

To  
the Business and Human Rights Working Group

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10 OCTOBER 2023

**RE: ESG AND BHR QUESTIONNAIRE**

Please find attached the Danish Institute for Human Rights' (DIHR) response to the UN Business and Human Rights Working Group's (UNWG) current consultation on ESG and Business and Human Rights.

The DIHR welcomes the UNWG's focus on this important agenda and remains available for further dialogue and collaboration.

Yours sincerely,



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## Consultation response

### General

1. *What do you understand Environmental, Social, and Governance (ESG) in finance to mean? How are human rights standards and frameworks considered by investors, if at all, in ESG?*

Despite widespread use of the term Environmental, Social, and Governance (ESG) and a significant growth in so-called 'ESG investment'<sup>1</sup> there currently is no uniform or authoritative ESG definition or methodology. For example, the term is being used both to refer to an investor assessing and addressing ESG impacts in its portfolio (ESG as a practice) and to financial products that claim to be invested in responsible companies (ESG as a product). With the lack of standardisation comes challenges of conceptual and methodological robustness and difficulties in comparing ESG approaches, data, products and regulations. Such challenges have been widely demonstrated in research<sup>2</sup>, further suggesting that approaches particularly lack rigor in the context of the 'S'<sup>3</sup>.

Notwithstanding an emphasis on the 'E', human rights are increasingly recognised by investors as part of or as constituting the 'S' in ESG. Many ESG methodologies however consider select human rights areas only (for instance ones where data is more readily available and/or those that may impact the FIs financial performance) rather than impacts across all rights. Datapoints typically also centre around companies' policies and performance, thereby lacking the impact dimension.<sup>4</sup>

Finally human rights are often considered (part of) the S rather than as a crosscutting concept that also connects with E and G impact areas. This comes with the risk of financial institutions (FIs) missing important interlinkages between e.g. climate change and human rights or corruption and human rights and as a result failing to address such interlinkages in stewardship or other activities that aim to tackle identified E, S or G concerns.

2. *Which are the main types of investors using ESG approaches, for example, in decision-making or engagements? On what basis*

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<sup>1</sup> [GSIA Resources | GSIA \(gsi-alliance.org\)](https://www.gsi-alliance.org/resources)

<sup>2</sup> Rau, P.R. and Yu, T. (2023), "A survey on ESG: investors, institutions and firms", *China Finance Review International*, Vol. ahead-of-print No. ahead-of-print. <https://doi.org/10.1108/CFRI-12-2022-0260>

<sup>3</sup> [Money, Millennials and Human Rights: Sustaining 'Sustainable Investing' by John Gerard Ruggie, Emily Middleton :: SSRN](https://ssrn.com/abstract=4288888)

<sup>4</sup> [Global | Putting the 'S' in ESG: Measuring Human Rights Performance for Investors - NYU Stern](https://www.nyustern.com/2023/05/01/global-putting-the-s-in-esg-measuring-human-rights-performance-for-investors/)

*are they making decisions on human rights, climate change and other related matters?*

3. *To what extent do ESG approaches present constraints or opportunities for investors and businesses overall?*
4. *What responsibilities and capacity do ESG index and data providers have regarding the assessment of adverse human rights and environmental impacts, and how can ESG indexes and research products be improved to align with the UNGPs approach?*

ESG index, data and service providers have been widely criticised for methodological weaknesses across E, S and G and especially around measurement of the S. Key concerns include lack of transparency over methodological approaches, significant divergence in what gets measured and assessed across providers, failure to identify risks to people and environment as well as conflicts of interests amongst providers that all together undermine the credibility of ESG scores/ratings.<sup>5</sup> . Nonetheless such providers continue to be massively used by investors in need of ESG data including on human rights to better manage their portfolio. The ESG service industry however predates UNGPs and the financial sector's more recent attention to human rights.

Earlier this year the European Commission published a proposal for a regulation on the transparency and integrity of ESG rating activities that seeks to address some of the criticisms related to greenwashing and conflicts of interest faced by the industry. Positively, the proposed regulation would require ESG data providers to clearly specify if their ratings address risks to business (financial materiality), risk to people (impact materiality) or both (double materiality), which has been an important source of confusion. However, the proposal falls short of regulating the content of ESG ratings/scores by specifying the international responsible business conduct standards that providers should rely upon when developing ESG ratings/scores. Refraining from regulating the substantive content of ESG ratings would be a missed opportunity to anchor the 'S' dimension of ESG in the UNGPs. Given its

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<sup>5</sup> See, for example, F. Berg et al, *Aggregate Confusion: The Divergence of ESG Ratings*, in *Review of Finance*, 26 (6), November 2022  
IOSCO, *Environmental, Social and Governance Ratings and Data Products Providers – Final Report*, November 2021  
SustainAbility, *Rate the Raters 2019: Expert Views on ESG Ratings*, February 2019  
Timothy M Doyle, *Ratings that Don't rate: The Subjective World of ESG Ratings Agencies*, in *Harvard School Forum on Corporate Governance and Financial Regulation*, 7 August 2018

expected impact on the financial industry within and outside the EU, the DIHR encourages the WG to follow the trajectory of this proposal and elevate key business and human rights messages with relevant EU stakeholders.

Further, case examples indicate that market dynamics and the conflict of interest dimension can indeed hinder alignment of the ESG industry with the UNGPs. For example, an ESG service provider has shared how in the context of the taxonomy minimum safeguards it developed a minimum safeguards compliance screening product, only to realise that no or very few portfolio companies could document respect for human rights/ implementation of the UNGPs. When marketing this new product, the service provider experienced that investors requested that the associated screening criteria should be loosened so as to not overly shrink their 'investable universe'. This highlights how ESG service providers operate on market terms and hence ESG methodologies and products need to factor in investor demand alongside alignment with standards, data considerations etc. Regulations such as the EU taxonomy with human rights related minimum safeguards and the EU Sustainable Finance Disclosure Regulation (SFDR) with Principle Adverse Impact indicators related to human rights are however currently driving a push for better human rights data by the industry, which can hopefully build market incentives for better alignment with UNGPs<sup>6</sup>.

At this point in time however, many ESG products and services offered to investors are yet to be aligned with the UNGPs. One such example is the widespread marketing and use of 'controversy screenings'. For FIs such screenings inform investment decisions, active engagement in the ownership stage or ultimately decisions to divest and have been a common component of investors' human rights risk management. However, controversy screenings typically rely on media reports and as a result have biases towards certain industries, countries and human rights areas.<sup>7</sup> Such services capture the most public cases *after* harms have arisen and hence foster a reactive approach by investors with less focus on (and perhaps an opportunity for improvement in) *preventing* harms or even predicting human rights performance of specific assets, investee companies, etc. They also typically fail to capture how companies involved with the controversies responded thereto including whether they've participated in providing access to remedy where required.

A final example relates to the difficulty of interpreting ESG scores/metrics from a human rights perspective. An ESG score typically

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<sup>6</sup> [What data do investors need to manage human rights risks? | Discussion paper | PRI \(unpri.org\)](#)

<sup>7</sup> [Final Report on Minimum Safeguards \(europa.eu\)](#) p.24-25

combines and synthesises multiple data points across a variety of thematic issue areas with differing weighting in the final score.<sup>8</sup> Such high level of aggregation raises concerns about the extent to which a synthetic score combining all E,S,G factors can be used to meaningfully orient action on human rights and help investors prioritise their leverage efforts and identify themes and sectors for engagement.

### ***State duty to protect human rights***

- 1. What State, regional, and international mechanisms and regulations exist to promote or restrict investment/financing using an ESG approach that takes human rights into account and how do they align with the UNGPs? How do these mechanisms and regulations promote or inhibit business respect for human rights consistent with the UNGPs?*

The EU is currently leading globally by having several regulations that impose responsible business requirements on financial institutions (FIs) including in respect to human rights. Notably the Sustainable Finance Taxonomy, the SFDR and the Corporate Sustainability Reporting Directive (CSRD) have heightened investor attention to human rights. The regulations however differ in the degree to which they align with and reinforce the UNGPs. For an overview and a human rights lens to each of these regulations please see finance chapter of DIHR's Piece of the Puzzle' Publication<sup>9</sup>.

For example, the EU taxonomy level 1 regulation from July 2020<sup>10</sup> includes useful and prominent references to the UNGPs in the form of a minimum safeguards clause integrated into taxonomy alignment criteria (articles 3 and 18). These make clear that for any investment to be considered environmentally sustainable it must be aligned with the UNGPs. However, there has been limited attention to and implementation of this requirement so far. Not least when compared with the environmental components of the taxonomy, which have been followed up with level 2 regulation specifying technical implementation criteria over hundreds of pages. In comparison, the Commission in 2023 published a Notice that included a 3 page non-binding FAQ clarifying the minimum safeguard elements of the taxonomy<sup>11</sup>. Similarly, whilst the SFDR usefully includes content related to social sustainability and human rights, the way in which the so-called social Principle Adverse

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<sup>8</sup> [Policy brief – Regulating ESG ratings to strengthen sustainable investors | Finance Watch \(finance-watch.org\)](#)

<sup>9</sup> [EU-RegulatoryMeasuresExplainer EN august2023.pdf \(humanrights.dk\)](#) page 28

<sup>10</sup> [EUR-Lex - 32020R0852 - EN - EUR-Lex \(europa.eu\)](#)

<sup>11</sup> [Publications Office \(europa.eu\)](#) p 2-5

Impact indicators have been developed have thus far resulted in confusion and a missed opportunity for alignment with the UNGPs<sup>12</sup>.

Overall, although regulatory initiatives such as the ones mentioned above have significantly increased investor interest in and awareness of human rights and the UNGPs they consist mainly of a classification system and reporting requirements and hence might not have the same transformative impact as a potential due diligence obligation may. In an EU context it is therefore key that investors are included in the forthcoming mandatory human rights and environmental due diligence obligation currently being developed<sup>13, 14</sup>.

2. *To what extent do current regulations ensure adequate information and disclosure for investors adopting an ESG approach to understand human rights impacts of businesses?*
3. *How can States encourage and regulate accurate communication of ESG practices by businesses and investors to prevent misleading or unsubstantiated claims regarding respect for human rights?*

The EU has taken several steps to combat greenwashing in the context of the capital market. However, these initiatives have mainly focused on the 'E' and are yet to effectively tackle risks of 'social washing'. For instance, in a consultation earlier this year the European Markets and Securities Authority (ESMA) explored questions around the introduction of Guidelines for the use of ESG or Sustainability-related terms in fund names. Whilst such initiative is a useful attempt at combatting greenwashing, ESMA should elevate social considerations equally alongside environmental impacts when establishing threshold criteria or minimum safeguards for sustainable funds,<sup>15</sup>. A future revision of the SFDR in response to the current consultation on the regulation also has the potential to address green and social washing concerns, including if minimum criteria are introduced in relation sustainability product categories<sup>16</sup>.

A more ambitious approach could materialise if the EU pursues a social taxonomy. Developed right, a social taxonomy has the potential to

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<sup>12</sup> [Review of the EU Sustainable Finance Disclosure Regulation | The Danish Institute for Human Rights](#)

<sup>13</sup> [Deciphering EU regulation on finance and human rights - the sum and its parts - Business & Human Rights Resource Centre \(business-humanrights.org\)](#)

<sup>14</sup> [State of play on the EU's Corporate Sustainability Due Diligence Directive: five key takeaways | The Danish Institute for Human Rights](#)

<sup>15</sup> DIHR consultation response available here:

[FINAL\\_ESMA\\_response\\_form\\_cp\\_on\\_guidelines\\_on\\_funds\\_names.docx \(live.com\)](#)

<sup>16</sup> [Sustainability-related disclosure in the financial services sector \(europa.eu\)](#)

encourage and regulate accurate ESG claims and communication by business and investors by providing a classification system leveraging the UNGPs as proposed by the Platform on Sustainable Finance in 2022<sup>17</sup>. Investor calls for a social taxonomy have continued despite the current standstill at EU level. Most recently a French investor group has initiated work to develop a social taxonomy<sup>18</sup>.

4. *How can policies, programs, plans and activities in one State concerning regulation of investors in relation to human rights have potential or actual adverse or positive human rights impacts outside of their territory or jurisdiction?*

Some of the EU regulations related to sustainable finance have extraterritorial reach in and of themselves and hence directly impact companies and investors outside the EU. In addition, to the degree that these regulations further a risk-based approach to human rights due diligence across value chains, their implementation has the potential to improve conditions for affected groups globally. It is however too early to document such effects.

The EU regulations has also served as an inspiration for regulation in other jurisdictions. For instance, several jurisdictions across geographical regions today have in place or are developing sustainable finance taxonomies (although largely focused on green objectives) including following inspiration from the EU developments<sup>19</sup>.

Such developments have overall been positively received as steps towards making the economy more sustainable. However, there is also a concern that the proliferation of sustainability regulation in the EU might paradoxically create disincentives for investing outside EU and hence de facto become a trade barrier affecting companies in economic developing countries and a hindrance for reaching the SDG financing goals<sup>20</sup>. Further research in this context is needed and careful consideration of unintended consequences is necessary when designing and adjusting legal measures.

5. *How can States better advance human rights-compatible regulation and policies concerning investors and financial institutions generally in a manner that fulfils their international legal obligation to protect human rights?*

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<sup>17</sup> [Platform on Sustainable Finance's report on social taxonomy \(europa.eu\)](#)

<sup>18</sup> [French investor group kicks off work on social taxonomy \(responsible-investor.com\)](#)

<sup>19</sup> [CCAP and GIZ Publish: "Towards a Common Pathway Across Sustainable Finance Taxonomies"](#)

<sup>20</sup> [New EU requirements for sustainability in value chains risk undermining prospects of green transition and trust between the EU and Africa. | CONCITO](#)

Including FIs in mandatory human rights due diligence (MHRDD) laws would be one way in which states can start fulfilling their international legal obligation to protect human rights including as interpreted by UNGPs pillar one. However, this is yet to materialise. Indeed, most states are yet to focus state-led human rights and business efforts achieving the desired *smart mix* of measures on the financial sector. For an illustrative overview of finance related elements of National Action Plans, please confer DIHR's NAP database<sup>21</sup>.

According to UNGP 4, States should take additional measures to protect against human rights abuses by state controlled and supported institutions. As such, states can also do more to require state supported financial institutions (development finance institutions, development banks, Export Credit Agencies, public pension funds, sovereign wealth funds etc) to align investment practices and ESG approaches with UNGPs including by way of making this explicit in laws that govern this institutions. For a discussion of challenges and opportunities associated with approaches to human right at development finance institutions see DIHR's publication from 2021<sup>22</sup>.

An area that has gained less attention from the BHR community is the area of sovereign and sub-sovereign bonds including green, social and sustainability-linked bonds. More can be done to analyse and identify how the surge in bonds including sustainability linked bonds could become a lever for respect for human rights<sup>23</sup>.

### ***Corporate responsibility to respect human rights***

- 1. To what extent are investors aware of their responsibility to respect human rights? Are some types of investors more likely than others to align their practices with the UNGPs? Does it depend on the type of investor?*

There are a few factors that seem to enable a stronger awareness and implementation of UNGPs by investors such as participation in multi-stakeholder initiatives or industry initiatives with an ESG/human rights focus and the existence of State policy or regulations that incentivise respect for human rights. For example, the Dutch pension fund agreement played a role in helping Dutch pension funds getting a better picture of their investment chain and how they are connected with

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<sup>21</sup> For an overview of what National Action Plans on Business and Human Rights say in relation to the Finance and Banking Sector please visit [Finance & banking sector | National Action Plans on Business and Human Rights \(globalnaps.org\)](https://www.globalnaps.org/)

<sup>22</sup> [Human rights at Development Finance Institutions | The Danish Institute for Human Rights](#)

<sup>23</sup> [Social Bonds for Sustainable Development: A Human Rights Perspective on Impact Investing | Business and Human Rights Journal | Cambridge Core](#)



human rights impacts.<sup>24</sup> Norway has adopted a set of Ethical Guidelines for exclusion and observation of companies from the Government Pension Fund Global (GPF) that includes a human rights criterion.<sup>25</sup> Sweden requires through its National Pension Insurance Fund that its pension funds contribute to sustainable development by managing their assets in an exemplary way. The First, Second, Third and Fourth Swedish National Pension Fund established a Council on Ethics to influence companies to address environmental and social issues, including human rights.<sup>26</sup>

2. *How effective are international instruments, institutions and guidance that promotes HRDD, such as by the UN Global Compact, Equator Principles, Principles of Responsible Investment, Investor Alliance for Human Rights, Business for Social Responsibility and other entities, effective in increasing awareness of human rights impacts among investors and other businesses? Please provide examples of participation, integration, or adherence of investors in these instruments and bodies.*
3. *How should investors integrate human rights considerations throughout the investment process, including when constructing, underwriting, and/or investing in an ESG product or service? How do these steps vary for different asset classes?*

Over the last 2-5 years several guidance notes and toolkits have helpfully provided more clarity around how human rights due diligence is to be implemented by investors and across the investment life cycle<sup>27</sup>.

That said, many resources focus predominantly on equity investment, which leaves room for more guidance and good practices to be developed in relation to other asset classes, which may be more challenging in terms of aligning current ESG practices with the UNGPs including when managing bonds, real estate investments etc.

For a recent case study capturing how an investor has tried to take a UNGPs and severity inspired approach to risk assessments see the case

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<sup>24</sup> [Pension Funds Agreement | IRBC Agreements \(imvoconvenanten.nl\)](https://www.imvoconvenanten.nl)

<sup>25</sup> [Council on Ethics – Government Pension Fund Global \(etikkradet.no\)](https://etikkradet.no)

<sup>26</sup> [The mission of the Council on Ethics – AP-fondernas etikråd \(etikradet.se\)](https://etikradet.se)

<sup>27</sup> [Responsible business conduct in the financial sector - OECD](https://www.oecd.org); [Why and how investors should act on human rights | Thought leadership | PRI \(unpri.org\)](https://www.unpri.org); [Investor Toolkit on Human Rights | Investor Alliance for Human Rights \(investorsforhumanrights.org\)](https://investorsforhumanrights.org)

about LBP AM in DIHR's publication on 'Due Diligence in the Downstream Value Chain'<sup>28</sup>.

4. *To what extent do investors assess human rights risks and adverse impacts using a risk to right-holders lens as being separate from ESG materiality considerations or as part of a double materiality assessment? <sup>41</sup> Are these integrated into an ESG approach and, if so, how? Please provide examples of practices.*

Mainstream ESG approaches consider risk to companies stemming from sustainability related matters (E, S or G). From a FI perspective, the ESG practice has served a purpose of anticipating and managing sustainability related risks that may in turn impact returns on investment and the overall financial performance of the FI. This underlying purpose has been key to how ESG methodologies and products have been developed. For instance, human rights screenings have been used to 'screen out' problematic companies from the portfolio.

From a BHR perspective, a fundamental question thus remains whether such practice can be reconfigured to have the 'risk to people and planet' perspective as its governing principle or whether it is better to develop a BHR practice amongst FIs in parallel to the ESG industry as this will continue to have financial risks at its core. Perhaps, the principle of 'double materiality' may be of inspiration for a similar reform of mainstream ESG approaches.<sup>29</sup> At a minimum it is important in the assessment of ESG methodologies and initiatives to be attentive to a potential bias resulting from mis-alignment with a 'risk to people' lens.

5. *What does appropriate investor action entail in the event that a client or portfolio company causes or contributes to a potential or actual adverse human rights impact?*
6. *What leverage do investors have to address human rights and climate change issues, and how does it differ based on asset classes and investment types? How does investor leverage differ based on asset classes, stocks and bonds, and lending?*

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<sup>28</sup> [Due diligence in the downstream value chain - case studies of current company practice september 2023 version.pdf \(humanrights.dk\)](#) p. 24

<sup>29</sup> For contrast and compare overview between ESG and human rights confer [Human Rights Roadmap.pdf \(bsr.org\)](#) p. 12ff

- 7. What provisions can be included in contracts or investment agreements to encourage respect for human rights? Can technological devices like Blockchain assist in this regard?*

Perhaps learning from DFIs use of E&S related clauses in contract agreements in the context of project finance could inspire the use of contractual clauses more explicitly requiring implementation of UNGPs by investee companies.

- 8. In what circumstances should investors refrain from making ESG-related investments in view of potential risks of adverse human rights impacts?*
- 9. How can investors best provide transparency in their disclosures about their practices which are, or are not, in alignment with the UNGPs?*

In annual sustainability reports or via website communication some investors note that they expect investee companies to comply with UNGPs, have human rights policy commitments and undertake human rights due diligence, but typically give less detail on how they themselves implement the UNGPs. Leading investors are increasingly sharing details around their active engagement practices, around exclusion and divestment, voting practices etc. However oftentimes at aggregated levels rather than by naming companies in question.

The DIHR is currently for the first time benchmarking Danish financial institutions on human rights, using a simplified version of the human rights elements of the World Benchmarking Alliance's methodology for their Financial Sector Benchmark and the Corporate Human Rights Benchmark core UNGP methodology. The benchmark will also include a look at the Danish companies disclosures on human rights in relation to the SFDR related reports from June this year which can help document the ways in which SFDR is or is not driving meaningful disclosures by investors in relation to human rights. The benchmarking report is expected to come out in Q4 2023 or Q1 2024.

- 10. Explain the differences and similarities of ESG approaches, including their approaches to human rights risks, with the human rights-based approach set out by the UNGPs?*

As mentioned, a key area of difference is that ESG approaches tend to measure risk to business as opposed to risk to people (see q4). Other notable points of difference include:

- ESG approaches lack a solid normative grounding, e.g. it is not clear what benchmarks or standards are being used to identify and measure ESG impacts
- ESG approaches do not clarify the investor's own responsibility to respect human rights, but primarily focus on measuring the performance of companies in the investor's portfolios
- ESG approaches are primarily shaped by the ESG industry and might inadvertently prevent investors from building up internal capacity to respect human rights, e.g. many asset owners tend to outsource ESG decisions and company engagement to service providers and asset managers
- ESG methodologies are biased towards quantitative, highly aggregated metrics, undermining more sophisticated analyses of root causes of abuses and meaningful interventions by investors
- ESG approaches generally do not involve engagement with affected stakeholders or their proxies to inform risk identification or responses
- ESG approaches traditionally have not included a focus on using leverage to mitigate impacts and facilitate access to remedy where relevant, but rather a focus on exclusion

*11. Is the role of consultation with stakeholders, such as the local communities, women and Indigenous peoples, the same for an ESG approach and an approach set out by the UNGPs and, if not, in what way do they differ? What expectations and/or challenges do investors face in undertaking meaningful stakeholder consultation?*

Consultation with affected stakeholders or their representatives is a very nascent field amongst investors and has traditionally not been a prominent component of investors' ESG practice. Most investors believe that stakeholder engagement is primarily a responsibility of portfolio companies and thus focus on getting portfolio companies to practice stakeholder engagement, if focussing on it at all.

That said emerging practices also demonstrate a shift towards a more direct role of investors in stakeholder engagement. For example, after the catastrophic tailings dam failure at Vale's Brumadinho mine in Brazil, the Church of England Pensions Board and the Swedish Council of Ethics of the AP Funds led the formation of the "Investor Mining & Tailings Safety Initiative," with the goal of allowing investors active in extractive industries to engage with impacted communities,

international experts, government representatives, and company representatives.<sup>30</sup>

*12. How should investors take gender-responsive, disability-responsive, and intersectional-responsive approaches? How should investors take a heightened human rights due diligence approach in conflict affected areas?*

*13. Are there any roles which stock exchanges could play in ensuring investors, and the businesses in which they invest, respect human rights?*

## **Access to remedy**

### **State-based judicial and non-judicial mechanisms**

*1. What steps have States taken to investigate, punish, and redress business-related human rights abuses connected to investors, and how effective are they? What challenges and opportunities for participation by affected stakeholders and/or redress have you observed?*

*2. Please provide examples of cases submitted to State-based judicial and/or non-judicial mechanisms regarding investors in the context of business-related human rights and environmental abuses. How effective are these in providing remedies to the victims and how can they be improved?*

The National Contact Points of the OECD Guidelines have considered several cases related to financial institutions.<sup>31</sup> However, very few cases resulted in remediation of harm. A positive example is the EC and IDI vs Australia and New Zealand (ANZ) Banking Group case that resulted in ANZ agreeing to paying a share of the gross profit earned from the loan to its client to support affected communities and their rehabilitation.<sup>32</sup>

### **Non-State based mechanisms**

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<sup>30</sup> [Investor Mining and Tailings Safety Initiative | Case study | PRI \(unpri.org\)](#)

<sup>31</sup> See for example [Society for Threatened Peoples Switzerland vs. UBS Group](#), [Milieudéfense et al vs. ING](#), [KTNC Watch et al vs KEXIM](#), [Forum Suape et al. vs. Atradius Dutch State Business](#)

<sup>32</sup> [EC and IDI vs. Australia and New Zealand Banking Group - OECD Watch](#)

1. *What remediation responsibilities should investors have? Should these responsibilities vary depending on the nature of the responsibility e.g. cause, contribute to, or be directly linked to the adverse human rights impact? Should it vary depending on the sector invested or the type of investment activity?*

The UNGPs involvement framework is rightly an important consideration in determining the investors' responsibility for remediation. Following the UNGPs investors too have a remediation responsibility when causing or contributing and can play a role in remediation in cases of direct linkage. However, given the sheer diversity of the financial sector the application of the involvement framework in the context of FIs is not always straightforward and requires factoring in variables related to the nature of financing instruments (e.g. corporate loans, project finance, equity, bonds), investment types (e.g. active/passive; public/private equity) and types of business relationships as well as considerations around investor due diligence practices or lack thereof. For example, large investors with minority equity stakes in thousands of portfolio companies are most likely to be in a situation of direct linkage and expected to exercise leverage if an adverse impact occurs. Private equity funds that have significant managerial control over investee companies, however, could more easily find themselves contributing to harm and expected to provide remediation.<sup>33</sup>

Other factors than share-size influence whether investors may move from situations of direct linkage to contribution as clarified by Ruggie in relation to the Thun Group exchange<sup>34</sup> and helpfully outlined by the OECD in guidance to the banking sector<sup>35</sup>. But real-world examples of remediations following application of the UNGPs in an FI context are too few at this point in time. Further, in our experience a large emphasis on involvement framework based analysis can overly complicate things for investors and result in limited resources being spent on analysing how a given FI is involved rather than on how – irrespective of the type of involvement – the FI can most meaningfully facilitate remediation of impacts.

Irrespective of the involvement framework and whether an adverse impact has occurred, all investors should be expected to have grievance mechanisms in place and to assess portfolio companies' preparedness to provide remedy as part of their human rights due diligence.

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<sup>33</sup> [Human rights due diligence for private markets investors: a technical guide | Reporting guidance | PRI \(unpri.org\)](#)

<sup>34</sup> [Thun\\_Final.pdf \(business-humanrights.org\)](#)

<sup>35</sup> [Due Diligence for Responsible Corporate Lending and Securities Underwriting \(oecd.org\)](#)

Depending on the types of human rights risks in their portfolios, investors could explore exercising collective leverage to build a stronger remedy ecosystem through policy dialogue and supporting corporate accountability initiatives. To this effect several investor groups have come out in favour of an EU level corporate sustainability due diligence directive that includes administrative penalties, legal liability ensures access to remedy for victims<sup>36</sup>. As the negotiations have progressed leading investors have also spoken out in favour of the inclusion of financial institutions themselves in such law as this has become a thorny point in the negotiations<sup>37</sup>. An innovative more topic-led example comes from the US where a group of institutional investors signed an amicus brief filed before the U.S. Supreme Court in support of same sex marriage to avoid discrimination of LGBT+ people in relation to a range of federal benefits otherwise available to married people.<sup>38</sup>

- 2. What measures and mechanisms, including grievance mechanisms, should be provided at the investment-level that enable individuals or communities affected by the business in which the investor has invested (e.g. the portfolio company) to report adverse human rights impacts to the investor and seek effective remedy for human rights and environmental abuses? How effective are these in providing remedies to the victims? Please provide examples of business or industry association actions in this area.*

### **Good practices**

- 1. Please provide examples of any good practices, tools, guidance, policies, etc., regarding the integration of the responsibility to respect human rights by investors, including examples of investors actively preventing or mitigating (including by using leverage or undertaking a responsible exit) any adverse human rights and environment impacts of the businesses in which they invest.*
- 2. Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National*

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<sup>36</sup> [More than 100 companies and investors call for effective EU corporate accountability legislation - Business & Human Rights Resource Centre \(business-humanrights.org\)](#)

<sup>37</sup> [INVEST1-2.pdf \(eurosif.org\)](#)

<sup>38</sup> [For Many On Wall Street, Gay Rights Are a Human and Business Issue \(institutionalinvestor.com\)](#)

*Human Rights Institutions that would assist in ensuring that investors act compatibly with the UNGPs?*

States should ensure that policies and regulation in the area of business and human rights explicitly cover financial institutions and account for the specificities of the financial sector. For example, State could (i) ensure that mandatory human rights due diligence and reporting laws include in their material scope financial institutions, (ii) ensure that sustainable finance regulation adequately reflects and incorporates business and human rights standards (iii) take additional measures to ensure state supported financial institutions conduct adequate human rights due diligence, (iv) develop appropriate guidance to support financial institutions to meet their human rights responsibilities.

National human rights institutions could use their mandates to monitor and document human rights abuses linked to the financial sector including state-affiliated financial institutions, raise awareness on systemic human rights challenges linked to the sector, such as the financialization of housing<sup>39</sup>, and advise on appropriate legislative, regulatory and policy measures for both state and non-state duty bearers.

*Any other comments or suggestions about the forthcoming report are also welcome.*

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<sup>39</sup> [The Shift Directives – The Shift \(make-the-shift.org\)](https://www.make-the-shift.org/)