet hard to operationalize – are there red line business models? Guidance is needed to determine red lines, e.g., in relation to bias and data breaches, and how these and other human rights risks should be identified and assessed. Likewise, how can human rights risks assessments be adapted/made fit for purposes depending on the stage of company growth?
 - o More peer to peer initiatives are needed to help investors understand and explore human rights and investment.
 - o More examples of responsible investment across asset classes and investment strategies.

4. *Access to remedy. Should we do more to increase investor engagement in the question of remedy? Do you have experiences with or ideas on how investors should provide or enable remedy for adverse human rights impacts connected to their investments?*

- **Enabling remedy:** One participant described how the concept of *enabling* remedy is key in the investment space. Where investors are ‘directly linked’ to impacts through portfolio companies, there is a responsibility to use leverage, which may include using leverage to enable remedy for victims of harm. The Swedish pension fund AP2 acknowledges their responsibility to *enable* remedy in their human rights policy.
- **Providing remedy:** Venture capital and private equity funds are interesting to explore in the context of remedy due to the degree of control many GPs have over companies. A pilot project on remedy targeting private equity investors should be considered.
- **Strengthening the remedy ecosystem:** There is a need to explore the remedy ecosystem of investors to determine where they sit and how best to strengthen the ecosystem. One way for investors to use their leverage in support of remedy is to play a role in improving the ecosystem so that once an impact occurs, it is easier to get companies to the table— “preparedness for remedy” and “remedy after the impact.” For example, investors can sit on complaints panels of multi-stakeholder initiatives (e.g., roundtable for sustainable palm oil) or weigh in on standard setting processes that include a remedy component.
- **Grievance mechanisms:** Preparedness for remedy also means looking at the extent to which portfolio companies have the ability to provide remedy, including whether they have effective grievance mechanisms in place.

5. *Do you see value in the business and human rights community – in the context of B-Tech and beyond—addressing the role of early-stage investors like venture capital? If so, why and how can we make progress in this arena?*

- “If you care about ESG and human rights, you have to care about venture capital.” The world 20 years from now will be unrecognisable, with gene modification, life extension technologies, etc.

- **Venture capital has systemic influence over markets:** Participants shared that VC funds seek out opportunities that often shift the nature of competition within a specific sector or business model. If that market shift is based on a business model that can or does infringe upon rights-holders then there needs to be a mechanism by which VC funds are held accountable for their contribution to changing the market. For example, a requirement to “stress test” a business model during the due diligence process for possible infringements on rights would create documentation that allows for assigning responsibility if/when that model causes harm.
- **Seed and series A funding:** One participant noted that in the case of early stage investing—seed and series A—business models are often not fixed, which makes it difficult to conduct human rights risk and impact analysis. One approach would be to focus on values and communicating expectations at the earliest stages of seed funding in order to set a bar of conduct. When adverse impacts occur, there is a baseline understanding of why this is a breach.
- **[Responsible Investing in Tech and Venture Capital](#)** highlights three priorities:
 - o **Diversity:** Increase diversity among VC leadership and employees. VCs are dominated by men, need more women and people of colour.
 - o **Tools:** Many employees in start-ups care about society but lack the tools and resources necessary to support their efforts. The report provides a Future Proofing Toolkit: “looking ahead 10 years, what does this tech look like and who are your users? “What are key opportunities but also where could the future human rights risks lie?” “How can you grow while addressing these identified risks?”
 - o **Data and transparency:** Critically important to improve access to data and ensuring greater transparency. Pitchbook could include information on ESG and human rights performance to help raise red flags for VCs, e.g., a company is developing AI and selling it in high-risk countries.