**Call for Input on Extractive sector, just transition and human rights - Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Human Rights Council**

***Submission by researchers from the Law and Development Research Group, University of Antwerp Faculty of Law***

*We would like to thank the United Nations Working Group on Business and Human Rights for this opportunity to address the question of the extractive sector, just transition and human rights. This input is drafted and submitted by (in alphabetical order):*

* *Dr. Gamze Erdem Türkelli, Assistant Research Professor,* [*Law and Development Research Group*](https://www.uantwerpen.be/en/research-groups/law-and-development/)*, Faculty of Law, University of Antwerp-*
* *Begüm Kilimcioğlu, Doctoral Researcher, Law and Development and* [*Personal and Property Rights Research Groups*](https://www.uantwerpen.be/en/research-groups/personal-rights-and-property-rights/)*, Faculty of Law, University of Antwerp*
* *Professor Thalia Kruger, Professor, Law and Development Research Group, Faculty of Law, University of Antwerp*

Our points below mainly cover questions under the rubric of the **Corporate responsibility to respect human rights, in particular questions 9, 10, 11, 13 and 14**, and draw on our joint research on extraterritorial human rights obligations of businesses, private international law and private remedies with regard to business and human rights.

Overall, we would like to stress that the just transition towards sustainability and sustainable development across the globe should encompass the various facets of sustainability, which have been denoted by the 2030 Agenda as the 5Ps: people, planet, prosperity, peace and partnership. We see the corporate responsibility to respect human rights and the environment in this context. We also acknowledge the obligations to protect the environment and to respect and protect human rights as set out in human rights and environmental law treaties, including progressive realisation and international cooperation in order not only to do no harm but also to make necessary resources available for the realisation of sustainable development in all its aspects.

**Question 9: Role of business enterprises in the extractive sector in integrating human rights into ongoing energy transition plans and programs to address adverse human rights impacts**

In light and in the spirit of the polycentric governance approach put forth by the UNGPs, business enterprises must respect human rights which includes self-assessment and regulation.[[1]](#footnote-2) UNGPs impose this duty on corporations via the duty to conduct meaningful, effective and robust human rights and environmental due diligence (HREDD).[[2]](#footnote-3) HREDD requires ongoing and proactive efforts by the companies to identify, analyze and prioritize the risks of their activities and firstly aim to prevent, if not possible mitigate or bring an end to the harm. This means that a HREDD of a company’s operations and investments should be conducted *ex ante*, throughout and *ex post* and accompanied by prevention, mitigation and remedy measures. [[3]](#footnote-4) Free, prior, informed consent of the local communities before the project starts is often overlooked by the companies. Most of the times problems start with the design of the business which does not involve the peoples. Lastly, it also happens that sometimes the local communities are told untruthfully that they would enjoy a better life.[[4]](#footnote-5)

The OECD's Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector of 2017 indicates that meaningful stakeholder engagement entails an ongoing, two-way engagement between the parties, acting on good faith, and responsiveness.[[5]](#footnote-6)

Considering that the main purpose of the energy transition is to facilitate sustainable development for all, companies must engage with all pillars of sustainable development including economic growth, social inclusion and environmental protection.[[6]](#footnote-7) Consequently, this would encompass engaging with international and domestic legal standards on health and safety at work, environmental and human rights issues related to the company’s activities and decisions wherever companies operate as well as tax and economic justice to ensure that companies do not jeopardize the availability of adequate public resources to achieve sustainable development through a just transitions, in particular in developing countries. To address these issues effectively and comprehensively:

* Businesses must **monitor the effect of their work on workers’ health**.[[7]](#footnote-8) They should also monitor this if workers are not directly employed by them but by subsidiaries or other actors in their value chain.
* Businesses must **check the source of materials they buy** for energy transition.[[8]](#footnote-9) Businesses must support local development, create decent jobs and most importantly retain, retrain and redeploy the previous workforce into new facilities in sectors from which they will divest due to sustainability concerns.[[9]](#footnote-10)
* Businesses must **identify and work together with all potentially affected stakeholders**, including unions, and give them a platform to voice their ideas and integrate their feedback into new projects.[[10]](#footnote-11)
* Considering that the majority of the energy transition projects are located on the lands of rights-holding groups, **businesses must consult with the rightsholders and acquire their genuine consent**.[[11]](#footnote-12)
* Stakeholder engagement should be done in a way that the affected stakeholders have **full access to information through the channels they use and languages which they speak** in their daily lives. For example, in the case *Sustaining the Wildlife Coast NPC and Others v Minister of Mineral Resources and Energy and Others*, the South African Court decided that it was not enough that Shell had consulted the stakeholders in English and Afrikaans but not in isiZulu or IsiXhosa which were the languages spoken in the communities.[[12]](#footnote-13) Furthermore, the Court agreed with the applicants when they criticized Shell for not having used radio and community newspapers which would have facilitated communication with the communities in the language used in their respective communities.[[13]](#footnote-14) Naturally, the newspapers Shell selected were only accessible to literate persons and excluded people who cannot read English or Afrikaans from the consultation process.[[14]](#footnote-15)
* Businesses must **incorporate nature preservation and restoration plans** into transition initiatives involving physical displacement of natural habitats and community dependent infrastructure. Businesses must work with the local community for the alternate uses of decommissioned infrastructure.[[15]](#footnote-16)
* Businesses must take a heightened **responsibility regarding the rights of groups prone to being marginalized** such as children, persons with disabilities or indigenous peoples, so as not to perpetuate or aggravate pre-existing inequalities.[[16]](#footnote-17)

**Question 10: Increasing the effectiveness of human rights provisions in existing concessions, contracts, and bilateral investment treaties, in encouraging businesses in the extractive sector, including investors, to respect all internationally recognised human rights**

As a way to increase the effectiveness of human rights clauses, investment and trade agreements must **spell out States' duties**.[[17]](#footnote-18) In this regard, Krajewski argues that limiting, reducing and clarifying the scope of investment protection, broadening the general exception clauses to include other policy goals to be invoked when justifying a deviation from the agreement and establishing directly binding obligations for investors such as requiring them to undertake HRDD would increase the effectiveness of such clauses.[[18]](#footnote-19) He has drafted several useful model clauses (see Annex).

Similarly private actors should include in their contracts clauses holding each other to human rights standards.[[19]](#footnote-20) Bringing duties concerning human rights into contracts make contract law remedies available. This is useful not only among contracting parties but also in litigation when disputing parties seek to join other parties (up the value chain) to hold them accountable for damages.

Especially for the extractive sector, given the widespread impacts on land and livelihoods, businesses should go beyond **consulting** indigenous peoples before, during and after projects but should also **obtain their consent** (as a duty of results for companies). In addition, considering the possible adverse impacts of the extractive sector, the standard of consent that now only applies to indigenous peoples’ should apply across to all local populations affected by the projects. Furthermore, businesses **cannot solely rely on State-regulated processes**, as sometimes the local community and/or indigenous peoples’ interests may be at odds with the State’s interests.[[20]](#footnote-21) They must therefore **directly engage with communities**. Moreover, settlement of international investment disputes must **include the right of third parties** (e.g. local communities) **to file a claim** and the right of the Host States to file a claim against the investors.[[21]](#footnote-22)

**Question 11: The role extractive sector investors should be required to play in preventing and mitigating negative impacts of energy transition efforts on human rights, including with respect to specific rights-holders and in remedies**

The transition away from fossil fuels is expected to require dramatic increase in the extraction of metals and rare-earth minerals, with real ecological and social costs.[[22]](#footnote-23) In other words, low-carbon energy technologies generally require more metals to produce the same output as their fossil counter-parts.[[23]](#footnote-24) Given the foreseeability and the high likelihood of these risks of adverse impacts on communities and the environment, investors have a heightened due diligence duty.

Investors have the duty to respect human rights just like all other businesses. In an instance before the Organization for Economic Cooperation and Development (OECD) National Contact Points (NCP) of S. Korea, The Netherlands and Norway against steel producer POSCO and its minority shareholders the Norwegian Bank Investment Management and the Dutch pension fund ABP / APG, the Norwegian and Dutch NCPs concluded that even minority investors have a duty to act in due diligence and exercise their leverage / influence in their business relationships to prevent or mitigate risks of human rights harms.[[24]](#footnote-25) The Norwegian NCP further commended the investor regarding its strategy over child labour but found that HRDD must address the whole range of human rights that may be relevant to the investment.[[25]](#footnote-26)

In another NCP instance, four NGOs filed a complaint against ING Banks before the Dutch NCP, claiming that the bank has failed to commit appropriately to achieving targets under the 2015 Paris Agreement.[[26]](#footnote-27) More specifically, the complaint alleged that the bank failed to set targets to reduce the emission of greenhouse gases from its financial products. In this instance, ING admits that its biggest climate impact is in its financing activities, the indirect emissions. The NCP recognizes that it is difficult for the banks to develop an appropriate methodology, including target-setting regarding climate change issues. The NCP further stresses that it is crucial for the banks to set intermediary targets and disclose them. Furthermore, ING’s efforts to develop a technological tool to identify the financed greenhouse gas emissions and to develop alternative means to identify the indirect climate impact for the banking sector is seen as a positive development.[[27]](#footnote-28)

In a bid to reveal investor responsibilities in mining for transition minerals in South Africa, Business & Human Rights Resource Centre has asked 15 banks about their human rights engagements.[[28]](#footnote-29) Deutsche Bank responded that, especially in the mining sector, they have an enhanced responsibility due to the potential environmental and social impacts. They assert that they assess how their clients address workplace and community health and safety, as well as community consultation, especially when indigenous peoples and artisanal miners are involved. The Bank asserts that they directly interact with the clients in their due diligence process and also engage with the potentially affected groups and other relevant stakeholders, as well as with independent experts. In the same vein Credit Suisse claims that they engage with affected communities, including disadvantaged and vulnerable groups regularly as per the Equator Principles. Mizuho Bank states that for them the impacts on communities and the environment are the most salient in mining processes. Contrary to the other two banks, Mizuho states that they require their clients to engage with the affected communities rather than themselves. Deutsche Bank and Credit Suisse state that they require their clients to set up grievance mechanisms.

On 23 February 2023, BNP was sued by three non-governmental organizations (NGOs) in France for having allegedly provided loans to oil and gas companies in breach of the vigilance duty enshrined in La Loi de Vigilance (2017) of France.[[29]](#footnote-30) The NGOs alleged that by investing in fossil fuel projects, BNP became one of the main contributors to the fossil fuel sector and thus was impeding the energy transition process.[[30]](#footnote-31) Although the case has not been decided yet, it provides an illustration how important investors are in this context.

**Question 13: Requiring all business enterprises producing, purchasing, processing, and distributing transition minerals to apply and implement human rights-based impact and risk assessments and due diligence standards, including gender-responsive HRDD and heightened HRDD for conflict-affected areas in concessions, contracts, and legislation**

The OECD has published a due diligence guidance for responsible supply chains of minerals from conflict- affected and high-risk areas which emphasize the need to improve women’s conditions in artisanal and small-scale mining through gender awareness and empowerment programs.[[31]](#footnote-32) There are also binding rules, such as the Conflict-Minerals Regulation in the EU and the Dodd-Franck Act in the US.[[32]](#footnote-33) Under the Conflict Minerals Rule in the Dodd-Frank Act, companies listed with the SEC must investigate and disclose whether their products contain minerals from conflicted regions.[[33]](#footnote-34) In the case where companies are subjected to certain legally-binding principles in parts of their supply chains, they should abide by them.

Another important point regards the dual-use items which can be used for both civil and military purposes, as can be the case of extracted minerals. These items can be subject to certain export control rules nationally or regionally.[[34]](#footnote-35) Export controls impose authorisations, but do not exempt companies of their responsibility to respect human rights and to conduct HREDD.[[35]](#footnote-36) In this line, human rights and humanitarian concerns underlie the EU's Recast Dual Use Regulation,[[36]](#footnote-37) which imposes duties on exporters to notify authorities of intended purposes of items they are aware of, even if the items are not specifically listed in the annex.[[37]](#footnote-38) While the Regulation does not specify how exporters should be 'aware of' the use of their items, this should be read in conjunction with other EU legislation and international duties on due diligence.

**Question 14. How higher education institutions can promote awareness and encourage human rights-compatible business practices**

Higher education institutions are in a unique position to not only implement HREDD in their many and large value chains, but also educate students in diverse fields on how this should be done. Therefore, higher education institutions should consult with the stakeholders as described in Questions 9 and 10 above, but also with their student population, who should be seen as both stakeholders and actors for the future improvement of the relation between business and human rights. Model clauses should be discussed in educational materials.

***Annex: Model Clauses[[38]](#footnote-39)\****

1. **Incorporation of human rights obligations in future investment and trade agreements**

* “The Parties will include (or: Each Party endeavours to include) clauses ensuring the protection of human rights (human rights clauses) in trade and investment agreements concluded amongst them (or: concluded by that Party).”
* “A Party may fulfil the obligations of this Article by incorporating an exception clause for human rights in its trade and investment agreements. Such a clause should refer to the obligations to respect, protect and fulfil human rights, cover internal and international policies to ensure the extraterritorial application of human rights and be based on all international human rights instruments applicable to that Party.”

1. **Human Rights Impact Assessments**

* “Each Party shall assess the impact of new trade and investment agreements on the respect for, protection and fulfilment of internationally recognised human rights before and during the negotiations of such an agreement and before its conclusion.”
* “Such assessment shall be based on applicable human rights as well as objective and transparent criteria, incorporate the views of potential victims of human rights violations and be carried out by an independent institution. Taking the findings of the assessment into account, the Party shall take any measures necessary to observe its human rights obligations in accordance with international law.”
* “Each Party shall periodically assess the impact of every trade and investment agreement ratified by the Party on the respect, protection and fulfilment of internationally recognized human rights/ the international human rights obligations of the Party/ fundamental human rights.”

1. Antoine Duval, 'Ruggie’s Double Movement: Assembling the Private and the Public Through Human Rights Due Diligence' (2023) Nordic Journal of Human Rights 1. [↑](#footnote-ref-2)
2. [UN Guiding Principles on Business and Human Rights](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) (UNGPs), Principle 17. [↑](#footnote-ref-3)
3. Edward Porokwa, ‘ An Approach to Develop Trust Between Communities and Businesses’ (2022) , UN Forum on Business & Human Rights, held in Geneva on 28-30 November. [↑](#footnote-ref-4)
4. Nestor Caicedo, ‘Issues Faced in Ecuador by Palmoil Enterprises’ (2022) , UN Forum on Business & Human Rights, held in Geneva on 28-30 November. [↑](#footnote-ref-5)
5. OECD, [‘OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector’](https://www.oecd.org/development/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm) (2017), at 20. [↑](#footnote-ref-6)
6. [United Nations Sustainable Development Agenda](https://www.un.org/sustainabledevelopment/development-agenda/) (2015). [↑](#footnote-ref-7)
7. Reference can be made to the [EU Directive 92/91/EEC regulating the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01992L0091-20070627). Article 3 is especially relevant. [↑](#footnote-ref-8)
8. Reference can be made to [EU Regulation 2017/821 on Conflict Minerals, Article 4(a](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017R0821-20201119)) or the [new deforestation rules adopted by the EU](https://www.europarl.europa.eu/news/en/press-room/20230414IPR80129/parliament-adopts-new-law-to-fight-global-deforestation) regulating the entry of certain products into the EU market conditional upon the legitimacy of their sources; [↑](#footnote-ref-9)
9. For example see, [Repsol’s, ACEN’s and SSE’s strategies](https://www.inclusivecapitalism.com/just-energy-transition-company-framework/retain-retrain-and-redeploy/). [↑](#footnote-ref-10)
10. See, David Kovick, [‘Meaningful Engagement with Affected Stakeholders’](https://shiftproject.org/meaningful-engagement-with-affected-stakeholders/) (SHIFT, 2018); Rosa Kusbiantoro [‘Human Rights, Access to Remedy, and Stakeholder Engagement’](https://www.bsr.org/en/blog/human-rights-access-to-remedy-and-stakeholder-engagement) (BSR, 2019); Rajiv Maher and Karin Buhmann, 'Meaningful Stakeholder Engagement: bottom-up Initiatives within Global Governance Frameworks' (2019) 107 Geoforum . [↑](#footnote-ref-11)
11. John R. Owen and others, 'Fast Track to Failure? Energy Transition Minerals and the Future of Consultation and Consent' (2022) 89 Energy Research & Social Science . [↑](#footnote-ref-12)
12. *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2021] ZAECGHC 118; [2022] 1 All SA 796 (ECG); 2022 (2) SA 585 (ECG) (28 December 2021), para 22. [↑](#footnote-ref-13)
13. ibid. [↑](#footnote-ref-14)
14. ibid. [↑](#footnote-ref-15)
15. See for examples on [preserving biodiversity and regenerating infrastructure](https://shiftproject.org/meaningful-engagement-with-affected-stakeholders/); See the Ok Tedi Mine for an example of both positive and negative feedback from an indigenous community; Kevin P. Kepore and Benedict Y. Imbun, 'Mining and Stakeholder Engagement Discourse in a Papua New Guinea Mine' (2011) 18 Corporate Social Responsibility and Environmental Management . [↑](#footnote-ref-16)
16. See Sanya Carley and David M. Konisky, 'The Justice and Equity Implications of the Clean Energy Transition' (2020) 5 Nature Energy 569; Nain Martinez and Nadejda Kimendantova, 'The Effectiveness of the Social Impact Assessment in Energy Transition Management: Stakeholders' Insights From Renewable Energy Projects in Mexico' (2020) 145 Energy Policy [↑](#footnote-ref-17)
17. Markus Krajewski, [“Ensuring the Primacy of Human Rights in Trade and Investment Policies”](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939354) (2017). [↑](#footnote-ref-18)
18. ibid. [↑](#footnote-ref-19)
19. See the model rules proposed by the European Law Institute in their report "[Business and Human Rights: Access to Justice and Effective Remedies (with input from the EU Agency for Fundamental Rights, FRA)](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Business_and_Human_Rights.pdf)" (2022), 59-60. [↑](#footnote-ref-20)
20. Akinwumi Oguranti, 'Between the Devil and the Deep Blue Sea-- Towards Access to Justice for Local Communities in Investor-state Arbitration or Business and Human Rights Arbitration' (2022) 59 Osgoode Hall Law Journal 707, at 727. [↑](#footnote-ref-21)
21. Akinwumi Oguranti, Colonisation in, of and through Business and Human Rights Symposium, Tilburg University, held on 26.04.2023. [↑](#footnote-ref-22)
22. Jason Hickel, *‘Less is More’* (2020), at 126. [↑](#footnote-ref-23)
23. Eleonore Lebre et al., 'The Social and Environmental Complexities of Extracting Energy Transition Metals' (2020) 11 Nature Communications 4823, at 4823. [↑](#footnote-ref-24)
24. *Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance, and Forum for Environment and Development vs POSCO/South Korea, ABP/APG (Netherlands) and NBIM (Norway)*, NCP of Norway (27 May 2013). [↑](#footnote-ref-25)
25. Karin Buhmann, 'Analysing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findingsand Outlook' (2018) 36 Nordic Journal of Human Rights . [↑](#footnote-ref-26)
26. *Final Statement of Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands vs ING*, NCP of the Netherlands (19 April 2019). [↑](#footnote-ref-27)
27. See <https://www.ing.com/Newsroom/News/Banks-progress-in-setting-climate-alignment-standard-.htm>. [↑](#footnote-ref-28)
28. See for all responses <https://www.business-humanrights.org/en/latest-news/financing-mining-for-transition-minerals-in-south-africa-are-banks-doing-enough-on-human-rights/>. [↑](#footnote-ref-29)
29. OXFAM, ‘[French NGOs Take BNP Paribas to Court in World’s First Climate Lawsuit Against a Commercial Bank](https://www.oxfam.org/en/press-releases/french-ngos-take-bnp-paribas-court-worlds-first-climate-lawsuit-against-commercial)’ (2023). [↑](#footnote-ref-30)
30. See [the writ of summons](https://notreaffaireatous.org/wp-content/uploads/2023/02/Assignation-BNP-fossiles-anglais.pdf). [↑](#footnote-ref-31)
31. OECD, ‘[OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’](http://mneguidelines.oecd.org/mining.htm), at 118. [↑](#footnote-ref-32)
32. See [EU Regulation 2017/821](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017R0821-20201119) on Conflict Minerals ; [Dodd- Frank Wall Street Reform and Consumer Protection Act 2010](https://www.govinfo.gov/link/plaw/111/public/203), c 1, s 1502. [↑](#footnote-ref-33)
33. Dodd-Frank Act Section 1502. [↑](#footnote-ref-34)
34. See for example [EU Regulation 2021/821](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02021R0821-20230112) setting up an EU regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32021R0821](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0821). [↑](#footnote-ref-35)
35. Amnesty International, [‘Closing the Loopholes: Recommendations for an EU Corporate Responsibility Law which Works for Rightsholders'](https://www.amnesty.org/en/documents/ior60/6539/2023/en/) (2023), at 28. [↑](#footnote-ref-36)
36. See EU Regulation 2021/821 Recitals 2, 5 and 8. [↑](#footnote-ref-37)
37. EU Regulation 2021/821 Art. 4(2). [↑](#footnote-ref-38)
38. \* Markus Krajewski, *Ensuring the Primacy of Human Rights in Trade and Invetsment Policies*, 2017), at 27-29. [↑](#footnote-ref-39)