

# ClientEarth Submission

UN Working Group on Business and Human Rights: Climate Change Information Note

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## Introduction

This submission seeks to assist Surya Deva and the Working Group on business and human rights (the **WG**) in formulating an Information Note on climate change and the UNGPs (the **Information Note**).

This submission does not attempt a complete or final analysis of the UNGPs with regard to climate change, which will necessarily be the subject of continuing development. Rather, it aims to draw attention to relevant aspects of climate change-related law and practice which we consider are sufficiently established to reflect in the Information Note regarding Pillars II and III of the UNGPs. In this regard, we emphasize that business practice on climate change has been the subject of recent and rapid development.

Our primary submission is 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. In terms of emissions reduction, this means actual alignment (beyond 'process') with the just transition to net-zero greenhouse gas emissions (GHGs) across a business' activities, products and services (Scopes 1–3) by 2050 at the latest, consistent with an emissions reduction pathway offering a reasonable chance at limiting warming to 1.5°C and a high chance of limiting warming to below 2°C, in line with the best available science.<sup>1</sup>

In this submission, this substantive aim is referred to as 'Paris-alignment' or 'alignment with the Paris Goal'. Alignment with the above emissions reduction pathway implies immediate steps, not just the setting of a long-term goal. Depending on the sector, Paris-alignment generally requires an enterprise to reduce its emissions c.25% by 2025.

In order to focus on issues of business responsibility to respect human rights and the Paris Goal, this submission does not specifically address State obligations<sup>2</sup> as set out in Pillar I or the human rights impacts of transition itself<sup>3</sup> – although the material herein will be relevant to these areas.

This submission first summarises ClientEarth's relevant interest and expertise. It then provides a series of general observations on the UNGPs and climate change under the following sub-titles.

We would be very pleased to discuss any questions regarding this submission.

## ClientEarth's interest and expertise

ClientEarth is an international non-profit environmental law organisation, operating in over 50 countries, with over 150 staff and over 160 active cases tackling environmental challenges at the time of writing. It

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<sup>1</sup> The IPCC's global carbon budget as of 2020 for a 50% chance of keeping to 1.5°C (*"pursuing efforts towards 1.5°C"* per the Paris Agreement) is 500 Gt CO<sub>2</sub>, which is approximately equivalent to the budget of 550 Gt CO<sub>2</sub> for an estimated 83% chance of keeping to 1.7°C (*"well below 2°C"*, per the Paris Agreement). See the IPCC's Sixth Assessment Working Group I Report, Summary for Policymakers, Table SPM.2 on page 38. <https://www.ipcc.ch/report/ar6/wg1/#SPM>

<sup>2</sup> See in particular the reports of the Special Rapporteur for Human Rights and the Environment and Special Rapporteur on extreme poverty and human rights, regarding climate change: A/HRC/31/52, A/74/161 and A/HRC/41/39.

<sup>3</sup> See in particular the recent work of the Institute of Human Rights and Business: [https://www.ihrb.org/uploads/briefings/IHRB%2C Connecting the Climate Change and BHR Agendas%2C Dec 2020.pdf](https://www.ihrb.org/uploads/briefings/IHRB%2C%20Connecting%20the%20Climate%20Change%20and%20BHR%20Agendas%20Dec%202020.pdf) and <https://www.ihrb.org/focus-areas/just-transitions/briefing-connecting-just-transitions-business-human-rights-agendas>

has offices in Brussels, Beijing, Berlin, London, Warsaw, Madrid, Los Angeles and Luxembourg. ClientEarth believes that strong law, properly enforced, is the best tool we have to protect the environment. Using the power of the law, ClientEarth develops innovative strategies and tools to address major environmental issues.

Regarding issues of climate change, human rights and business, ClientEarth has among other work:

- Supported a group of Torres Straits Islanders, an Australian indigenous community facing the ongoing impacts of climate change due to sea level rise threatening the continued safe habitation of their islands and their ability to practise their culture, in a pending complaint before the UN Human Rights Committee, in which ClientEarth lawyers are acting for the authors of the complaint.
- Submitted an amicus curiae submission and given evidence to the Philippine Commission on Human Rights' national inquiry on the impact of climate change on the human rights of the Filipino people, which examined the climate-related responsibility of the 'Carbon Majors' business enterprises.
- Brought a world-first greenwashing complaint to the UK OECD National Contact Point regarding the oil and gas company BP.
- Been involved as active participant in the European process regarding mandatory human rights and environmental due diligence legislation, part of the European Sustainable Corporate Governance Initiative.
- Brought a successful case to the Court of Justice of the EU regarding the European Investment Banks' policies.
- Engaged with investors and financial regulators on issues relating to corporate responses to climate change.

## Interpreting the UNGPs with regard to international climate change law and practice

Two of the three main international human rights law instruments to which the UNGPs specifically refer (in GP12) have been interpreted to reflect international environmental law applicable to climate change.

The UN Human Rights Committee considered in 2018 that, in regard to the ICCPR, “[o]bligations of States parties under international environmental law should thus inform the contents of article 6 of the [ICCPR], and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law”.<sup>4</sup> In the same year, the Committee on Economic, Social and Cultural Rights has warned States that “a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach” of their obligation under the ICESCR to respect, protect and

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<sup>4</sup> General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc CCPR/C/GC/36, Para. 62

fulfil all human rights for all.<sup>5</sup> Similarly, the connection between the impacts of climate change and adverse human rights consequences was confirmed by a joint statement from nine Special Procedures mandate-holders, including the WG, in September 2019.<sup>6</sup> Various UN human rights treaty bodies have addressed and elaborated the human rights obligations regarding climate change, including by setting out substantive measures which are required to discharge these obligations.<sup>7</sup> In Concluding Observations to States and in General Comments, UN treaty bodies have said that States must: set 1.5C pathway targets, revise policies to reflect highest possible ambition in reducing emissions, limit fossil fuel use, phase out the use of coal, reconsider oil exploitation, limit fracking, work toward a shift to renewable energy, discontinue deforestation, regulate businesses to ensure they do not worsen climate change, and take measures to ensure businesses remedy their (climate) impacts and reduce public and private investments in fossil fuel industries (among other things).<sup>8</sup>

Similarly, as a matter of the international law principle of systemic interpretation, the UNGPs must be interpreted **in light of, and in accordance with**, the international legal framework governing climate change, other norms of international environmental law and the relevant State and business practice. Together, these constitute the normative international legal framework in which the UNGPs are applied.<sup>9</sup> The inclusion of subsequent developments in the understanding of relevant international law and practice is also consistent with the express understanding of the key drafters of the UNGPs, who have stated publicly that the UNGPs are to be understood in a “*dynamic dimension, such as [the UNGPs] capacity to push the development of new norms and practices that go beyond the initial content of the [UN]GPs and improve companies’ compliance with human rights standards*”.<sup>10</sup> This is also consistent with the Commentary to Guiding Principle 12 of the UNGPs that “*business enterprises may need to consider additional standards [of human rights]*” beyond those specifically given in the UNGPs.

In our submission, the key aspects of the current normative international legal framework relevant (in particular) to climate change mitigation<sup>11</sup> efforts are summarised below.

- The precautionary principle is recognised in the UN Framework Convention on Climate Change (UNFCCC), in light of the dangerous, irreversible and catastrophic future effects of climate change and the need to limit these effects. As the OHCHR comments, “*In the context of climate*

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<sup>5</sup> OHCHR | Committee releases statement on climate change and the Covenant

<sup>6</sup> The nine mandate holders were: Special Rapporteur on human rights and the environment; Special Rapporteur on the right to food; Special Rapporteur on the human rights to safe drinking water and sanitation; Special Rapporteur on the rights of indigenous peoples; Members of the UN Working Group on human rights and transnational corporations and other business enterprises; Special Rapporteur on the right to development; Special Rapporteur on the right to physical and mental health; Special Rapporteur on extreme poverty and human rights; and Special Rapporteur on extrajudicial, summary or arbitrary executions.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25003>

<sup>7</sup> For example, CEDAW General Comment No. 37 (2018) UN Doc CEDAW/C/GC/37,

[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_37\\_8642\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_37_8642_E.pdf);

For a synthesis of climate change-related Concluding Observations from CEDAW, CRC, CCPR and CESCR, see pages 10-18: <https://www.ciel.org/wp-content/uploads/2019/03/HRTB-Feb.-2019-update-2019-03-25.pdf>

<sup>8</sup> Pages 10-18: <https://www.ciel.org/wp-content/uploads/2019/03/HRTB-Feb.-2019-update-2019-03-25.pdf>

<sup>9</sup> See for example ILC, Fragmentation of international law: Difficulties arising from the diversification and expansion of international law (2006) [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) and Scott Sheeran, ‘The Relationship of international human rights law and general international law: Hermeneutic constraint, or pushing the boundaries?’ In *Routledge handbook of international human rights law* (New York: Routledge, 2013) pp. 95–124

<sup>10</sup> John Ruggie, Caroline Rees and Rachel Davis, “Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations” (2021) 6 *Business and Human Rights Journal* 179, 181.

<sup>11</sup> Climate change mitigation refers to reducing or preventing emissions of GHGs; adaptation to actions to adapt to the effects of climate change.

change, the only uncertainty remaining is how much more damage it will cause. Under these circumstances, urgent preventative action is needed".<sup>12</sup> The UNFCCC states:

*"The Parties should take **precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.** Where there are threats of serious or irreversible damage, **lack of full scientific certainty should not be used as a reason for postponing such measures,** taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost..."*<sup>13</sup>

- The polluter-pays principle is spelled out in the Rio Declaration: *"National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."*<sup>14</sup>
- Other general principles of international law relevant to the interpretation of the UNGPs regarding climate change have been explained by the OHCHR:
  - o Accountability and access to remedy – *"Those affected by climate change must have access to meaningful remedies, including judicial and other redress mechanisms, and States must be accountable to rights holders for their contributions to climate change, including for failure to adequately regulate the emissions of businesses under their jurisdiction."*<sup>15</sup>
  - o Equity – *"Equity in climate action requires that efforts to mitigate and adapt to the impacts of climate change should benefit people in developing countries, indigenous peoples, people in vulnerable situations and future generations"*.<sup>16</sup>
  - o Common but differentiated responsibilities and respective capabilities, in light of national circumstances (CBDRRC) – *"The principle of common but differentiated responsibilities and respective capabilities is central to the climate change regime and affirms that all States have common responsibilities to protect the environment and promote sustainable development, but with different burdens due to their different contributions to environmental degradation and to their varying financial and technological capabilities"*.<sup>17</sup>
  - o Transparency and inclusiveness – *"Effective rights-based climate action requires participatory and transparent processes"*. The OHCHR draws this conclusion from the protection of the right to participate and the right to access to information in a number of international human rights and international environmental law instruments, along with

<sup>12</sup> [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

<sup>13</sup> UN Framework Convention on Climate Change 1992, Article 3.

<sup>14</sup> Principle 16,

[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)

<sup>15</sup> Page 63, [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

<sup>16</sup> Page 33, [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

<sup>17</sup> Page 63, [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

Art. 12 of the Paris Agreement which specifically establishes the obligation of the parties to cooperate to enhance public participation and access to information.<sup>18</sup>

In light of the above principles, we submit that the following aspects of international law and State and business practice are centrally relevant:

- In the Paris Agreement, States agreed to the goal of *“holding the increase in the global average temperature to well below 2 degrees celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees celsius above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change.”*<sup>19</sup> (hereafter, the **Paris Goal**)
- In order to achieve this long-term temperature goal, Article 4(1) provides that the parties will aim to reach global peaking of greenhouse gas emissions as soon as possible, and will: *“undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gasses in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.”*
- Further provisions enshrine key elements guiding States’ pursuit of the Paris Goal: progression, highest possible ambition reflecting CBDRRC and the need to adopt economy-wide absolute<sup>20</sup> emission reduction targets.

*“As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time,”*<sup>21</sup>

*“Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”*<sup>22</sup>

*Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.”*<sup>23</sup>

- Apart from emissions reduction and sequestration, the Paris Agreement contains headline goals relating to adapting to the impacts of climate change and aligning finance flows with emissions

<sup>18</sup> Page 39, [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

<sup>19</sup> UNFCCC, Paris Agreement, Art. 2.1

<sup>20</sup> In this context, ‘absolute’ targets refers to targets to reduce annual emissions from an absolute amount (e.g. 100 tonnes of greenhouse gases) by an absolute amount (e.g. 20 tonnes reduction in the next five years). It is notable that this effectively discourages the use of ‘intensity’ targets. ‘Intensity’ targets use a metric of emissions per unit of value (a product, for example). This is because it is possible to achieve reduced emissions intensity figures whilst increasing the overall, absolute amount of emissions, if the units of value increase too.

<sup>21</sup> Paris Agreement, Article 3.

<sup>22</sup> Paris Agreement, Article 4(3)

<sup>23</sup> Paris Agreement, Article 4(4)

reduction and climate-resilient development: “(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”<sup>24</sup>

- Following the Paris Agreement, the IPCC Special Report on global warming of 1.5C found, in brief, that limiting human rights impacts of climate change required limiting global warming to 1.5C above pre-industrial temperatures, and identified the emissions reductions assessed as necessary to keep to this limit. It also highlighted the irreversible effects of climate change. After multiple stages of expert and State review, IPCC reports are accepted as a comprehensive, objective and balanced view on the subject matter by the 195 IPCC member States.<sup>25</sup> The IPCC is a body established by the WMO and UNEP, and has itself noted the interlinkages and alignment between the objectives and principles of the Paris Agreement and the objectives of IHRL.<sup>26</sup>

*"In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO2 emissions decline by about 45% from 2010 levels by 2030 (40-60% interquartile range), reaching net zero around 2050"*

*"Without increased and urgent mitigation ambition in the coming years, leading to a sharp decline in greenhouse gas emissions by 2030, global warming will surpass 1.5°C in the following decades, leading to irreversible loss of the most fragile ecosystems, and crisis after crisis for the most vulnerable people and societies."*<sup>27</sup>

- Following the 2018 Special Report, States, localities, cities and a wide range of business enterprises have committed to the transition to net zero by around 2050 as used by the IPCC (hereafter, **Net Zero** and **Net Zero Transition**) in one form or another.<sup>28</sup> This includes many large, high-emitting businesses.<sup>29</sup> Sectoral ‘alliances’ or groups of business enterprises pledging action toward Net Zero are increasingly common. The UNFCCC has established a global ‘Race

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<sup>24</sup> Paris Agreement, Art. 2.

<sup>25</sup> [https://www.ipcc.ch/site/assets/uploads/2021/07/AR6\\_FS\\_approve.pdf](https://www.ipcc.ch/site/assets/uploads/2021/07/AR6_FS_approve.pdf);  
[https://www.ipcc.ch/site/assets/uploads/2021/07/AR6\\_FS\\_review\\_process.pdf](https://www.ipcc.ch/site/assets/uploads/2021/07/AR6_FS_review_process.pdf);  
[https://www.ipcc.ch/site/assets/uploads/2019/02/ipcc\\_members.pdf](https://www.ipcc.ch/site/assets/uploads/2019/02/ipcc_members.pdf)

<sup>26</sup> “[a] sizeable and growing literature exists on how best to operationalize climate equity considerations, drawing on other concepts mentioned in the Paris Agreement, notably its explicit reference to human rights. Human rights comprise internationally agreed norms that align with the Paris ambitions of poverty eradication, sustainable development, and the reduction of vulnerability” IPCC SR15, Full Report, page 55,  
<https://www.ipcc.ch/sr15/download/#full>

<sup>27</sup> IPCC SR 15 Full Report, page vi, <https://www.ipcc.ch/sr15/download/#full>

<sup>28</sup> <https://eciu.net/netzerotracker>; <https://www.climateaction100.org/progress/net-zero-company-benchmark/>;  
<https://unfccc.int/climate-action/race-to-zero-campaign>; <https://www.unepfi.org/net-zero-banking/>;  
<https://www.unepfi.org/net-zero-alliance/>; <https://www.netzeroassetmanagers.org/>;

<http://priceofoil.org/2021/05/26/nzpfbriefing/> See also Merryll Lawry-White’s observation that “the Paris Agreement has already begun to influence the behaviour of businesses directly rather than via national legislation. This is another example of public international law directly influencing the behaviour of private actors, separately from its enactment into domestic law. Certain businesses have already committed to aligning with the Paris goals, for example, in the Katowice Commitment” Page 65,

[https://www.biici.org/documents/125\\_hrdd\\_for\\_climate\\_change\\_impacts\\_webinar\\_series\\_report\\_8\\_jan\\_2020.pdf](https://www.biici.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf)

<sup>29</sup> See <https://www.climateaction100.org/progress/net-zero-company-benchmark/>



to Zero' campaign seeking for non-State actors to commit to Net Zero, including businesses.<sup>30</sup> Net Zero pledges are estimated by the Race to Zero campaign to cover actors representing over 70% of global GDP.<sup>31</sup>

- Emissions reductions targets, including targets to reach Net Zero by 2050, are increasingly being enforced by national courts, following the decisions of the Dutch Courts in the case of *Urgenda Foundation v. State of the Netherlands*.<sup>32</sup> There have been successful cases brought against governments around the world challenging whether their climate targets are adequate and/or whether they have taken adequate measures to meet their targets, including in Australia, Belgium, France, Germany, Ireland and Pakistan. In Germany, in the case of *Neubauer et al v Germany*,<sup>33</sup> and in Belgium, in the case of *VZW Klimaatzaak v. Kingdom of Belgium & Others*,<sup>34</sup> the judgments specifically cite the 1.5°C temperature goal. Climate arguments and the 1.5°C temperature goal have also been cited in cases concerning planning and major infrastructure. For example, in the case of *Gloucester Resources Limited v Minister for Planning*, the Australian Court refused permission for a new coal mine and made clear that the project would be inconsistent with the urgent need to reduce emissions to meet the Paris Goal (the 1.5C pathway not permitting the development of any new coal mines). The Net Zero standard has now also been enforced against a business enterprise, with a claim by civil society organisations and over 17,000 Dutch citizens claim resulting in the Dutch Court's order that Shell must correct its emissions targets so as to reduce its net carbon dioxide emissions by 45% by 2030, in line with the global emissions pathway identified by the IPCC for meeting the Paris Goal.<sup>35</sup>
- There has been a rapid international adoption<sup>36</sup> and, increasingly, legislation<sup>37</sup> of the 2017 Task Force for Climate-related Financial Disclosures (TCFD) recommendations. Whilst the TCFD recommendations predated IPCC Special Report and so did not specifically aim for adherence to 1.5C pathways or Net Zero, it did recommend disclosures of "*the resilience of the [business]*

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<sup>30</sup> "Race To Zero is a global campaign to rally leadership and support from businesses, cities, regions, investors for a healthy, resilient, zero carbon recovery that prevents future threats, creates decent jobs, and unlocks inclusive, sustainable growth. It mobilizes a coalition of leading net zero initiatives, representing 733 cities, 31 regions, 3,067 businesses, 173 of the biggest investors, and 622 Higher Education Institutions. These 'real economy' actors join 120 countries in the largest ever alliance committed to achieving net zero carbon emissions by 2050 at the latest." <https://unfccc.int/climate-action/race-to-zero-campaign>

<sup>31</sup> <https://racetozero.unfccc.int/2020-breakthrough-year/>

<sup>32</sup> The UN High Commissioner for Human Rights Michelle Bachelet welcomed this final instance Dutch decision, commenting that "*more ambitious climate action, in all parts of the world, is a human rights obligation rather than simply a policy choice.*"

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E>

<sup>33</sup> See para 246 of the German Supreme Court judgement, available at: [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210429\\_11817\\_judgment-1.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210429_11817_judgment-1.pdf)

<sup>34</sup> See judgment of the Brussels First Instance Court, available at: [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617\\_2660\\_judgment-1.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-1.pdf)

<sup>35</sup> *Milieudefensie et al. v. Royal Dutch Shell plc*. [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526\\_8918\\_judgment-2.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf)

<sup>36</sup> The TCFD status report dated October 2020 talked of "*the substantial progress made in "mainstreaming" the Task Force's recommendations in the financial markets through investor demand for TCFD disclosures, policy and regulatory actions, and good business practices*". As of October 2020, nearly 60% of the world's 100 largest public companies support and/or report in line with TCFD. <https://www.fsb.org/wp-content/uploads/P291020-1.pdf>

<sup>37</sup> There have been various initiatives examining or announcing the incorporation of TCFD disclosure into national law, such as in the UK, Canada, Mexico, Chile, Brazil, South Africa, New Zealand, Japan, Hong Kong, Singapore, Switzerland and Australia. <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/towards-mandatory-tcfid>

organization's [business] strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario" and of "the targets used by the organization to manage climate-related risks and opportunities and performance against targets".<sup>38</sup> It also "was aware of [...] the nascency of climate-related reporting at the time, and anticipated that metric disclosure would evolve as climate-related financial reporting matured".<sup>39</sup>

- In May 2021, the TCFD updated this as follows:

*"the [IPCC Special Report] has shifted the language used in the international dialogue on climate change. Today, there is less focus on the carbon budget that is consistent with the Paris Agreement goal, and more focus on achieving net-zero emissions by 2050, in keeping with the IPCC modelling of how to limit warming to 1.5°C. Since the publication of the IPCC special report, the concept of net-zero targets has entered mainstream corporate and political debate, with many leading companies, financial institutions, and a growing number of governments setting net-zero targets for mid-century."* (TCFD footnote references omitted).<sup>40</sup>

- Investors are increasingly taking coordinated action to compel investee businesses to set targets toward Net Zero. The Climate Action 100+ (CA100+) is an association of over 600 investors responsible for \$55 trillion of assets under management which coordinates engagement with investee businesses. One of its three key 'asks' is for companies to, *"take action to reduce greenhouse gas emissions across the value chain, consistent with the Paris Agreement's goal of limiting global average temperature increase to well below two degrees Celsius above pre-industrial levels, aiming for 1.5 degrees"* – which the CA100+ acknowledges means Net Zero by 2050.<sup>41</sup> In 2021, the CA100+ published its 'Net Zero Benchmark' which ranks the progress of c.160 large target companies to align their businesses with Net Zero by 2050. The Net Zero Benchmark is used to inform investor engagement activities, such as climate-related shareholder resolutions, votes against the company's reports and accounts and votes against the (re)appointment of the board of directors.<sup>42</sup> Investors' resolutions contributed to high-profile company change toward a Net Zero pathway in the 2021 AGM season.<sup>43</sup>
- Net Zero has begun solidifying in legislative initiatives regulating business. Spanish legislation which includes a requirement for large companies (owned by the State or with a State shareholding) to have and publish climate action plans has gained congressional approval.<sup>44</sup> The UK recently announced new measures that will require businesses to commit to Net Zero by 2050 and publish a carbon reduction plan for public procurement bids.<sup>45</sup> The EU Commission's April 2021 proposal for a Corporate Sustainability Disclosure directive would require large

<sup>38</sup> <https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf>

<sup>39</sup> Page 4, [https://assets.bbhub.io/company/sites/60/2021/05/2021-TCFD-Metrics\\_Targets\\_Guidance.pdf](https://assets.bbhub.io/company/sites/60/2021/05/2021-TCFD-Metrics_Targets_Guidance.pdf)

<sup>40</sup> Page 49. In the text following this quote, the TCFD surveys various business and international initiatives toward Net Zero. [https://assets.bbhub.io/company/sites/60/2021/05/2021-TCFD-Metrics\\_Targets\\_Guidance.pdf](https://assets.bbhub.io/company/sites/60/2021/05/2021-TCFD-Metrics_Targets_Guidance.pdf)

<sup>41</sup> <https://www.climateaction100.org/approach/the-three-asks/>

<sup>42</sup> <https://www.climateaction100.org/progress/net-zero-company-benchmark/>

<sup>43</sup> For example, <https://www.hsbc.com/news-and-media/hsbc-news/shareholders-back-hsbcs-net-zero-commitments>; <https://www.nytimes.com/2021/06/02/business/exxon-board-clean-energy.html>

<sup>44</sup> The Spanish Climate Change and Energy Transition law. See:

<https://www.lavanguardia.com/natural/cambio-climatico/20210408/6635930/congreso-puntoaprobar.html>

<sup>45</sup> For contracts worth more than £5 million per year. <https://www.gov.uk/government/news/firms-must-commit-to-net-zero-to-win-major-government-contracts>

businesses and certain SMEs to report: “*the plans of the undertaking to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement*”.<sup>46</sup> The proposed EU standards are to be adopted by October 2022. The US SEC is consulting on similar corporate disclosures of specific greenhouse gas emissions reduction goals.<sup>47</sup>

In light of all of the above, alignment with Net Zero is likely to become a *requirement* of general corporate law for business enterprises under national law.

Specifically, Net Zero alignment may flow from obligations on directors to (broadly) act in the best interests of a company or its shareholders (including in light of obligations to have regard to wider stakeholder interests).<sup>48</sup> This follows from the fact that risk from climate change impacts, mitigation, adaptation and litigation (in corporate and financial regulatory terms, known as physical, transition and liability risks)<sup>49</sup> add up to a clear material financial risk to most, if not all, business enterprises.<sup>50</sup> It is particularly the case when the business in question operates in a jurisdiction (or jurisdictions) with a Net Zero commitment, given such business enterprises risk being increasingly misaligned with and affected by government policy and regulation.

Accordingly, the TCFD states “[t]ransition planning is emerging as an important component of a company’s overall strategy to address climate-related risks and opportunities in the context of a transition to a low-carbon economy consistent with a 2°C or lower scenario. **An organization should release a transition plan component of its strategy if an organization determines it has material climate-related transition risks**, including if it operates in a jurisdiction with an emissions reduction commitment, has made an emissions reduction commitment, or seeks to meet emissions reduction expectations from financial market participants” (emphasis added).<sup>51</sup> This is relevant because the

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<sup>46</sup> Art. 19a(2)(a)(iii). EU CSRD

<sup>47</sup> US SEC consultation Question 2 includes: “Are there specific metrics on which all registrants should report (such as, for example, scopes 1, 2, and 3 greenhouse gas emissions, and greenhouse gas reduction goals)?” <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>

<sup>48</sup> For example, “Developing a credible Paris-aligned strategy with targets to reduce its exposure to fossil fuel assets is in HSBC’s best interests”. <https://www.clientearth.org/media/10nf01r5/2021-02-letter-from-clientearth-to-noel-quinn-of-hsbc.pdf> See also paragraphs 43, 22(b)-(c) and 25 of: <https://www.clientearth.org/media/420mgimr/clientearth-response-to-beis-consultation-on-mandatory-climate-related-financial-disclosures.pdf>

<sup>49</sup> See, for example, <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2019/ss319>, pages 2-3 and the Carbon Tracker Initiative report ‘Handbrake Turn: The cost of failing to anticipate an Inevitable Policy Response to climate change’, <https://carbontracker.org/reports/handbrake-turn/>

<sup>50</sup> As the UK’s Financial Conduct Authority considers: “Climate change is a relevant consideration for all companies and likely to be material for most [...] We also note that the financial impacts of climate-related risks and opportunities are relevant to all issuers, and likely to be material for many of them”, pages 3 and 57 <https://www.fca.org.uk/publication/consultation/cp21-18.pdf>

<sup>51</sup> The TCFD’s proposed guidance continues: “All other organizations should consider disclosing a transition plan if their business activity includes significant emissions (Scope 1, 2, or 3) or is materially dependent on carbon-related assets. Transition plans should be disclosed as part of an organization’s broader climate-related strategy, be anchored in quantitative elements, including climate-related metrics and targets, be approved and overseen by the board, be actionable and linked to specific initiatives, and be detailed and verifiable to allow for verification of progress and achievement of intended outcomes” <https://assets.bbhub.io/company/sites/60/2021/05/2021-TCFD-Metrics Targets Guidance.pdf>, page 58

responsibility to respect human rights incorporates but extends beyond compliance with national legal and regulatory requirements.<sup>52</sup>

There is conversely a danger in leaving scope for interpretations of the UNGPs which conflict with the fundamental internationally agreed standard of the Paris Goal. For example, an interpretation which does not lead to any particular standard of climate change mitigation (GHG emissions reduction) may be misused to permit a business to claim compliance with the globally authoritative UNGPs standards whilst opting not to reduce value chain emissions in alignment with the Paris Goal, thus deepening the risk of more severe climate impacts in the future. Such interpretations may be misused in courts and other fora to deny accountability and effective remedy regarding businesses' climate change-related human rights impacts.

The Commentary to the UNGPs notes that business enterprises may need to consider additional standards depending on the circumstances.<sup>53</sup> The OHCHR notes that, as a measure with "*particular relevance in the context of climate change, business and human rights[,] [b]usinesses should set science-based targets throughout their operations to align with limiting global warming to well below 2°C above pre-industrial levels and pursuing efforts towards 1.5°C, with efforts towards net-zero greenhouse gas emissions by 2050, as indicated in the Paris Agreement*".

We agree – and consider that the Information Note should centrally reflect the consensus standard of business alignment with the Paris Goal (and, therefore, Net Zero Transition).

Lastly, we note that the inclusion of a substantive standard is itself dynamic, in that climate-related international law obligations and State and business practice (and the underlying scientific understanding) will undoubtedly evolve. The appropriate substantive standard for business action on climate change may evolve too.

## Human rights due diligence and business climate responsibility in general

We submit that UNGPs (and the parameters of the human rights due diligence which they set out) provide a critical tool to regulate and guide businesses in climate change-related decision-making in areas beyond developing national law and regulation. As the UNGP Interpretive Guide states, "*[i]n sum, the responsibility to respect human rights, as a global standard expected of all enterprises in all situations, provides clarity and predictability for enterprises facing differing expectations and demands*".<sup>54</sup> The relevance of the UNGPs to climate business responsibility is, for example, reflected in the recent

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<sup>52</sup> UNGP Interpretive Guide, Q82 on page 77. "*the responsibility to respect human rights extends beyond compliance with national laws and regulations protecting human rights and entails respect for all internationally recognized human rights. It therefore also applies where there are no national laws and regulations to protect these rights. For the same reason, where national laws and regulations offer a level of human rights protection that falls short of internationally recognized human rights standards, enterprises should operate to the higher standard.*" See also "Go beyond legal compliance" OHCHR, Human Rights, Climate Change and Business Key Messages, page 4. <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>

<sup>53</sup> Commentary to GP 12.

<sup>54</sup> UNGP Interpretive Guide, Q82 on page 77

Dutch Court's recourse to the UNGPs in interpreting the unwritten standard of care laid down in the Dutch Civil Code.<sup>55</sup>

Underscoring the applicability of the UNGPs to corporate climate decision-making is particularly necessary when, as a general matter, issues of business responsibility relating to climate change are insufficiently regulated by national law. Despite developing initiatives outlined above and high profile actions for accountability, business enterprises are essentially permitted (de facto, if not de jure) to maintain, or increase, their greenhouse gas emissions in conflict with the Paris Goal and even to take active steps to impede or inhibit the transition to Net Zero. There are examples of businesses acting counter to Net Zero Transition and the Paris Goal, and there are examples of businesses demonstrating responsible leadership in taking rapid action to reduce their greenhouse gas emissions in alignment with Paris Goal. There are also examples of businesses aligned with the transition to Net Zero incurring responsibility for adverse human rights impacts unrelated to climate change – and the UNGPs plainly apply to such situations too.<sup>56</sup>

In our view, using the UNGPs to guide a rights-based approach to issues of climate business responsibility, including through the effective application of human rights due diligence, provides a valuable and much-needed framework to business practice.

This does not mean that human rights due diligence will, by itself, ensure that businesses limit the worst impacts of climate change. The IPCC emphasizes the importance of a 'whole systems' approach to support the chance of a successful Net Zero transition.<sup>57</sup> Government regulation and international cooperation clearly play a key part in transition. However, the logic of the 'whole systems' approach underscores the key role the business responsibility to respect human rights can play in providing a common framework and minimum standard for the range of decisions businesses face beyond legal compliance in relation to climate change.

## Climate change points of difference

We agree with Surya Deva's observation<sup>58</sup> that the issue of climate change involves points of difference to certain non-climate-related human rights issues.

Specifically:

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<sup>55</sup> See *Shell* judgment at 4.4.11 to 4.4.15. [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526\\_8918\\_judgment-2.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf)

<sup>56</sup> See, for example, <https://www.business-humanrights.org/en/from-us/briefings/renewable-energy-human-rights-benchmark/>

<sup>57</sup> IPCC SR 1.5, Full Report p392 "*Because these different actions are connected, a 'whole systems' approach would be needed for the type of transformations that could limit warming to 1.5°C. This means that all relevant companies, industries and stakeholders would need to be involved to increase the support and chance of successful implementation. As an illustration, the deployment of low-emission technology (e.g., renewable energy projects or a bio-based chemical plants) would depend upon economic conditions (e.g., employment generation or capacity to mobilize investment), but also on social/cultural conditions (e.g., awareness and acceptability) and institutional conditions (e.g., political support and understanding).*"

<sup>58</sup> [https://www.biicl.org/documents/125\\_hrdd\\_for\\_climate\\_change\\_impacts\\_webinar\\_series\\_report\\_8\\_jan\\_2020.pdf](https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf)

- The effects of climate change are of the utmost severity in that they are being experienced and will be experienced on a massive scale and scope, and will involve significant irremediable impacts.
- The causes and effects on the enjoyment of rights of climate change are global, because they involve atmospheric change and oceanic acidification.
- The causes and effects of climate change also implicate virtually everyone – from individuals to businesses and governments. Every organisation and every individual can be linked to historic and ongoing greenhouse gas emissions.
- Climate change is significantly driven by certain kinds of high-emitting business activities, notably:<sup>59</sup> the production and use of fossil fuels and biomass, deforestation and industrial agriculture. Regarding fossil fuels production for example, causation is highly concentrated: just 100 businesses (known as “Carbon Majors”) are responsible for 71 per cent of industrial greenhouse gas emissions since 1988.<sup>60</sup> Businesses in high-emitting sectors are particularly central to achieving the Paris Goal.
- The causes and effects of climate change are long-term. Atmospheric concentrations of long-lived greenhouse gases have been building up since the advent of the industrial era, with a sharp increase in the last decades, and the effects of climate change on human rights will continue for (at least) decades to come and potentially millennia.

While the effects of climate change can therefore be differentiated from certain other kinds of business impact on human rights this does not exclude them from the business impacts within the UNGPs. Rather, as Guiding Principle 14 indicates, the severity of the human rights impacts of business activities will be judged by their scale, scope and irremediable character. As Joseph Wilde-Ramsing has observed, *“these three factors, if you look at climate change, make it clear that climate change should be very high on almost all companies risk prioritization”*, where prioritization is necessary.<sup>61</sup>

The international community, in conformity with the principle of international cooperation, has sought to address the particularities of climate change impacts through an agreed collective framework. As explained above, the resulting framework requires every State to pursue efforts reflecting highest possible ambition toward a global consensus standard as to the prevention and mitigation of the future potential impacts of climate change – the Paris Goal, involving Net Zero transition. As also explained in the above section, governments, businesses and courts have adopted this approach.

A critical part of the collective climate change normative framework is the concept of CBDRRC, which permits common action toward an overarching goal according to significantly varying capabilities and contributory responsibilities. This governance approach has significant parallels with the universally applicable UNGPs (see the references to differentiation factors for businesses’ human rights policies and processes in GPs 14, 17, 18, 19). Critically, all business enterprises have their role to play.

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<sup>59</sup> *“Business plays a central role in climate change. Much of the CO2 emissions causing climate change come from business-driven economic activity”* OHCHR, Human Rights, Climate Change and Business Key Messages, page 1. <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>

<sup>60</sup> Richard Heede, “Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010”, *Climatic Change*, vol. 122, issue 1–2, pp. 229–241 (January 2014).

<sup>61</sup> Page 73, [https://www.biicl.org/documents/125\\_hrdd\\_for\\_climate\\_change\\_impacts\\_webinar\\_series\\_report\\_8\\_jan\\_2020.pdf](https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf)

The OHCHR recognises the relevance of CDDRRC to the UNGPs, commenting that “[t]he principles of equity and fair sharing of benefits and burdens embedded in the UNFCCC and the Declaration on the Right to Development call for high-emitting developed countries to take the lead in reducing greenhouse gas emissions and to provide financial resources and technical assistance to developing countries. Businesses should also take steps to implement fair and just policies and programs to address the adverse effects of climate change”.<sup>62</sup>

The other key element of the international response to climate change is the focus on the Paris Goal. The Special Rapporteur on Human Rights and the Environment has commented as follows:<sup>63</sup>

*“In the human rights context, climate change is probably not best understood as a set of simultaneously occurring transboundary harms that should be addressed by each State trying to take into account its individual contribution to the effects of climate change in every other State in the world. The practical obstacles to such an undertaking are daunting, and it is instructive that the international community has not attempted to address climate change in this way.”*

*“The human rights norms relating to protection of the environment indicate that once States have adopted measures to protect human rights from environmental harm, they must implement those measures. The commitments made in relation to the Paris Agreement are elements of the collective decision of States on how to address climate change. All of them — the commitments for assistance as much as the commitments for mitigation and adaptation — should be implemented fully, as well as strengthened as necessary, to protect against the effects of climate change on human rights”*

A human rights perspective brings its own tools to operationalize this framework, as Professor Alan Boyle has argued with regard to States’ human rights obligations:<sup>64</sup>

*“UN human rights bodies could use their existing powers of oversight to focus attention on how States parties respond (or fail to respond) to commitments made in the Paris Agreement. This would represent a significant contribution to the debate on human rights and climate change. To some extent, as we saw earlier, it is already happening. [...]*

*The important point here is that human rights can be defined and expanded by reference to environmental commitments, including those adopted at Paris. Moreover, insofar as economic and social rights are generally concerned with encouraging governments to pursue policies which ‘ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’, making the Paris Agreement a success is vital for this purpose. Thus, despite its transparent weakness, the reference to human rights in the preamble of the Paris Agreement does reinforce their significance. Paris may not require States to comply with human rights commitments, but human rights commitments could and should require States to implement Paris, and their record in doing so can and should be monitored and assessed by UN human rights bodies in the same way that they would monitor and assess any other set of policies which adversely impact on the fulfilment of human rights.”*

<sup>62</sup> OHCHR, Human Rights, Climate Change and Business Key Messages, page 7. <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>

<sup>63</sup> Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (February 2016) UN Doc A/HRC/31/52 Paras. 41 and 80

<sup>64</sup> Alan Boyle. CLIMATE CHANGE, THE PARIS AGREEMENT AND HUMAN RIGHTS. *International and Comparative Law Quarterly*, 67(4) (2018), 759-777.

In our submission, the same general considerations apply to the UNGPs, and signify that the Information Note should centrally incorporate the Paris Goal as a key substantive ‘obligation of result’.

In the following sections, we expand on what this means for specific aspects of human rights due diligence.

## Identifying adverse climate impact

The exercise of a business enterprise identifying adverse climate-related impacts on human rights can build on the normative international legal framework and take into account the particularities of climate change. We submit that climate adverse impact identification, and the standard for addressing these impacts, should be interpreted in light of the Net Zero transition.

This means:

- A business must identify, make and (pursuant to GP 21, and the principle of transparency) publically disclose an inventory of the greenhouse gas emissions attributable to its operations, products and services.
- Emissions accounting practice is well established pursuant to international standards from the Greenhouse Gas Protocol’s Corporate Accounting and Reporting Standard to the more detailed criteria set out by bodies such as CDP (formerly the Carbon Disclosure Project)<sup>65</sup> and the Science-Based Target Initiative,<sup>66</sup> and is increasingly required by national emissions reporting laws.<sup>67</sup> Just as with human rights due diligence generally,<sup>68</sup> emissions accounting practice is dynamic, not static, in that practice is improving.
- It is critical that the inventory of emissions proceeds from the fundamental ‘whole value chain’ perspective of the UNGPs, and does not ‘carve out’ parts of an enterprises’ activities or the downstream or indirect emissions from a business’ products (known as Scope 3 emissions under the Greenhouse Gas Protocol). The inventory process should make use of internal or independent emissions accounting expertise as provided by an increasing range of organisations.

## Stakeholder consultation

We agree with Surya Deva’s observation<sup>69</sup> that the widespread, ongoing and worsening impacts of climate change mean that a different approach to the consultation of rightsholders is needed. In our submission:

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<sup>65</sup> [www.cdp.net](http://www.cdp.net)

<sup>66</sup> <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf> ;  
<https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf> (April 2021 version)

<sup>67</sup> “At least 40 countries require facilities or companies to measure and report their emissions periodically”.  
<https://www.ul.com/news/mandatory-emissions-reporting-around-globe>

<sup>68</sup> Commentary to GP 18.

<sup>69</sup> [https://www.biicl.org/documents/125\\_hrdd\\_for\\_climate\\_change\\_impacts\\_webinar\\_series\\_report\\_8\\_jan\\_2020.pdf](https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf)



- Consultation with rightsholders presently affected by climate change is valuable to highlight to business enterprises the reality of climate impacts and to amplify the voices and preferences of those suffering climate change impacts, consistent with the UNGPs' Commentary and Interpretive Guide.<sup>70</sup> The widespread nature of climate change impacts does not make this type of consultation irrelevant; indeed, measures to facilitate public participation on climate action is a particular issue highlighted by the General Assembly.<sup>71</sup> Enterprises should not avoid consultation on the pretext that consultation with all affected rightsholders is difficult. Consultation with *"individuals from groups or populations [...] at heightened risk of vulnerability"* from climate change impacts is feasible, particularly through civil society and/or legitimate community or regional representatives.<sup>72</sup> Accordingly, the OHCHR states *"[i]f it is not possible to sufficiently engage with all relevant stakeholders, businesses should consider reasonable alternatives such as consulting credible, independent expert resources, including environmental human rights defenders and civil society"*.<sup>73</sup> Consultation will facilitate acting *"in accordance with the principles of gender sensitivity, participation, transparency and accountability; and building on local and traditional knowledge."*<sup>74</sup> It may be particularly valuable in highlighting and addressing the reality that contributions to climate change are concentrated in business enterprises and the Global North, whereas the ongoing and potential impacts are highly concentrated in the Global South.<sup>75</sup>

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<sup>70</sup> Interpretive Guide Q42, Pages 43-44 and Box 5: *"Engaging with potentially affected groups and other relevant stakeholders provides important insights into their perspectives and concerns regarding the enterprise's operations and the implications these have for human rights. Effective engagement can also help demonstrate that the enterprise takes stakeholders' views and their dignity, welfare and human rights seriously. This can help to build trust and make it easier to find ways to address impact in an agreed and sustainable way, avoiding unnecessary grievances and disputes."*

<sup>71</sup> *"The obligation to facilitate public participation in environmental decision-making has strong roots in human rights law [...] There can be no doubt that this duty encompasses decision-making in relation to climate policy. States have long emphasized the importance of public participation in addressing climate change. Article 6 (a) of the United Nations Framework Convention on Climate Change requires its parties to promote and facilitate public participation, and the General Assembly has recognized "the need to engage a broad range of stakeholders at the global, regional, national and local levels, including national, subnational and local governments, private businesses and civil society, and including youth and persons with disabilities, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change. Similarly, article 12 of the Paris Agreement requires its parties to cooperate in taking appropriate measures to enhance public participation"* Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (February 2016) UN Doc A/HRC/31/52 Paras. 56 to 57

<sup>72</sup> Quotes from the Commentary to GP 18.

<sup>73</sup> OHCHR, Human Rights, Climate Change and Business Key Messages, page 4.  
<https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>

<sup>74</sup> Stated by the Committee on Economic, Social and Cultural Rights regarding States taking into account human rights duties in designing their climate commitments (Nationally Determined Contributions) under the Paris Agreement. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>

<sup>75</sup> *"Climate-related natural disasters are hitting low-income countries and small island developing States hard [...] The poorest half of the world's population, 3.9 billion people, generate only 10 per cent of global emissions. Conversely, the richest 10 per cent produce half of global emissions. The wealthiest 1 per cent have a carbon footprint that is 2,000 times larger than that of the poorest 1 per cent. Just 100 businesses (known as "carbon majors") are responsible for 71 per cent of industrial greenhouse gas emissions since 1988"*. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (July 2019) UN Doc A/74/161 Para. 13. According to the IPCC: *"moderate and large multisector impacts are prevalent at 1.5°C where vulnerable people live, predominantly in South Asia (mostly Pakistan, India and China), but that impacts spread to sub-Saharan Africa, the Middle East and East Asia at higher levels of warming. Beyond 2°C and at higher risk thresholds, the world's poorest populations are expected to be*

For example, corporate use of carbon offsets is an area where consultation with local communities, climate-affected communities and expert resources would be valuable (see below in the Carbon offsets section).

- Consultation must be complemented with the best available science on limiting future climate impacts. It is for this reason that ClientEarth's Principles for Paris-Alignment expect business transition plans to be "*regularly updated in line with the best available science*". Climate science falls into the category of "*credible, independent expert resources*" identified in the Commentary to GP 18.<sup>76</sup> The best available science is a concept centrally incorporated in the Paris Agreement,<sup>77</sup> which captures the ongoing development of scientific knowledge relating to the interaction between human activities and climate change and the necessity of acting on this basis given the urgency of the escalating threat of climate change. That said, the degree of scientific and policy consensus around the fundamental need to make rapid and significant reductions in greenhouse gas emissions is no longer the subject of any material scientific uncertainty.<sup>78</sup>
- Business enterprises will be implementing climate adaptation measures with regard to their own operations and value chains. The Paris Agreement incorporates the aim that climate adaptation action should be "*based on and guided by [...] as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems*" (as well as the best available science).<sup>79</sup> Adaptation measures should involve direct consultation with those affected by the climate impacts which the measures seek to manage.

## Business size

Regarding smaller businesses, the UNGP Interpretive Guide states, "*[i]n many instances, the approaches needed to embed respect for human rights in a smaller enterprise's operations can mirror the lesser complexity of its operations. However size is never the only factor in determining the nature and scale of the processes necessary for an enterprise to manage its human rights risks. The severity of its actual and potential human rights impact will be the more significant factor*".<sup>80</sup>

These points are equally relevant to addressing climate-related impacts as set out above, where smaller businesses may make use of a 'proportionality' approach. This may, for example, comprise identifying the bulk of their emissions through sectoral guidance and initially focussing on certain categories such as

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*disproportionately impacted, particularly in cases (SSP3) of great inequality in Africa and southern Asia.*" IPCC Special Report on 1.5C, paragraph 3.4.11 and Figure 3.19 on page 245

<sup>76</sup> According to the Committee on Economic, Social and Cultural Rights, "*States parties are required to respect, protect and fulfil all human rights for all [...] In doing so they should, consistent with the Covenant, act on the basis of the best scientific evidence available*".

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>

<sup>77</sup> See the quotation of Article 4(1) of the Paris Agreement on page 6 of this submission, and the recital: "*Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge*"

<sup>78</sup> "*Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in carbon dioxide (CO2) and other greenhouse gas emissions occur in the coming decades.*" IPCC Sixth Assessment Report, Working Group I, Summary for Policymakers, B.1. on page SPM-17.

[https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf)

<sup>79</sup> Paris Agreement, Art. 7(5).

<sup>80</sup> UNGP Interpretive Guide, page 20.

purchased electricity or transport.<sup>81</sup> The accompanying example given in the UNGP Interpretive Guide of a 10-person conflict minerals trading company with severe impacts is, however, instructive. It is comparable to a small coal exploration and development company, whose activities are strikingly in conflict with the imminent phase-out of thermal coal clearly identified in consensus climate science on the 1.5C pathway.<sup>82</sup> SMEs must also identify, prevent, mitigate and account for their climate impacts, and must also align with the Paris Goal and the Net Zero Transition in order to do so.

## Impact typology: cause, contribute, direct linkage

As the OHCHR Factsheet on climate change recognises,<sup>83</sup> businesses can be considered to cause, contribute or be directly linked to actual as well as potential climate change-related human rights impacts. This may take the form of emissions or land use change (deforestation, for example).

However, owing to the fact that greenhouse gasses will be emitted both directly by many businesses and across the value chains (and energy supplies) of all businesses, categorising business climate impacts in terms of causal typology involves points of difference compared to more limited and specific human rights impacts.

According to the OHCHR's advice regarding banks, a business "*can contribute to an adverse impact through its own activities (actions or omissions)—either directly alongside other entities, or through some outside entity, such as a client. Contribution implies an element of 'causality', for example that the bank's actions and decisions influenced the client in such a way as to make the adverse human rights impact more likely. This element of causality may in practice exclude activities that have only a 'trivial or minor' effect on the client*".<sup>84</sup>

According to John Ruggie, the impact typology also includes the following factors: "*the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could*

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<sup>81</sup> "The commentary to Guiding Principle 17 discusses further how external expertise and pooled resources can assist all enterprises, and particularly small and medium-sized ones, in conducting human rights due diligence that is both effective and proportionate to their human rights risks and their resources." UNGP Interpretive Guide, page 20.

<sup>82</sup> For example, the International Energy Agency includes coal expansion and phase out in its "Key milestones in the pathway to net zero" in its best assessment of the pathway to limit warming to 1.5C: 2021 "No new unabated coal plants approved for development [...] no new coal mines or mine extensions" and by 2030 "Phase out of unabated coal in advanced economies" and by 2040 "Phase-out of all unabated coal and oil power plants"

<sup>83</sup> Page 36, [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf) "The corporate responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. This includes the emission of greenhouse gases and toxic wastes, the contamination of air, water and soil, and deforestation – which adversely impact human life and health, ecosystems and biodiversity;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts, including impacts caused by the greenhouse gas and toxic waste emissions of the entire related value chain."

<sup>84</sup> Page 5, OHCHR advice to Banktrack [https://media.business-humanrights.org/media/documents/files/documents/Banktrack\\_response\\_FINAL.pdf#:~:text=The%20Office%20of%20the%20United%20Nations%20High%20Commissioner,the%20financial%20sector.%20Earlier%20advice%20to%20the%20non-](https://media.business-humanrights.org/media/documents/files/documents/Banktrack_response_FINAL.pdf#:~:text=The%20Office%20of%20the%20United%20Nations%20High%20Commissioner,the%20financial%20sector.%20Earlier%20advice%20to%20the%20non-)

or should have known about such harm; and the quality of any mitigating steps it has taken to address it".<sup>85</sup>

In practice, virtually all businesses will be causally linked to climate change:

- Certain high-emitting business sectors contribute in a particularly significant way to climate human rights impacts, because they or their supply chain or products have a very large emissions footprint, which can in no way be qualified as 'trivial or minor'. As the Institute for Human Rights and Business states, "*science and policy makers are clear about major contributors to climate change and are becoming ever clearer about contributions from a far wider range of sectors*".<sup>86</sup> This includes businesses engaged in the exploration, production, refinement, and distribution of coal, oil or gas (or derived products such as plastics), certain industrial businesses (cement, steel), certain large transport businesses (automotive, aviation), and agriculture businesses, including those implicated in deforestation. The international investor group, the Climate Action 100+, provides an indicative guide to the relevant industrial sectors.<sup>87</sup> The OHCHR considers that business of this type ("*large businesses involved in the generation of electricity and heat, transportation, industrial agriculture, and other high emitting sectors*") have contributed to severe impacts, meaning business enterprises in these sectors – where prioritization is necessary - must prioritize addressing climate impacts (GP 24).
- Other businesses may be analysed as contributing to human rights climate impacts through their high-emitting clients/customers, depending on various factors. This can include finance businesses, but also advertising businesses, legal businesses, advisory/consulting businesses and other kinds of service industries. We highlight here the relevance of Anita Ramasastry's work on professional service providers.<sup>88</sup>
- Still other types of businesses can be analysed as bearing relatively less significant responsibility for climate impacts, where they and their value chains are not responsible for significant emissions (typically, where emissions footprints are relatively minor and largely limited to their travel and energy usage). However, such businesses still are responsible for emissions and their purchases of energy and transport (at the very least) must change in the transition to Net Zero.

<sup>85</sup> Ruggie response to the Thun Group [https://media.business-humanrights.org/media/documents/files/documents/Thun\\_Final.pdf](https://media.business-humanrights.org/media/documents/files/documents/Thun_Final.pdf) ; OHCHR advice to Banktrack [https://media.business-humanrights.org/media/documents/files/documents/Banktrack\\_response\\_FINAL.pdf#:~:text=The%20Office%20of%20the%20United%20Nations%20High%20Commissioner,the%20financial%20sector.%20Earlier%20advice%20to%20the%20non-](https://media.business-humanrights.org/media/documents/files/documents/Banktrack_response_FINAL.pdf#:~:text=The%20Office%20of%20the%20United%20Nations%20High%20Commissioner,the%20financial%20sector.%20Earlier%20advice%20to%20the%20non-)

<sup>86</sup> [Connecting the Climate Change and Business & Human Rights Agendas | Institute for Human Rights and Business \(ihrb.org\)](https://www.ihrb.org/)

<sup>87</sup> "*Climate Action 100+ is focused on companies that are key to driving the global net-zero emissions transition. 167 focus companies have been selected for engagement, accounting for over 80 percent of corporate industrial greenhouse gas emissions.*" [www.climateaction100.org/progress/net-zero-company-benchmark/](http://www.climateaction100.org/progress/net-zero-company-benchmark/)

<sup>88</sup> "*This article [...] underscores the critical need for these [professional service providers] to align their business processes and advisory services with the UNGPs to avoid being enablers of human rights abuses.*" Anita Ramasastry (2021). *Advisors or Enablers? Bringing Professional Service Providers into the Guiding Principles' Fold.* *Business and Human Rights Journal*, 6(2), 293-311. <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/advisors-or-enablers-bringing-professional-service-providers-into-the-guiding-principles-fold/D8E3DA1860530F7A232DAFFC9C3BA89E>

We agree with the Institute for Human Rights and Business that debates about factual causation must not stand in the way of urgent climate action<sup>89</sup> – and must not be used to water down the fundamental responsibility to align business activities with the Paris Goal. Applying a too-strict causal understanding to impact typology can run counter to the aims of the Paris Agreement. For example, limiting business responsibility for emissions produced by others in its value chain to the application of leverage can result in a situation where a business seeks to evade responsibility for transitioning its value chain (such as its products,<sup>90</sup> or its key supply chain climate impacts) in line with the Paris Goal.

In our submission, the impact typology regarding climate-related impacts should be assessed by reference to the steps the business is taking in response, in line with John Ruggie’s analysis above, and reflecting and implementing the normative international legal framework on climate change. We consider that the test of meaningful alignment with (at least) the Paris Goal and the Net Zero Transition (as the measure of whether businesses are seeking to address their climate impacts) should be the key factor in differentiating the impact typology for climate-change related human rights impacts. In other words, a business which is not Paris-aligned is more likely to fall into ‘cause’ or ‘contribute’. This means as follows:

- businesses which *are* meaningfully aligned with the Paris Goal will be taking steps to prevent and mitigate the potential climate impacts of their value chain, according to the best available science. They must continue to reassess this as science develops and in accordance with the dynamic nature of human rights due diligence.
- businesses which *are not* aligned with the Paris Goal – or whose business activities can impede progress towards the Paris Goal – risk an increasing responsibility for climate impacts, calls for accountability and remediation, and the associated reputational, financial and legal consequences. They should take steps to align with the Paris Goal, and where they fail to do so, may be analysed as causing or contributing to climate impacts, engendering the responsibility to provide for or cooperate in remediation in line with GP 22 (see further below under Remediation).
- High-emitting businesses must align immediately with the Paris Goal in order to mitigate their climate human rights risk – this is a ‘red line’. They are increasingly in danger of losing their social licence to operate (if not their position of regulatory and legal compliance)<sup>91</sup> if they fail to do so. They must also consider how to provide for or cooperate in remediation of existing impacts from historic emissions, in line with GP 22.

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<sup>89</sup> “Don’t let business and human rights debates about causation stand in the way of urgent climate action: The UNGPs developed a differentiated framework of company responsibility to respond to human rights impacts, depending on whether a business has “caused, contributed to, or is directly linked to” an impact. But causality is not always clear, nor are distinctions between the categories. Such debates should not become an excuse for delayed action.” [Connecting the Climate Change and Business & Human Rights Agendas | Institute for Human Rights and Business \(ihrb.org\)](https://www.clientearth.org/the-greenwashing-files/)

<sup>90</sup> As many fossil fuel businesses do today, in a manner similar to the tobacco industry’s historic efforts to avoid responsibility for the consequences of its products. See for example: <https://www.clientearth.org/the-greenwashing-files/>

<sup>91</sup> For example, an automotive manufacturer will not be able to sell internal combustion engine vehicles in the UK from 2030, according to a UK government announcement in November 2020. <https://www.gov.uk/government/news/government-takes-historic-step-towards-net-zero-with-end-of-sale-of-new-petrol-and-diesel-cars-by-2030> Other countries with fossil fuel vehicle phase-outs are listed here: [Update on government targets for phasing out new sales of internal combustion engine passenger cars \(theicct.org\)](https://www.theicct.org/)

## Preventing potential climate impacts

In order to take action to prevent, insofar as possible, the crystallisation of climate change-related human rights risks, a business must align its business strategy and plans with the Paris Goal. In practice, this means having emission reduction targets consistent with the best available science on sectoral pathways; as the OHCHR states “[b]usinesses should set science-based targets throughout their operations to align with limiting global warming to well below 2°C above pre-industrial levels and pursuing efforts towards 1.5°C, with efforts towards net-zero greenhouse gas emissions by 2050, as indicated in the Paris Agreement.” Depending on the sector, this is likely to mean reducing emissions against today’s baseline by c.25% by 2025.

ClientEarth has published a set of Principles for Paris Alignment which state that: “*Paris-aligned targets, assumptions and methodologies must be reasonable, precautionary, evidence-based and regularly updated in line with the best available science.*”<sup>92</sup> Underlying this are four ‘red lines’:

- “(i) the entity must set an objective of achieving net-zero GHG emissions (Scopes 1–3) by 2050 at the latest, depending on sector, and consistent with a 1.5°C pathway*
- “(ii) the entity must adopt a strategy which sets short, medium and long term targets to achieve its net-zero objective, including 2025 and 2030 targets (Scopes 1–3)*
- “(iii) the strategy and underlying assumptions must prioritise reductions in direct value chain GHG emissions and not unreasonably rely on unproven or uncosted negative GHG emissions, offsets, and/or technology*
- “(iv) the strategy must explicitly consider ‘just transition’ imperatives”*

Businesses should address climate impacts based on their total GHG emissions inventory across their value chain, and with the starting point of the pathway to the Paris Goal. This is likely to include taking immediate climate change mitigation (emission reduction) measures. In this regard, the UNGPs should proceed from way the international community has sought to address climate change, as explained by the Special Rapporteur on Human Rights and the Environment, above.

Furthermore, alignment with the Paris Goal applies across business relationships. For business enterprises to integrate the findings of their climate human rights assessment and take appropriate action to prevent impacts requires that they “*should use (and seek to increase) leverage to influence businesses with which they have relationships to prevent or mitigate any climate change-related harms (for instance to ensure compliance with climate and environmental standards)*” – namely, the standard of Paris-alignment.<sup>93</sup>

## Mitigating climate impacts

Climate impacts on human rights are not all preventable. UNGPs-compliant action to address climate-related impacts involves mitigating the unavoidable impacts of climate change, through ‘adaptation measures’.

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<sup>93</sup> OHCHR, Human Rights, Climate Change and Business Key Messages, page 4.  
<https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>

With regard to the impacts in their own operations and value chains affecting their employees and (sub)contractors, business enterprises must take measures to adapt their operations (and, potentially, their value chains) to the unavoidable impacts of climate change (adaptation measures).

Business enterprises must also consider mitigating the unavoidable impacts of climate change on wider categories of victims.

One of the goals of the Paris Agreement is to “[i]ncreas[e] the ability to adapt to the adverse impacts of climate change and foster climate resilience”.<sup>94</sup> The Committee on Economic, Social and Cultural Rights states that support from high-income States for adaptation efforts, particularly in developing countries, “would be consistent with the requirement under the Covenant that States ensure “the right of everyone to enjoy the benefits of scientific progress””.<sup>95</sup>

The 2020 UN Environment Programme Adaptation Gap report assesses the state of global adaptation needs and efforts. It concludes that the adaptation finance gap is not closing, and finds that “[p]ublic and private finance for adaptation must be stepped up urgently”.<sup>96</sup> The report also describes the role of multilateral UNFCCC funds entities in channelling finance to adaptation projects in climate vulnerable States:<sup>97</sup>

*“Additional adaptation finance is critical to enhance adaptation planning and implementation and limit climate damages, particularly in developing countries [...] Further scaling up of the levels of implementation is needed to avoid falling behind with managing climate risks, particularly in developing countries”*

**“Significant scaling up and incentivizing for both public and private adaptation finance is required to narrow the gap.** Adaptation finance modalities of bilateral and multilateral support are evolving, such that grants are increasingly accompanied by a broader range of instruments, actors and approaches. For instance, as the biggest dedicated multilateral climate fund, the [UNFCCC] Green Climate Fund has allocated 40 per cent of its total portfolio to adaptation and is increasingly using its catalytic power to crowd-in investments from private investors.”

*“Analysis of the adaptation projects that have started since 2015, supported by the [...] multilateral funds serving the Paris Agreement (the Adaptation Fund, the Green Climate Fund and the Global Environment Facility) [...], shows that more than half are being implemented in least developed countries (LDCs) and almost 15 per cent in small island developing States (SIDS). The majority focus on the most climate-sensitive sectors, i.e. agriculture and water, with drought, rainfall variability, flooding and coastal impacts among the most commonly addressed climate hazards. Engagement of the private sector remained low except for the tourism, agriculture and insurance industries.”*

The multilateral UNFCCC funds are mandated to facilitate the transfer of public and private financial resources to developing countries for assistance with respect to mitigation and adaptation, and provide a

<sup>94</sup> Paris Agreement, Art. 1(b)

<sup>95</sup> Climate change and the International Covenant on Economic, Social and Cultural Rights Statement of the Committee on Economic, Social and Cultural Rights (8 October 2018)

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>

<sup>96</sup> <https://www.unep.org/resources/adaptation-gap-report-2020>

<sup>97</sup> UN Environment Programme, Adaptation Gap Report 2020, Executive Summary

[https://wedocs.unep.org/bitstream/handle/20.500.11822/34726/AGR\\_en.pdf?sequence=35](https://wedocs.unep.org/bitstream/handle/20.500.11822/34726/AGR_en.pdf?sequence=35)

collective channel for climate financial support.<sup>98</sup> For example, the Adaptation Fund is financed by government as well as private donors and finances projects and programmes that help vulnerable communities in developing countries adapt to climate change, based on country needs, views and priorities.<sup>99</sup>

As the OHCHR notes, if a business may contribute to an adverse climate change-related human rights “it should cease or prevent its contribution and mitigate any remaining impact to the greatest extent possible. In the case of business contributions to climate change, this may include supporting climate adaptation measures”.<sup>100</sup> Business enterprises can invest in adaptation for those who cannot afford to adapt to the inevitable impacts of climate change, in line with IPCC conclusions.<sup>101</sup>

In our submission, business enterprises must consider contributing to adaptation efforts for impacted rightsholders as part of mitigating their climate impacts, potentially through the UNFCCC funds entities established for this purpose. They must do so in a rights-respecting way (for example, with regard to stakeholder consultation, as explained above).

## Tracking, communication and policy coherence

On these issues, we agree with the position set out in the OHCHR’s Key Messages on Human Rights, Climate Change and Business, which states that businesses should on an ongoing basis:<sup>102</sup>

- *“Track the effectiveness of their response: Tracking should draw on a range of expert sources so businesses can understand whether climate change-related human rights impacts are being properly addressed.*
- *Communicate how they address their human rights impacts externally: Businesses should publicly provide information that is sufficient to evaluate the adequacy of their response to climate change-related human rights harms.*
- *Ensure policy coherence throughout business activities: Businesses should strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relations, including as they relate to climate change. This should include, for example, climate change dimensions of policies and procedures that set financial and*

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<sup>98</sup> The Global Environment Facility,

<sup>99</sup> <https://www.adaptation-fund.org/about/>

<sup>100</sup> OHCHR Factsheet on Human Rights and Climate Change, page 37,  
[https://www.ohchr.org/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

<sup>101</sup> According to the IPCC, “[l]imiting the risks from global warming of 1.5°C in the context of sustainable development and poverty eradication implies system transitions that can be enabled by an increase of adaptation and mitigation investments [...] adaptation investments can facilitate the mobilization of private funds and enhance the effectiveness of other public policies. Studies indicate a number of challenges, including access to finance and mobilization of funds. (high confidence) [...] More recently there is a growing understanding of the scale and increase in non-governmental organizations and private funding in some regions (medium confidence). Barriers include the scale of adaptation financing, limited capacity and access to adaptation finance (medium confidence).” IPCC Special Report on 1.5C, Summary for Policymakers, D.5.

<sup>102</sup> OHCHR, Human Rights, Climate Change and Business Key Messages, page 4.  
<https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>



*other performance incentives for personnel; procurement practices; and lobbying activities where climate change-related human rights issues are implicated.”*

We emphasize that emissions reduction efforts must be tracked, quantitatively, against the standard of Paris-alignment. We agree with Joseph Wilde-Ramsing’s observation that “[t]racking and setting goals for greenhouse gas emissions reductions is really important and it should be tied to the Paris Agreement.”<sup>103</sup>

Policy coherence (including regarding marketing and advertising activities, and ‘greenwashing’) are key to address the deficiencies of current business practice on climate change human rights impacts.<sup>104</sup> As the OHCHR states, “businesses should refrain from supporting public information campaigns based on inaccurate, misleading and unfounded assertions which harm the ability of States and the public to make informed decisions regarding climate change.”<sup>105</sup> Business responses to climate change are in particular need of striving for coherence across activities and relationships, as accusations of ‘greenwash’ and evidence of the disjunct between public positions and operations shows.<sup>106</sup>

Business enterprises must externally communicate how they address their climate change-related human rights impacts, in line with GP 21. Existing standards of climate disclosures do not presently meet the standard of providing information sufficient to understand and evaluate the adequacy of enterprises’ response to their climate impacts. This may be because a human rights lens is not applied and reporting is of business, not human rights risk. For example, in 2020 ClientEarth’s Accountability Emergency report reviewed the climate-related reporting of 250 large listed companies and found significant failures to communicate climate impacts and the action taken to address them.<sup>107</sup>

The severity of climate impacts requires that businesses (and particularly high-emitting businesses) formally report on these issues as a matter of human rights reporting, and likely subject to independent human rights verification. Among other things, this means that there must be transparent and detailed disclosure of emissions inventories and Paris-aligned business plans. The ClientEarth Principles for Paris-Alignment state:<sup>108</sup>

*“(v) the entity must disclose its targets, assumptions, uncertainties, methodology, impacts, and strategy, and report annually against progress in its financial reporting*

*(vi) assumptions used in the entity’s financial accounts, capital expenditure and/or investment decisions must be consistent with its targets and strategy*

*(vii) disclosures must be subject to third party assurance”*

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<sup>103</sup> Page 74,

[https://www.biicl.org/documents/125\\_hrdd\\_for\\_climate\\_change\\_impacts\\_webinar\\_series\\_report\\_8\\_jan\\_2020.pdf](https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf)

<sup>104</sup> OHCHR, Human Rights, Climate Change and Business Key Messages, page 4 and 7.

<https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>

<sup>105</sup> OHCHR, Human Rights, Climate Change and Business Key Messages, page 7.

<https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>

<sup>106</sup> See for example ClientEarth, The Greenwashing Files. <https://www.clientearth.org/the-greenwashing-files/>

<sup>107</sup> ClientEarth, Accountability Emergency: A review of UK-listed companies’ climate change-related reporting (2019-20) <https://www.clientearth.org/media/wbglw3r3/clientearth-accountability-emergency.pdf>

<sup>108</sup> <https://www.clientearth.org/media/40omeroa/2020-10-16-principles-for-paris-alignment-position-paper-ce-en.pdf>

## Remediation

In the Paris Agreement, States parties set out a mechanism for dealing with ‘loss and damage’ from climate change, building on the establishment of the Warsaw International Mechanism for Loss and Damage (the Warsaw Mechanism) at COP19 of the UNFCCC in Warsaw in 2013. In Article 8 of the Paris Agreement, States parties recognised the importance of “*averting, minimizing and addressing loss and damage associated with the adverse effects of climate change*” (hereafter Loss & Damage), and agreed that they should “*enhance understanding, action and support [...] on a cooperative and facilitative basis with respect to*” Loss & Damage. The concept of Loss & Damage is understood as the “*negative effects of climate variability and climate change that people have not been able to cope with or adapt to*”. Loss & Damage is, in effect, concerned with the implications of climate change on the enjoyment of human rights.<sup>109</sup> Overall, the Paris Agreement Loss & Damage provisions indicate the international community’s aim of remedying the inevitable harms associated with climate change.

This aim overlaps with international human rights law, and academic commentators have observed that a human rights based approach to Loss & Damage brings with it key benefits.<sup>110</sup> The Special Rapporteur on Human Rights and the Environment has noted that States have a procedural obligation to “*[e]nable affordable and timely access to justice and effective remedies for all, to hold States and businesses accountable for fulfilling their climate change obligations*” and businesses have the responsibility to “*ensure that people affected by business-related human rights violations have access to effective remedies*”.<sup>111</sup>

Regarding business responsibility in the remediation of climate harms, we note the OHCHR’s Key Messages that:

*“Business enterprises should participate in good faith, and not undermine, proceedings before legal or non-legal tribunals that promote accountability for climate harms. In the context of climate change, particularly where businesses have contributed to severe impacts (such as large businesses involved in the generation of electricity and heat, transportation, industrial agriculture, and other high emitting sectors), each business should provide for remediation appropriate to its share in responsibility for the harm.”<sup>112</sup>*

In light of the above, we have the following observations regarding access to remedy under Pillar III:

- Access to justice for climate impacts is critical, as witnessed by the increasing attempts to seek remedy through judicial and non-judicial state-based mechanisms.<sup>113</sup>

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<sup>109</sup> Warner, Koko, van der Geest, Kees, Kreft, Soenke, Huq, Saleemul, Harmeling, Sven, Kusters, Koen and De Sherbinin, Alex (2012). *Evidence from the frontlines of climate change: loss and damage to communities despite coping and adaptation*. UNU-EHS Report. UNU- EHS. <https://collections.unu.edu/view/UNU:1847>

<sup>110</sup> See the benefits of a human rights based approach identified in: Patrick Toussaint & Adrian Martínez Blanco (2020) A human rights-based approach to loss and damage under the climate change regime, *Climate Policy*, 20:6, 743-757, <https://doi.org/10.1080/14693062.2019.1630354>

<sup>111</sup> Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (July 2019) UN Doc A/74/161 Paras. 64(c) and 72

<sup>112</sup> OHCHR, Human Rights, Climate Change and Business Key Messages, page 5. <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>

<sup>113</sup> See, for example, <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/>

- Implementation of due diligence (including in compliance with mandatory due diligence requirements in relevant jurisdictions) should not absolve a company's liability from causing, contributing to or failing to prevent human rights violations or environmental damage. It is necessary for States to ensure members of the public, including NGOs, can bring complaints directly against companies and hold them accountable in case of damage. Legal standing should also be granted to organisations with a legitimate interest in representing victims and rights-holders.
- Available remedies should be adequate and effective, including the key preventative tool of injunctive relief, and procedures should be fair, equitable, timely and not prohibitively expensive. In line with the Commentary to GP 25, there needs to be a "*bouquet of remedies*" available so that a diverse range of victims can access appropriate and effective remedies.<sup>114</sup> This includes vulnerable groups, such as indigenous people and persons with disabilities, and groups who have experienced long-term adverse impacts such as women and those who are poor.<sup>115</sup> Information on administrative and judicial review procedures should be disseminated to the public, in particular to stakeholders and potentially affected communities. Access to justice should also provide for public and appropriate assistance mechanisms to remove or reduce financial and other barriers.
- As explained above in the Impact typology section, high-emitting businesses, and those which are not aligned with the Paris Goal, should acknowledge their responsibility and provide for and cooperate in the remediation of climate impacts. We consider that Paris-alignment and high-emitting status are key factors for assessing a business' "*share in responsibility for [climate] harm[s]*", adopting the OHCHR's phrase. This reflects the focus of actions for accountability already ongoing in judicial and other fora, and the inclusion of Loss & Damage provisions in the Paris Agreement.<sup>116</sup> Business enterprises' remediation responsibility should not be predicated on arguments about their delineated causal role in those impacts.
- As the OHCHR notes (see quote above) businesses should cooperate in good faith in attempts to access judicial and non-judicial remedy for climate impacts. This includes pursuing a litigation (and settlement) strategy which is consistent with the responsibility to respect human rights,<sup>117</sup> an approach generally absent in existing climate litigation.<sup>118</sup>

<sup>114</sup> See Report of the WG on Access to Remedies, [A/72/162 - E - A/72/162 -Desktop \(undocs.org\)](#).

<sup>115</sup> See report of the WG on Gender Dimensions of the UNGPs, [A/HRC/41/43 - E - A/HRC/41/43 -Desktop \(undocs.org\)](#).

<sup>116</sup> Examples include the various climate litigations against oil and gas companies in the USA, *RWE v Lliuya*, the *Milieudefensie et al v Shell* and the Phillipines National Human Rights Commission's 'Carbon Majors' enquiry. See further [https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation\\_2021-snapshot.pdf](https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf)

<sup>117</sup> "*Should the corporate responsibility to respect human rights remain entirely divorced from litigation strategy and tactics, particularly where the company has choices about the grounds on which to defend itself? Should the litigation strategy aim to destroy an entire juridical edifice for redressing gross violations of human rights, particularly where other legal grounds exist to protect the company's interests?*" John Ruggie, KIOBEL AND CORPORATE SOCIAL RESPONSIBILITY: An Issues Brief by John G. Ruggie (2012) <https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-kiobel-and-corp-social-responsibility-sep-2012.pdf>

<sup>118</sup> See, for example: <https://www.theguardian.com/business/2021/jul/29/shell-raises-dividend-soaring-oil-prices>; <https://capitalmonitor.ai/factor/environmental/how-the-obscure-energy-charter-treaty-is-delaying-climate-action/>

## Carbon offsetting

This section explains our view of the problems associated with business use of carbon offsets. In summary, we consider that the Information Note should discourage businesses from using offsets.

'Carbon offsets' are schemes by which 'carbon credits' can be purchased to contribute funding towards forest protection, afforestation or clean energy/appliance projects in an effort to absorb or avoid greenhouse gas emissions elsewhere. Many projects relate to forest protection schemes and claim that they 'cancel out' emissions by relying on a hypothetical counterfactual scenario – using the logic that '*but for*' the funding for forest protection, the forest *would* have been cut down and the forests' absorbed and stored carbon dioxide released into the atmosphere through tree burning or degradation. Others must argue that energy efficient appliances (more modern cookstoves, efficient lighting etc) or renewable projects would not have gone ahead '*but for*' the funding generated by the sale of offsets.<sup>119</sup> Through the purchase of carbon credits of this kind, a business may apply them as equivalent to emission reductions in meeting its Net Zero target, or may claim that it (or its products), are 'carbon neutral' as a form of action to address its contribution to climate change.

There are various issues with the purported utility of carbon offsets to address business climate change impacts:

- *Firstly*, depending on the way offsets are calculated, offsets may not extend to all of the life-cycle emissions for which a business (or product/service) is responsible (i.e. there are value chain emissions as a result of the business' activities which are not covered). For example, the production and transport of the fossil fuel 'natural' gas involves leakage and so emissions of methane, a very powerful greenhouse gas, which are not often fully captured by gas business measurements. The calculation of offsets may also involve double-counting, for example if the State in which the offset project is located is itself claiming the climate 'credit' of the carbon sink or project.
- *Secondly*, there are also 'in principle' issues with the justification that offsets are an effective way of 'cancelling out' the relevant emissions. Offsets theoretically must ensure 'additionality' – i.e. that, '*but for*' the forest (or other natural carbon sink) protection project funded by offsets, the relevant forest would have been cut down and its stores of carbon dioxide released into the atmosphere. They also must ensure 'permanence', so that forest continues to store carbon into the future. However, it is impossible to establish either the 'counterfactual' or sufficient longevity. For example, it cannot be *proved* that, absent funding for forest protection, deforestation would have occurred over the lifetime of the project. Instead, at best, risk of deforestation can be projected with varying degrees of confidence from previous events or deforestation in different areas.<sup>120</sup> Project lifetimes is measured in decades, and it is difficult to argue that forests will last

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<sup>119</sup> A subset of carbon offsets relate to 'emission removals' schemes, through investment in re/afforestation (planting new trees). Planting new trees is an equally ineffective solution to insufficient declining emissions in the current climate emergency, due to the limited carbon absorption capacity in timescales relevant to the Paris Goals, lack of available land mass globally and impermanence of plantations. See, for example,

<sup>120</sup> There are in practice real concerns that additionality claims are often overstated. According to one 2016 study of EU offset schemes, "*our results suggest that 85% of the projects covered in this analysis and 73% of the potential 2013-2020 Certified Emissions Reduction (CER) supply have a low likelihood that emission reductions are additional and are not over-estimated*".

[https://ec.europa.eu/clima/sites/clima/files/ets/docs/clean\\_dev\\_mechanism\\_en.pdf](https://ec.europa.eu/clima/sites/clima/files/ets/docs/clean_dev_mechanism_en.pdf) Another 2021 investigation into

for centuries – not least due to climate change itself, which is and will significantly alter ecosystems.<sup>121</sup> On the ‘debit side’ of the offset logic, however, the ‘offset’ emissions are both certain and near-permanent (lasting hundreds of years in the atmosphere) – and need to be reduced to reach Net zero. As such, offsets are a flawed ‘like for like’ solution to emissions.

- *Thirdly*, offsets are the wrong fix for a climate emergency. Today, we face a situation where the estimated global carbon budget for limiting warming to 1.5C is severely limited.<sup>122</sup> Analysis estimates that it would run out in c. 5-10 years at current oil and gas production levels.<sup>123</sup> Reaching net zero means reducing emissions to near zero, and finding ways to absorb those residual emissions which cannot be reduced. For many sources of emissions which are the subject of offsets (transport, energy, heating), there are technologically feasible and cost-effective alternatives which must be taken up at significantly increased rate.<sup>124</sup> As such, offsets are not an effective means for business enterprises to address (or ‘cancel out’) their emissions, particularly emissions which can practically be reduced. Businesses which describe their carbon credit purchases as signifying ‘carbon neutrality’ run the risk of misleading stakeholders that they are effectively addressing their climate impact in line with the Paris Goal – or, worse, that they are already ‘Net Zero’-aligned as a business, given the scope for confusion between the concepts of carbon neutrality and Net Zero in different contexts. Reliance on offsets as a substitute for emission reductions cannot support a claim of alignment with the Paris Goal, or a claim of addressing climate change impacts generally.

The above conclusions are reflected in various expert bodies currently considering the problem of offsets:

- There is a widely held expert consensus that offsets cannot be used in place of emissions reductions. For example, the Science-Based Target Initiative states “*The widespread adoption of a practice that leaves a ton of emissions unabated for every ton of emissions abated somewhere else would not be consistent with phasing out nearly all sources of anthropogenic GHG*

10 airlines’ offsetting schemes found various problems with claims of additionality, such as deforestation projected from a neighbouring area with a major road, where the project area itself had no major roads.

<https://unearthed.greenpeace.org/2021/05/04/carbon-offsetting-british-airways-easyjet-verra/>

<sup>121</sup> In August 2021, US forest fires hit carbon offset projects used by companies, according to press reports. These events are supposed to be covered by a ‘buffer pool’ of extra offsets/carbon credits, but that this may be insufficient as climate impacts accelerate. According to FT article: “*Given the risks from fire and drought, forestry offsetting schemes contributed about 10-20 per cent of the credits they generate to the “buffer pool”. Critics of the unregulated offsetting system have warned that buffer pools may be too small to compensate for the damage done by major fires. “The concern is that the pool is not large enough to cover the increased risk of [the carbon benefits being reversed] with climate change over the full set of participating projects,” said Barbara Haya, research fellow at the University of California, Berkeley. Danny Cullenward, policy director at CarbonPlan, a non-profit organisation that has previously conducted analysis on soil carbon offsets with funding from Microsoft, said quantifying the carbon impacts of a specific fire, and therefore how many offsets to cancel, was complicated. However, he noted that “having fires like the 2020 season could wipe out the buffer pool if they happen every four years”.*

<https://www.ft.com/content/3f89c759-eb9a-4dfb-b768-d4af1ec5aa23>

<https://www.proactiveinvestors.co.uk/companies/news/956701/bps-carbon-offset-programme-hit-by-us-forest-fires--reports-956701.html>

<sup>122</sup> See the IPCC AR6 Working Group I report, Summary for Policymakers, Table SPM.2 on page SPM-38.

<https://www.ipcc.ch/report/ar6/wg1/#SPM>

<sup>123</sup> “*Our analysis shows that even with no expansion of fossil fuel production, the current productions levels will exhaust the carbon budget associated with a 1.5°C target by 2025.*” [Fossil Fuel Exit Strategy.pdf](#) (adobeindd.com)

<sup>124</sup> See the IEA’s Net Zero Roadmap, for example. [https://iea.blob.core.windows.net/assets/405543d2-054d-4cbd-9b89-d174831643a4/NetZeroby2050-ARoadmapfortheGlobalEnergySector\\_CORR.pdf](https://iea.blob.core.windows.net/assets/405543d2-054d-4cbd-9b89-d174831643a4/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf)

emissions.”<sup>125</sup> It says that offsets “do not replace the need to reduce value chain emissions in line with science”.<sup>126</sup> Others confirming this include the Oxford Principles for Net Zero Aligned Carbon Offsetting and the report of the Task Force on Scaling Voluntary Carbon Markets (a high-level initiative led by the UN Special Envoy for Climate Action, Mark Carney, and involving 50 members and experts from c. 120 different institutions).<sup>127</sup>

- The Task Force also comments that “*There should be clarity on the exact [emissions] reduction pathway the company and the [point of sale] offering are undertaking. This will reinforce the credibility of the use of offsets by companies without confusing or misleading consumers*”.<sup>128</sup>
- For its part, the UK’s Committee on Climate Change (CCC) makes clear that “*A net-zero target requires deep reductions in emissions, with any remaining sources offset by removals of CO<sub>2</sub> from the atmosphere (e.g. by afforestation)*”.<sup>129</sup> The CCC also states that businesses should “**[m]inimise offsets, phase them out, and ensure only permanent emissions removals remain, in line with our recommendations around how the UK should meet its national carbon budgets**” (emphasis added).<sup>130</sup>
- In place of the current unregulated use of offsets, there are various proposals for the appropriate use of offsets, including: prohibiting them entirely, limiting them to emissions (or specific sectors) which are not feasible to reduce, limiting them to the temporary and declining emissions on a Paris-aligned emissions reduction pathway, limiting them to historic emissions only.<sup>131</sup>
- Regulators and legislators have begun to address the problematic use of offsets by businesses. The sustainability guidance published by the Dutch consumer protection regulator, the Authority for Consumers and Markets, limits the valid use of offsets for specific residual emissions whilst enterprises act to reduce all the emissions they can cut down: “*[t]he aim is that companies make their production processes more sustainable in order to produce fewer emissions in a structural manner. CO<sub>2</sub>-compensation as a supplementary instrument can help reduce the impact of emissions that remain, and can serve as a temporary measure during the time it takes to make production processes truly sustainable*”.<sup>132</sup> The French legislature is moving to ban claims of ‘carbon neutral’ products or services altogether.<sup>133</sup> Most recently, the Dutch advertising regulator

<sup>125</sup> Page 24, <https://sciencebasedtargets.org/resources/files/foundations-for-net-zero-full-paper.pdf>

<sup>126</sup> Page 8, <https://sciencebasedtargets.org/resources/files/foundations-for-net-zero-full-paper.pdf>

<sup>127</sup> Page 6, <https://www.smithschool.ox.ac.uk/publications/reports/Oxford-Offsetting-Principles-2020.pdf> ; Page 18, [https://www.iif.com/Portals/1/Files/TSVCM\\_Report.pdf](https://www.iif.com/Portals/1/Files/TSVCM_Report.pdf)

<sup>128</sup> Page 106, [https://www.iif.com/Portals/1/Files/TSVCM\\_Report.pdf](https://www.iif.com/Portals/1/Files/TSVCM_Report.pdf)

<sup>129</sup> CCC Net Zero report, page 16 <https://www.theccc.org.uk/wp-content/uploads/2019/05/Net-Zero-The-UKs-contribution-to-stopping-global-warming.pdf>

<sup>130</sup> CCC Box 9.1 on page 393 <https://www.theccc.org.uk/wp-content/uploads/2020/12/The-Sixth-Carbon-Budget-The-UKs-path-to-Net-Zero.pdf>

<sup>131</sup> See a review of expert bodies published by Oxford University: <https://netzeroclimate.org/wp-content/uploads/2020/12/Net-Zero-Target-Map.pdf>, pages 3-4

<sup>132</sup> Page 14, [Sustainability agreements \(acm.nl\)](https://www.sustainabilityagreements.acm.nl)

<sup>133</sup> The draft bill is the “Projet de loi n° 602, portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets” (i.e. Bill No. 602 on combating climate change and strengthening resilience to its impacts). It was adopted by the French National Assembly on May 4th but still has to be examined by the Senate (scheduled on June 14th). The reference is to Article 4 bis C, which modifies Article L. 229-62 of the Environmental Code by adding the quoted provision. The text of the bill is here: [https://www.assemblee-nationale.fr/dyn/15/textes/l15t0602\\_texte-adopte-seance](https://www.assemblee-nationale.fr/dyn/15/textes/l15t0602_texte-adopte-seance)

found that Shell's advertising claim that its car fuel emissions were completely compensated by its offsets (so customers could 'drive neutral') was not substantiated.<sup>134</sup>

Apart from flaws in the effectiveness of carbon offsets to address emissions, carbon credit projects are often located in areas with low levels of human rights protection and governance and are associated with significant human rights impacts on local communities and indigenous peoples and failures regarding free prior and informed consent, although safeguards have been developed.<sup>135</sup> The increasing use of offsets projects located in developing nations by large emitters in developed nations in the context of a structural power imbalance has given rise to analyses of 'carbon colonialism'.<sup>136</sup>

In summary, at worst offsets can be used as a distraction – a false claim of mitigating climate impacts to delay much-needed emissions reductions, whilst risking human rights impacts on local communities.

Businesses should communicate information sufficient to evaluate accurately the adequacy of their response to their climate impacts (GP 21). We suggest that the Information Note should encourage companies to explore ways of supporting climate mitigation and adaptation in developing countries (including through locally appropriate 'nature-based solutions') as an **additional** means of addressing their impact,<sup>137</sup> whilst discouraging them from claiming wrongly that 'offsets' comprise a means of addressing their own emissions.

If a business believes that it is using carbon credits as a genuinely effective measure to address its own emissions, then it must be prepared to justify this in line with the UNGPs with reference to: its own emissions reductions, the Paris Goal and the Net Zero transition, and the affected communities.

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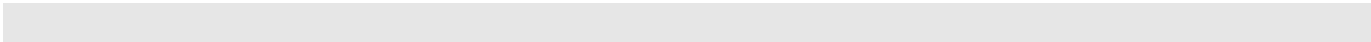
<sup>134</sup> <https://www.bloomberg.com/news/articles/2021-08-27/dutch-ad-watchdog-tells-shell-to-pull-carbon-neutral-campaign>

<sup>135</sup> NO REDD+, A Dozen of the Worst REDD-type Projects Affecting Indigenous Peoples and Local Communities, <http://no-redd.com/wp-content/uploads/2015/04/A-Dozen-of-the-Worst-REDD-type-projects-English1.pdf> On the effectiveness of safeguards, see also paragraphs 95 to 97 of the Report of the Special Rapporteur on the rights of indigenous Peoples (November 2017) UN Doc A/HRC/36/46

<sup>136</sup> Eberle, Caitlyn & Münstermann, Nadja & Siebeneck, Jana. (2019) *Carbon Colonialism: A postcolonial assessment of carbon offsetting* [https://www.researchgate.net/publication/337622634\\_Carbon\\_Colonialism\\_A\\_postcolonial\\_assessment\\_of\\_carbon\\_offsetting](https://www.researchgate.net/publication/337622634_Carbon_Colonialism_A_postcolonial_assessment_of_carbon_offsetting)

<sup>137</sup> Which may, of course, be the subject of appropriate external communication in line with GP 21.

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