

**WRITTEN OBSERVATIONS ON THE REQUEST FOR AN ADVISORY OPINION ON THE  
CLIMATE EMERGENCY AND HUMAN RIGHTS, AS REQUESTED BY THE STATES OF  
COLOMBIA AND CHILE**

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**AMICUS BRIEF SUBMITTED TO THE  
INTER-AMERICAN COURT OF HUMAN RIGHTS**

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Union of  
Concerned Scientists  
Science for a healthy planet and safer world

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## Expertise and Interests of Submitting Organizations

**The Center for International Environmental Law (CIEL)** uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. Since 1989, CIEL has been a leader in the development of international environmental and human rights law, including with respect to climate change and the interlinkages between human rights and climate policies. CIEL has submitted third-party interventions and amicus curiae briefs in numerous cases concerning human rights and the environment, before national, regional, and international courts, and arbitral tribunals, including *inter alia*, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the European Court of Human Rights, the International Tribunal for the Law of the Sea, the United States Supreme Court and U.S. Courts of Appeals, panels of the International Centre for Settlement of Investment Disputes, and national human rights institutions. CIEL has consultative status with the UN Economic and Social Council, is accredited to the UN Environment Programme, is registered with the Organization of American States, and enjoys observer status with the UN Framework Convention on Climate Change and the Intergovernmental Panel on Climate Change.

**NYU Law's Climate Litigation Accelerator (CLX)** is a global collaborative hub for research, advocacy, and strategic litigation on the climate emergency. Working with scholars, activists, and litigants from around the world, CLX initiates and supports efforts that build the speed and scale necessary to spur action on the climate emergency within the limited timeframe left to avoid triggering extreme scenarios of global warming. CLX helps fill gaps in existing practice, connects litigants and experts in different fields (from climate science to strategic communications to ecology to climate economics), and spearheads and supports climate lawsuits and other forms of advocacy.

**Greenpeace** is an independent global network of campaigning organizations that act to change attitudes and behavior, protect and conserve the environment and promote peace. Greenpeace consists of 25 independent national or regional organizations with a presence in over 40 countries worldwide, as well as Stichting Greenpeace Council (Greenpeace International) which serves as a coordinating body. For over 50 years, Greenpeace has campaigned to prevent environmental harm, protect human rights and ensure the Earth's ability to nurture life in all its forms. Greenpeace International enjoys observer or similar status with intergovernmental organizations in the fields of human rights law, climate change and the environment. These include the United Nations Framework Convention on Climate Change ("UNFCCC") and the UN Environment Programme ("UNEP"). Greenpeace submissions on human rights in the context of climate change are received by international and regional tribunals and courts, including the International Tribunal for the Law of the Sea ("ITLOS"), International Criminal Court ("ICC"), Court of Justice of the European Union ("CJEU") and the European Court of Human Rights ("ECtHR"). Greenpeace International has unique expertise in contentious and advisory matters regarding the obligations of States to act on climate change and consistently advocates for the rights of the most climate impacted communities.

**The Open Society Foundations** established the **Justice Initiative** in 2003 to provide expert legal support for its broader mission and values through strategic human rights litigation and other legal work. Our lawyers have represented individuals and groups before domestic and international courts and tribunals around the world. These cases seek not only to vindicate individual claims, but to set precedents to establish and strengthen the law's protections.

**The Union of Concerned Scientists (UCS)** puts rigorous, independent science into action, developing solutions and advocating for a healthy, safe, and just future. Our half-million members and supporters include everyday people as well as some of the top scientists in the United States; our distinctive UCS Science Network mobilizes more than 21,000 scientists and technical experts across the country to assist our local, state, and national efforts. Working together, we advance equitable science-based solutions to some of the world's most pressing problems, conduct rigorous technical analyses, and mobilize our supporters to build powerful coalitions, educate decisionmakers, and advocate for change.

**The above-listed organizations received input from Greenpeace Mexico, Greenpeace Chile, Greenpeace Colombia and Greenpeace Argentina and the El Bosque Community in Tabasco, Mexico, in writing this brief.**

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## SUMMARY

1. This brief presents the written observations of Stichting Greenpeace Council, otherwise known as Greenpeace International (“GPI”), the Union of Concerned Scientists (“UCS”), the Center for International Environmental Law (“CIEL”), the New York University School of Law Climate Law Accelerator (“CLX”), and the Open Society Justice Initiative (“OSJI”),<sup>1</sup> with respect to the Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, on January 9, 2023. The above-listed organizations have unique experience in contentious and advisory matters regarding the obligations of States to act on climate change, and relevant expertise in the fields of international human rights and environmental law, climate science, including attribution science, and corporate accountability. In view of their respective missions, the submitting organizations have a particular interest in ensuring that the Court’s guidance to States regarding human rights-based solutions to the climate emergency fully reflects the obligations of States to safeguard human rights from business conduct that drives climate change and impedes climate action, of business enterprises to avoid and minimize such conduct, and of both States and business enterprises to remediate resulting climate change-related violations of human rights.
2. The observations provided herein address questions A1, A2, B1, C1, C2, D1, D2 and F in the request before the Court. We outline the outsized role of the fossil fuel and agribusiness industries in causing climate change and impeding climate action, the duty of States under the American Convention on Human Rights (ACHR) to effectively regulate such conduct to prevent the violation of human rights due to climate change, the independent obligations of business enterprises to refrain from causing such violations, and the duty of both to remediate them. To fulfill their human rights obligations in the context of the climate emergency, States must confront the industries driving it and curb their capture of climate policy.
3. Climate change is unequivocally a human rights crisis. Its accelerating impacts impair the enjoyment of all human rights, but do not affect the rights of all people equally. Because climate change is a threat multiplier, whose impacts fall disproportionately on marginalized populations and people in vulnerable situations, it is inherently discriminatory. The increasing toll of climate change is evident throughout the Americas, from a rural community in Tabasco, Mexico, being displaced from their homes due to climate-induced sea level rise, coastal erosion and floods caused by heavy rains, to Indigenous Peoples in Central America losing millions of hectares of crops and disruptions to their agricultural livelihoods due to hurricanes intensified by climate change, to extreme heat and wildfires across South America. The long history and ongoing practice of extractivist, racist colonialism and corporate exploitation—largely led by foreign business enterprises from the Global North<sup>2</sup>—has contributed to the structural

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<sup>1</sup> For descriptions of each entity, see *supra*, “Expertise and Interests of Submitting Organizations”.

<sup>2</sup> See definition of Global North and Global South offered by the Center of Economic and Social Rights. CESR, *Transforming the Global Economic System: 2023–2027 Strategy*, p. 8, available at [https://www.cesr.org/sites/default/files/2023/CESR\\_2023-2027\\_Strategy.pdf](https://www.cesr.org/sites/default/files/2023/CESR_2023-2027_Strategy.pdf). (“These widely used terms highlight disparities in wealth, consumption, economic power, and political influence between different parts of the world. The Global South includes many formerly colonized countries across Africa, Asia, and Latin America and the

vulnerability of the communities most affected by the climate crisis and the destructive conduct causing it.

4. Climate change is driven largely by the actions and influences of a relatively small number of business enterprises, chiefly in the fossil fuel and agroindustrial sectors. Improvements in attribution science make it increasingly possible to link certain phenomena and events, like extreme heat, wildfires, floods, and storms, to climate change, and in turn to link climate change to specific sources of greenhouse gas (GHG) emissions. Research shows that the majority of industrial GHG emissions since the industrial revolution originated in just 90 entities around the world, known as the “Carbon Majors.” Deforestation, caused largely by agroindustrial expansion, also releases large quantities of heat-trapping gasses while reducing the amount of carbon that forest ecosystems and soil systems can remove from the atmosphere.
5. Corporate climate-destructive conduct has two distinct facets: physical drivers and social drivers of climate change. Fossil fuel and agroindustrial companies contribute to climate change both through their physical activities, which generate GHG emissions, destroy carbon sinks, and erode resilience, and through their socio-political activities, which obstruct regulations, deny the science, deceive the public, and delay necessary climate action. To prevent climate-induced human rights harm, States must take immediate measures to regulate and hold business enterprises accountable for both types of drivers. Business enterprises, in turn, have an independent obligation under human rights law to refrain from engaging in such conduct, regardless of the political will or capacity of States to fulfill their human rights obligations.
6. The climate crisis is a fossil fuel crisis. Fossil fuels are the overwhelming source of GHG emissions driving global warming and its impacts on people and ecosystems. Coal, oil, and gas account for more than 75% of GHG emissions and nearly 90% of all carbon dioxide (CO<sub>2</sub>) emissions. Fossil fuel production ineluctably leads to emissions across the lifecycle, from the extraction and processing of oil, gas, and coal, to their transport and intended end use, primarily combustion. Agroindustrial deforestation is the second largest source of GHG emissions globally, as deforestation and other forms of land conversion and degradation destroy carbon sinks and erode ecosystem resilience. In the Americas, deforestation and other land use changes are behind nearly half of the region’s GHG emissions.
7. These GHG-generating and carbon sink-destroying activities have been enabled, perpetuated, and insulated from regulation by the same industries’ obstructionist and deceptive conduct. The fossil fuel industry has known about the climate consequences of its operations and products for at least six decades. Yet instead of curbing those activities, fossil fuel companies sought first to publicly deny climate science and their products’ contribution to climate change, next to obstruct and derail climate regulations, and then to deceive the public about their impacts on climate change, painting themselves as essential to climate solutions rather than the core of the problem. The effect of this ongoing interference, deception, and greenwashing—understood as the use of unsubstantiated or misleading claims about, minimization, omission or selective disclosure of, the environmental impacts of company

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Caribbean. The Global North includes Australia, Canada, Japan, the US and most of Western Europe. The countries within each group are diverse, and the challenges they face vary; and within all countries there are dominant elites and marginalized communities. The terms are still useful in capturing systemic global inequalities.”).

operations, products, or practices for commercial or political gain—has been to undermine State action on climate change, thereby prolonging climate-destructive practices, promoting demand and dependence on fossil fuels, and exacerbating the climate crisis, with its human rights impacts.

8. This conduct by fossil fuel and agroindustrial companies is incompatible with what climate science shows is necessary to avoid catastrophic levels of warming. The science is unequivocal: present levels of warming are already harming human rights, and every fraction of a degree that the planet heats amplifies those impacts and diminishes the capacity of people and ecosystems to adapt. The world's preeminent authority on climate science, the Intergovernmental Panel on Climate Change (IPCC), has stated that warming of 1.5°C above pre-industrial levels is not safe for most communities and ecosystems, and that if temperature rise exceeds 1.5°, even temporarily, it will unleash irreversible and even more catastrophic consequences than those being witnessed around the world today. Preventing these outcomes requires urgent action to rapidly reduce GHG emissions and protect and restore natural ecosystems. Such emissions reductions and improvements in resilience cannot be achieved without an immediate halt to fossil fuel expansion and agroindustrial deforestation, a rapid and equitable phaseout of the production and use of fossil fuels, and reduction in industrial agriculture—while ensuring a just transition to a peaceful, renewable energy future.
9. In the face of such facts, States have a duty under longstanding human rights law to take all measures within their power to prevent further deprivation of human rights due to climate change and to ensure effective remedy for those whose rights have been, are being, and are likely to be violated in the future. Those measures must be capable of averting the risk of harm. Science makes clear that the best way to minimize future warming and the foreseeable deprivation of human rights that results from it is to tackle fossil fuel and agroindustrial operations. That means that States have a human rights obligation to halt expansion of fossil fuel production and agricultural deforestation, and accelerate the phaseout of fossil fuels in a just manner. Doing so requires regulating climate-destructive corporate conduct, including interference with climate action, and holding corporations accountable for their contributions to climate change-related human rights harm.
10. The measures that are within States' power to prevent and mitigate climate change-related human rights violations will be a function of their economic means and respective capabilities. The greater a State's cumulative contributions to climate change, economic capacity, and technological capabilities, the greater its obligations to take immediate measures to respect and protect human rights from climate change-related harm, and remedy human rights violations related to climate change. Thus, wealthy States particularly from the Global North not only have a heightened duty to regulate business enterprises subject to their jurisdiction and control, whose conduct has had and continues to have an outsized impact on climate change. They also must ensure effective remedy for the resultant human rights violations, avoid impeding the ability of other States to fulfill their human rights obligations with respect to climate change, and support climate action through international cooperation, finance and technology transfer.
11. Business enterprises have an independent obligation to respect human rights, regardless of the State's ability or will to satisfy its own human rights obligations. That duty requires business enterprises to refrain from conduct that foreseeably causes or contributes to human rights violations, as well as

conduct such as fossil fuel expansion and deforestation, that drives increased GHG emissions, destroys carbon sinks, erodes resilience, and/or impedes necessary climate action. The obligations of business enterprises encompass duties to provide accurate and timely information on their business activities, assess foreseeable climate impacts across their value chains, respect the rights to consent, consultation and participation, and provide remedy for human rights harms that they have caused or to which they have contributed.

12. In interpreting State duties under the ACHR to act on climate change, longstanding human rights law must be the touchstone. Informed by the best available science and consistent with a harmonious interpretation approach, the Court should look to other relevant rules and principles of international law, including States' concurrent obligations under other international legal regimes and the principles of prevention, precaution, intergenerational equity, public participation, and non-retrogression. The global climate regime, comprising the United Nations Framework Convention on Climate Change (UNFCCC) and decisions taken by the Parties thereto, as well as the Paris Agreement, should inform *but do not define or limit* the scope and content of States' human rights obligations with regard to climate change. States' human rights duties to act on climate change derive from human rights law. Those obligations predate and exist concurrently with the duties set out in the climate regime.
13. The UNFCCC establishes States' binding commitment to avoid dangerous anthropogenic interference with the climate system by stabilizing greenhouse gas emissions, and the Paris Agreement commits Parties to pursue efforts to limit temperature increase to 1.5°C through climate action based on the best available scientific knowledge. Those agreements set out State obligations *inter se*, to take action to mitigate, adapt to, and address loss and damage from climate change, through maximally ambitious measures that evolve with climate science and reflect States' common but differentiated responsibilities and respective capabilities. In discharging its obligations under the UNFCCC and Paris Agreement, a State does not discharge its obligations under human rights law—which extend to individuals and communities affected by conduct subject to the State's jurisdiction and control. Given the insufficiency of States' action pursuant to the Paris Agreement to limit climate destruction or remediate climate change-related harm, human rights law clearly obliges States to do more.
14. Clarifying what human rights law requires of States in the climate emergency, as this Court is asked to do in the present Advisory Opinion, in no way conflicts with or disrupts the climate regime. To the contrary, it elucidates the imperatives that States have to ensure that the action they take pursuant to the global climate regime is sufficient to protect the rights of present and future generations. As elaborated below, such action must include adequate measures to prevent and remediate the corporate conduct in the fossil fuel and agroindustrial sectors that drives climate change through GHG-intensive activities and destruction of carbon sinks, and through obstruction, deception, and delay of climate action.

## 1. ANTHROPOGENIC CLIMATE CHANGE AFFECTS THE ENJOYMENT OF ALL HUMAN RIGHTS AND ITS IMPACTS FALL DISPROPORTIONATELY ON PEOPLE IN VULNERABLE SITUATIONS

15. Human-induced climate change is the “defining challenge” of our time.<sup>3</sup> Anthropogenic emissions of GHGs to the atmosphere—mainly from fossil fuel combustion, land use, and land use change, such as deforestation—“have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020.”<sup>4</sup> (See Section 2). At current levels of global warming, “widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred,”<sup>5</sup> causing “widespread adverse impacts and related losses and damages to nature and people”<sup>6</sup> and disproportionately affecting people in vulnerable situations “who have historically contributed the least to current climate change.”<sup>7</sup> Some losses in human and natural systems are already irreversible and others are approaching irreversibility.<sup>8</sup>
16. Climate change constitutes one of the “greatest threats” to the full exercise of human rights.<sup>9</sup> This Court has recognized the interrelationship between human rights and the environment,<sup>10</sup> and the negative impacts that environmental degradation and the adverse effects of climate change can have on the “real enjoyment” of human rights.”<sup>11</sup> Other international bodies have also recognized this interconnection. For example, the Human Rights Committee has recognized that “environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”<sup>12</sup> Likewise, the United Nations General Assembly acknowledged that the impacts of climate change interfere with the enjoyment of the right to a clean, healthy and sustainable environment and that damage to the environment “has negative implications, both direct and indirect, for the effective enjoyment of all human rights.”<sup>13</sup>
17. In its General Comment No. 26, the UN Committee on the Rights of the Child (CRC) stated that “[a] clean, healthy and sustainable environment (...) is necessary for the full enjoyment of a broad range of

<sup>3</sup> Inter-American Commission on Human Rights [IACHR] *Resolution No. 03/2021* [IACHR Resolution No. 03/2021], at p. 8; Lahore High Court (PK), *Leghari v. Pakistan*, [2015] W.P. No. 25501/201 [hereinafter Lahore High Court (PK), *Leghari v. Pakistan*], para. 6.

<sup>4</sup> IPCC, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the IPCC, Synthesis Report, Summary for Policymakers, 2023 [hereinafter IPCC AR6 SYR SPM], A.1

<sup>5</sup> IPCC AR6 SYR SPM, at A.2.

<sup>6</sup> *Id.* (high confidence).

<sup>7</sup> *Id.* (high confidence).

<sup>8</sup> IPCC, Working Group II Contribution to the Sixth Assessment Report of the IPCC, Climate Change 2022: Impacts Adaptation and Vulnerability, Summary for Policymakers, 2022, [hereinafter IPCC AR6 WGII SPM], at B1.2.

<sup>9</sup> IACHR Resolution No. 03/2021, at p. 8; Lahore High Court (PK), *Leghari v. Pakistan*, para. 6.

<sup>10</sup> Inter-American Court of Human Rights [IACtHR], *Advisory Opinion OC-23/2017 on the Environment and Human Rights*, November 15 2017 [hereinafter IACtHR, OC-23/2017], para 47-55; see also, IACHR, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources – Norms and jurisprudence of the inter-American human rights system*, December 30 2009, OEA/Ser.L/V/II. Doc. 56/09, para. 190.

<sup>11</sup> IACtHR, OC-23/2017, para 47

<sup>12</sup> Human Rights Committee, General Comment No. 36, 3 September 2019 [hereinafter Human Rights Committee, General Comment No. 36], UN Doc. CCPR/C/CG/36.

<sup>13</sup> UN General Assembly [UNGA], *Resolution adopted by the General Assembly on the human right to a clean, healthy and sustainable environment*, 28 July 2022 [hereinafter UNGA, A/RES/76/300], UN Doc. A/RES/76/300, p. 2.

children’s rights. Conversely, environmental degradation, including the consequences of the climate crisis, adversely affects the enjoyment of these rights, in particular for children in disadvantaged situations or children living in regions that are highly exposed to climate change.”<sup>14</sup> Furthermore, the CRC established that climate change is a form of structural violence against children.<sup>15</sup>

18. Echoing the scientific reports of the IPCC, the Organization of American States (OAS) Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights (REDESCA) also concluded that climate change “threatens the very future of human rights and would undo the last fifty years of progress in development, health and poverty reduction.”<sup>16</sup> This is true for the Americas and particularly for those within the region who find themselves in situations of vulnerability.

### **1.1 The impacts of climate change are becoming increasingly severe, leading to significant damages and losses across human and natural systems**

#### **1.1.1 Scientific studies highlight the adverse effects of climate change upon humans across the globe**

19. Attribution science—which identifies and quantifies the contribution of climate change to global climate trends and extreme weather events—has revealed the ways in which climate change adversely affects humans.<sup>17</sup> By comparing models of Earth’s climate with and without human influence, studies in this field can now explain, among other things, not only how human-driven GHG emissions contribute to sea level rise or ocean acidification, but also how climate change makes a heatwave hotter or a hurricane-related downpour more intense than they would have otherwise been.<sup>18</sup> Generally, attribution studies account for all human-driven emissions including those from fossil fuel combustion as well as deforestation. Further, source attribution research—which quantifies how emissions from specific sources contribute to a given climate impact—specifically establishes a direct connection between corporate behavior and climate change. Such research has, for instance, traced emissions from the 88 largest fossil fuel companies and cement manufacturers (previously 90 entities, now 88 companies due to mergers and acquisitions), hereinafter the “Carbon Majors,”<sup>19</sup> to observed increases

<sup>14</sup> Committee on the Rights of the Child, *General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change* [hereinafter Committee on the Rights of the Child, General Comment No. 26 (2023)], 22 August 2023, UN Doc. CRC/C/GC/26, para. 8.

<sup>15</sup> Committee on the Rights of the Child, General Comment No. 26 (2023), para. 35 states that “[p]overty, economic and social inequalities, food insecurity and forced displacement aggravate the risk that children will experience violence, abuse and exploitation.”

<sup>16</sup> IACHR Resolution No. 03/2021, p. 4.

<sup>17</sup> IPCC, *Climate Change 2023: Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Synthesis Report* [hereinafter IPCC AR6 SYR], p. 46 (noting that such attribution science has gotten stronger since the IPCC published its Fifth Assessment Report in 2014).

<sup>18</sup> Otto, F.E.L. “Attribution of weather and climate events” (2017) *Annual Review of Environment and Resources* 42, p. 628 available at <https://doi.org/10.1146/annurev-environ-102016-060847>.

<sup>19</sup> Licker, R. et al, *Attributing ocean acidification to major carbon producers*, *Environmental Research Letters* 14, (2019), p. 2. Supplemental information 3, Alpha Natural Resources acquired Massey Energy in 2011, CNOOC acquired Nexen Canada in 2013.

in global surface temperature, sea level rise,<sup>20</sup> and ocean acidification,<sup>21</sup> linking the products and actions of corporations to climate impacts that are violating human rights.

20. Best available science has made evident that the consequences of climate change are becoming increasingly severe, leading to significant damages and losses across ecosystems.<sup>22</sup> Warming ocean waters and marine heatwaves have led to widespread coral bleaching and mortality.<sup>23</sup> On land, extended droughts have increased tree mortality,<sup>24</sup> while priming forests for severe wildfire.<sup>25</sup> Changes to some ecosystems, like those in the alpine and Arctic, are approaching a state of irreversibility.<sup>26</sup>
21. The most recent Assessment Report (AR6) released by the IPCC highlights how current impacts of climate change are already undermining human rights, indicating the confidence of their conclusions in parentheses. Across the globe, more frequent extreme heat,<sup>27</sup> powerful Category 4 and 5 tropical cyclones,<sup>28</sup> and heavy precipitation driven by changes in Earth's climate are negatively impacting human rights, putting communities at risk, and exposing millions of people to acute food insecurity, reduced water availability,<sup>29</sup> disease,<sup>30</sup> and violence.<sup>31</sup> In all regions of the world, "extreme heat events have resulted in human mortality and morbidity (very high confidence)"<sup>32</sup> and "the occurrence of climate-related food-borne and water-borne diseases (very high confidence) and the incidence of vector-borne diseases (high confidence) have increased."<sup>33</sup> The report also identifies the association of mental health challenges with increasing temperatures, such as "trauma from extreme events (very high confidence), and loss of livelihoods and culture (high confidence)."<sup>34</sup> Climate and weather extremes are also increasingly driving human displacement in the Americas region, Africa, and Asia, "with small island states in the Caribbean and South Pacific being disproportionately affected relative to their small population size (high confidence)."<sup>35</sup> Additionally, "[u]rban infrastructure, including transportation, water, sanitation and energy systems have been compromised by extreme and slow-onset events, with

<sup>20</sup> Ekwurzel, B. *et al.*, "The rise in global atmospheric CO<sub>2</sub>, surface temperature, and sea level from emissions traced to major carbon producers" (2017) *Climatic Change* 144 p. 586 available at <https://doi.org/10.1007/s10584-017-1978-0>.

<sup>21</sup> Licker, R. *et al.*, Attributing ocean acidification to major carbon producers, *Environmental Research Letters* 14, (2019), p. 2.

<sup>22</sup> IPCC AR6 SYR, p. 35-115.

<sup>23</sup> IPCC, Working Group II Contribution to the Sixth Assessment Report of the IPCC, Summary for Policymakers, 2023 [hereinafter IPCC AR6 WGII SPM], at B.1.1.

<sup>24</sup> IPCC AR6 WGII SPM, at B.1.1.

<sup>25</sup> IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group II to the Sixth Assessment Report (AR6), Technical Summary*, 2022 [hereinafter IPCC AR6 WGII TS], at B.2.2.

<sup>26</sup> IPCC AR6 WGII SPM, at B.1.2.

<sup>27</sup> IPCC AR6 SYR SPM, at A.2.5.

<sup>28</sup> Category 4 and 5 tropical cyclones are the most powerful and destructive storms on the Saffir-Simpson Hurricane Wind Scale, with sustained wind speeds of 131-155 mph (Category 4) and over 155 mph (Category 5), capable of causing catastrophic damage and posing significant threats to life and property. *See* IPCC AR6 SYR, p. 46.

<sup>29</sup> IPCC AR6 SYR SPM at A.2.2.

<sup>30</sup> IPCC AR6 SYR SPM, at A.2.5.

<sup>31</sup> IPCC AR6 WGII TS, 2022, at C.8.1.

<sup>32</sup> IPCC AR6 SYR SPM, A.2.5.

<sup>33</sup> IPCC AR6 SYR SPM, A.2.5.

<sup>34</sup> IPCC AR6 SYR SPM, at A.2.5.

<sup>35</sup> IPCC AR6 SYR SPM, at A.2.5.

resulting economic losses, disruptions of services and negative impacts to well-being,”<sup>36</sup> particularly impacting “economically and socially marginalised urban residents (high confidence).”<sup>37</sup>

22. The IPCC also highlights that approximately 3.3 to 3.6 billion people are living in contexts of high vulnerability to climate change.<sup>38</sup> As stated in the report, “increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, [Least Developed Countries], Small Islands, and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households. Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability. (high confidence).”<sup>39</sup>

### 1.1.2. Ecosystems and communities in the Americas are especially impacted by climate change

23. Attribution science has also demonstrated how climate change impacts are already disrupting the lives of people across the Americas region.<sup>40</sup> Intensified dry seasons and reductions in water availability, for instance, have both been linked to human-caused climate change.<sup>41</sup> Moreover, glacial lakes, like those in the Andes, are at higher risk for outburst flooding from enhanced glacial melt due to rising temperatures.<sup>42</sup> The intensification of South America’s dry season and associated increasing temperatures are taking thousands of lives in metropolises: one study found that almost 900,000 deaths between 2002 and 2015 in major Latin American cities could be attributable solely to extreme temperatures.<sup>43</sup> Further, several countries in Latin America and the Caribbean have some of the highest proportion of climate change-attributed, heat-related mortality in the world.<sup>44</sup>
24. In North America, increasing wildfire activity has also been attributed to climate change. Climate change, by increasing the dryness of the atmosphere, led to a more than doubling in burned area in forests of western North America.<sup>45</sup> During British Columbia’s record breaking 2017 wildfire season, climate change increased the area burned by a factor of 7-11.<sup>46</sup> Further, 37% of the total area burned by

<sup>36</sup> IPCC AR6 SYR SPM, at A.2.7.

<sup>37</sup> IPCC AR6 SYR SPM, at A.2.7.

<sup>38</sup> IPCC AR6 SYR SPM, at A.2.2.

<sup>39</sup> IPCC AR6 SYR SPM, A.2.2 [internal citations omitted].

<sup>40</sup> IACHR Resolution No. 03/2021, p. 5.

<sup>41</sup> Padron, R. *et al.*, “Observed changes in dry season water availability attributed to human-induced climate change” (2020) *Nature Geoscience* 13 available at <https://doi.org/10.1038/s41561-020-0594-1>.

<sup>42</sup> Taylor, C. *et al.*, “Glacial lake outburst floods threaten millions globally” (2023) *Nature Communications* 14 available at <https://doi.org/10.1038/s41467-023-36033-x>.

<sup>43</sup> Rodrigo Pérez Ortega, *Extreme Temperatures in Major Latin American Cities Could Be Linked to Nearly 1 Million Deaths*, *Science* (June 28, 2022), <https://www.science.org/content/article/extreme-temperatures-major-latin-american-cities-could-be-linked-nearly-1-million>.

<sup>44</sup> Vicedo-Cabrera, A.M. *et al.*, *The burden of heat-related mortality attributable to recent human-induced climate change* (2021), *Nature Climate Change* 11, p. 497, available at: <https://doi.org/10.1038/s41558-021-01058-x>.

<sup>45</sup> Abatzoglou, J. T. & Williams, A. P., *Impact of anthropogenic climate change on wildfire across western US forests*, *Proceedings of the National Academy of Sciences* 113, 11770–11775 (2016).

<sup>46</sup> Kirchmeier-Young, M. C., Gillett, N. P., Zwiers, F. W., Cannon, A. J. & Anslow, F. S., *Attribution of the Influence of Human-Induced Climate Change on an Extreme Fire Season*, *Earth’s Future* 7, 2–10 (2019).

forest fires in the western United States and southwestern Canada since 1986 can be attributed to GHG emissions traced to the Carbon Majors.<sup>47</sup>

25. Across the Americas region, attribution science has also provided evidence of how climate change has amplified extreme events with devastating consequences for affected communities. For example, Argentina’s December 2013 heatwave, which led to more than 1,000 excess deaths,<sup>48</sup> was made five times more likely due to human-caused climate change.<sup>49</sup> Similarly, climate change at least doubled the risk of 2017’s extreme rain and flooding in the Uruguay River Basin, which displaced 3,500 individuals and led to a direct economic loss of USD 102 million in Brazil.<sup>50</sup> Extreme rainfall and flooding in Peru during 2017, which killed 67 people and forced thousands to evacuate,<sup>51</sup> was nearly twice as likely due to climate change.<sup>52</sup> In May 2022, Northeast Brazil received 70% of monthly rainfall in 24 hours, leading to 133 deaths and the displacement of more than 25,000 people. In the absence of human-caused climate change, this event would have been 20% less intense.<sup>53</sup> Taken together, such climate-induced events highlight the urgency of addressing climate change to mitigate their impacts on human rights.

### 1.1.3 With every fraction of a degree of warming, climate change harms intensify and resilience erodes

26. Decisions in this present decade will dictate global temperature trajectories.<sup>54</sup> The IPCC has warned that with every increment of global warming from current levels, adverse impacts and related losses and damages—such as the ones highlighted in the subsection above—will escalate,<sup>55</sup> and climate change risks will become increasingly complex and more difficult to manage.<sup>56</sup> At warming of 1.5°C

<sup>47</sup> Dahl, K. A. et al, *Quantifying the contribution of major carbon producers to increases in vapor pressure deficit and burned area in western US and southwestern Canadian forests*, Environ. Res. Lett. 18, 064011 (2023).

<sup>48</sup> Chesini, F. et al., *Mortality risk during heat*, See Union of Concerned Scientists, *The Fossil Fuels Behind Forest Fires : Quantifying the Contribution of Major Carbon Producers to Increasing Wildfire Risk* (2023). *aves in the summer 2013-2014 in 18 provinces of Argentina: Ecological Study*, Ciência & Saúde Coletiva 27, no. 5 (May 2022): 2071–86, available at <https://doi.org/10.1590/1413-81232022275.07502021>, p. 2076.

<sup>49</sup> Hannart, A. et al., *Causal Influence of Anthropogenic Forcings on the Argentinian Heat Wave of December 2013*, Bulletin of the American Meteorological Society 96, 2015, p. S44, available at <https://doi.org/10.1175/BAMS-D-15-00137.1>.

<sup>50</sup> de Abreu, R.C. et al., *Contribution of Anthropogenic Climate Change to April–May 2017 Heavy Precipitation over the Uruguay River Basin*, Bulletin of the American Meteorological Society 100, no. 1 (January 2019): S37–41, available at <https://doi.org/10.1175/BAMS-D-18-0102.1>.

<sup>51</sup> Dan Collins and Jonathan Watts, *Peru Floods Kill 67 and Spark Criticism of Country’s Climate Change Preparedness*, The Guardian (Mar. 17, 2017), available at: <https://www.theguardian.com/world/2017/mar/17/peru-floods-ocean-climate-change>

<sup>52</sup> Christidis, N. et al., *The Extremely Wet March of 2017 in Peru*, Bulletin of the American Meteorological Society 100, no. 1 (January 2019): S31–35, available at <https://doi.org/10.1175/BAMS-D-18-0110.1>.

<sup>53</sup> Zachariah, M. et al. “Climate change increased heavy rainfall, hitting vulnerable communities in eastern Northeast Brazil” Online. July 5, 2022 available at <https://www.worldweatherattribution.org/>

<sup>54</sup> IPCC AR6 SYR SPM, B.6.

<sup>55</sup> IPCC AR6 SYR SPM, B.2.2.

<sup>56</sup> IPCC AR6 SYR SPM, B.2.3.

or higher above pre-industrial levels many human and natural systems will face severe additional risks.<sup>57</sup>

27. Climate risks and projected impacts to life, liberty, property and essential human needs worldwide significantly increase at 1.5°C or above. For example, warming of 1.5°C and above increases the risks of heat-related illness and mortality.<sup>58</sup> At 2°C warming, 420 million more people risk exposure to extreme heat than at 1.5°C.<sup>59</sup> The risks resulting from some vector-borne diseases, including malaria and dengue fever, are also higher at 2°C than 1.5°C.<sup>60</sup> Likewise, food security is threatened, as climate change is projected to cause more frequent droughts that decrease crop yields and food availability.<sup>61</sup>
28. Warming above 1.5°C will trigger catastrophic impacts.<sup>62</sup> Exceeding certain thresholds of global warming can result in abrupt and irreversible changes known as “tipping points.”<sup>63</sup> Scientists have identified that tipping points could occur between 1°C and 2°C<sup>64</sup> and that even at 1.5°C, some impacts may be “long-lasting or irreversible.”<sup>65</sup> The crossing of tipping points in one system can increase the risk of crossing them in others,<sup>66</sup> causing what is known as a “cascade effect.” For instance, the current melting of Arctic sea-ice amplifies regional warming and alters ocean currents that play a key role in regulating global temperature. This could shift heat distribution around the planet, affecting multiple regions, and in turn accelerating Antarctic ice sheet loss, leading to multiple meters of sea level rise over hundreds to thousands of years,<sup>67</sup> as well as more immediate impacts. Even a temporary overshoot of 1.5°C in the coming decades could cause irreversible impacts, which could not be remedied by a reduction in global temperature at a later time.<sup>68</sup>
29. The IPCC has warned that “[t]here is a rapidly closing window of opportunity to secure a livable and sustainable future for all.”<sup>69</sup> Limiting global warming to a maximum of 1.5°C to avoid the most catastrophic and irreversible impacts of climate change requires keeping cumulative CO<sub>2</sub> emissions within a finite budget, in addition to ambitious reductions in other GHGs.<sup>70</sup> However, projected emissions from existing fossil fuel infrastructure alone will exceed the remaining carbon budget to limit

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<sup>57</sup> IPCC AR6 WGII SPM, B.6.

<sup>58</sup> IPCC, Global Warming of 1.5°C, Special Report, Summary for Policymakers, 2018 [hereinafter IPCC 1.5°C SR SPM], B.5.2.

<sup>59</sup> IPCC 1.5°C SR, Chapter 3 (“Impacts of 1.5°C Global Warming on Natural and Human Systems”) [hereinafter IPCC 1.5°C SR, Full Report, Ch. 3], 3.3.2.2.

<sup>60</sup> IPCC 1.5°C SR SPM, B.5.2.

<sup>61</sup> IPCC AR6 WGII SPM, B.1.3, B.5.1.

<sup>62</sup> See AR6 WGII SPM B.6. See also IPCC 1.5°C SR, Full Report, Ch. 3 at 3.5.2.5; IPCC, 1.5°C SR, Chapter 1 (“Framing and Context”) [hereinafter IPCC 1.5°C SR, Full Report, Ch. 1], pp. 68-72.

<sup>63</sup> IPCC AR6 WGII SPM, at B.5.2. See also IPCC 1.5°C SR, Ch. 3, 3.5.5.

<sup>64</sup> IPCC 1.5°C SR SPM, pp. 5, 7, 8, paras. A.3.2, B.2.2, B.4.2.

<sup>65</sup> IPCC 1.5°C SR SPM, at p. 5, para. A.3.2.

<sup>66</sup> Lenton, T. M. *et al.*, *Climate tipping points — too risky to bet against*, (2019) 575 Nature 592-594 available at <https://doi.org/10.1038/d41586-019-03595-0>

<sup>67</sup> *Id.* at 594.

<sup>68</sup> IPCC AR6 WGII SPM, B.6.

<sup>69</sup> IPCC AR6 SPM, Headline Statements.

<sup>70</sup> IPCC AR6 SYR Longer Report, Section 3.3.1, p. 82.

warming to 1.5°C.<sup>71</sup> This underscores the need not only to immediately halt fossil fuel expansion, but to urgently phase out fossil fuel production and use.

30. The best available science shows that in order to have even a 50% chance of limiting global warming to a maximum of 1.5°C with limited to no overshoot, global GHG emissions should peak in the early 2020s and be reduced by at least 43% by 2030 below 2019 levels.<sup>72</sup> CO<sub>2</sub> emissions from the electricity and fossil fuel industries and land-use change need to reach net zero earlier than other sectors,<sup>73</sup> decreasing by approximately 48% from 2019 levels by 2030 and net zero by 2050.<sup>74</sup> Specifically, coal use would need to decline by up to 100% of 2019 levels by 2050; oil usage would need to decline by up to 90%; and gas usage by up to 85% in the same period.<sup>75</sup> Additionally, non-carbon GHG emissions must continue to fall by 60% by 2035, 69% by 2040, and 84% by 2050.<sup>76</sup>
31. Scientists have also identified irrecoverable carbon reserves that, if burned, would impair humanity's possibilities to stay within the 1.5°C carbon budget.<sup>77</sup> The Amazon rainforest, the temperate rainforest of Northwestern North America, the forests and boreal peatlands of Eastern Canada, and mangroves and tidal wetlands contain "the largest and highest-density irrecoverable carbon reserves in the world."<sup>78</sup> Scientists suggest that "just as the concept of 'unburnable reserves' refers to the fossil fuels that must stay in the ground to limit global warming (...), ecosystems with high densities or quantities of irrecoverable carbon should be considered 'unconvertible' or 'unexploitable,'" <sup>79</sup> underscoring the importance of halting deforestation and other carbon sinks destruction.
32. In the Amazon region, scientific literature has been predicting the possibility of a tipping point, where deforestation could potentially lead to a widespread degradation process that would affect the stability of the ecosystem and result in the loss of most of its vegetation, since the early 1990s.<sup>80</sup> Three decades later, clear signs of a fast-approaching tipping point can already be identified. A 2022 study discovered that a pronounced loss of the Amazon rainforest's resilience to climate and land-use change is already taking place and that "deforestation and climate change, via increasing dry-season length and drought frequency, may already have pushed the Amazon close to a critical threshold of rainforest dieback."<sup>81</sup>

<sup>71</sup> IPCC AR6 SYR SPM, B.5.

<sup>72</sup> IPCC AR6 SYR Longer Report, Section 4.1 p. 92.

<sup>73</sup> *Id.*

<sup>74</sup> See IPCC, Working Group III Contribution to the Sixth Assessment Report of the IPCC, Climate Change 2022: Mitigation of Climate Change, Summary for Policymakers [hereinafter IPCC AR6 WGIII SPM], at C.1.2, Table SPM.2; see also IPCC, Working Group III Contribution to the Sixth Assessment Report of the IPCC, Climate Change 2022: Mitigation of Climate Change [hereinafter IPCC AR6 WGIII], at Ch. 3, 3.3; IPCC AR6 SYR Longer Report, Section 4.1, p.92.

<sup>75</sup> IPCC AR6 WGIII SPM, C.3.2.

<sup>76</sup> IPCC AR6 Longer Report, at Section 4.1, p. 92.

<sup>77</sup> Monica L. Noon *et al*, *Mapping the irrecoverable carbon in Earth's ecosystems*, Nature Sustainability 5 (January 2022) [hereinafter Monica L. Noon *et al*, *Mapping the irrecoverable carbon in Earth's ecosystems*], 37–46.

<sup>78</sup> Monica L. Noon *et al*, *Mapping the irrecoverable carbon in Earth's ecosystems*, p.3 9.

<sup>79</sup> *Id.*

<sup>80</sup> Araujo, R., Mourao, J. (2023), The Amazon Domino Effect: How Deforestation Can Trigger Widespread Degradation. Climate Policy Initiative. Available at: <https://www.climatepolicyinitiative.org/publication/the-amazon-domino-effect-how-deforestation-can-trigger-widespread-degradation/>.

<sup>81</sup> Boulton, C. A., Lenton, T. M., Boers, N. (2022), *Pronounced Loss of Amazon Rainforest Resilience since the Early 2000s*, Nature Climate Change 12, no. 3 (March 2022): 271–78. <https://doi.org/10.1038/s41558-022-01287-8>.

Other recent scientific research discovered an ongoing shift within tree communities in the Amazon due to the increase in atmospheric CO<sub>2</sub>, with wet-affiliated species dying at record rates while dry-affiliated trees are becoming more abundant.<sup>82</sup> Luciana Gatti's alarming 2021 study discovered that the Amazon's capacity to act as a carbon sink has been declining and that the southeastern Amazonia in particular has become a net atmospheric carbon source as a result of factors such as deforestation and climate change.<sup>83</sup> In an editorial, Brazilian Earth Systems scientist Carlos Nobre and the late, renowned tropical ecologist Thomas Lovejoy—who studied the region for decades—confirmed that the Amazon's tipping point is no longer a future prediction but is manifested in real life. According to the scientists, the region is not only unable to withstand further deforestation, but it now requires rebuilding through ambitious reforestation, particularly in the southern and eastern Amazon.<sup>84</sup>

## 1.2. Structural vulnerabilities in the Americas exacerbate the human rights impacts of climate change in the region

33. Within the Americas region, climate change does not affect the rights of all people equally. It is a threat multiplier that disproportionately impacts countries and segments of the population already in disadvantaged situations.<sup>85</sup> It is therefore “inherently discriminatory”<sup>86</sup> and disproportionately impacts the human rights of those in vulnerable situations.<sup>87</sup> Notably, climate change and the perpetuation of such vulnerabilities are largely driven by the actions and influences of a relatively small number of business enterprises.

### 1.2.1 The impacts of climate change fall disproportionately on communities in the Americas that are in vulnerable situations

34. At current levels of warming “[i]ncreasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security” with the largest impacts observed in many locations including Central, South America, and the Caribbean.<sup>88</sup>

35. In Latin America and the Caribbean, environmental damage will continue to “be experienced with greater force in the sectors of the population that are already in a vulnerable situation.”<sup>89</sup> The organs of

<sup>82</sup> Esquivel-Muelbert, A., Baker, T. R., Dexter, K. G., Lewis, S. L., Brien, et. al (2019), *Compositional response of Amazon forests to climate change*, Glob. Change Biol., 25, 39–56. <https://doi.org/10.1111/gcb.14413>.

<sup>83</sup> Gatti, L.V., Basso, L.S., Miller, J.B. et al. (2021), *Amazonia as a carbon source linked to deforestation and climate change*. *Nature* 595, 388–393. <https://doi.org/10.1038/s41586-021-03629-6>.

<sup>84</sup> Lovejoy, T. E., Nobre, C., *Amazon tipping point: Last chance for action*, Sci. Adv. 5 (2019) eaba2949, available at <https://www.science.org/doi/10.1126/sciadv.aba2949>.

<sup>85</sup> IPCC AR6 SYR Longer Report, Section 2.1, p. 51.

<sup>86</sup> Human Rights Council, 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 1, 2016, UN Doc. A/HRC/31/52 [hereinafter Human Rights Council UN Doc. No. A/HRC/31/52], para. 81.

<sup>87</sup> Human Rights Council UN Doc. No. A/HRC/31/52, para. 81.

<sup>88</sup> IPCC AR6 SYR Longer Report, Section 2.1.2, p. 50.

<sup>89</sup> IACtHR, Advisory Opinion OC-23/2017 on the Environment and Human Rights, November 15 2017 [hereinafter IACtHR OC-23/2017], para. 67 (quoting Human Rights Council, Resolution 16/11, “Human rights and the environment,” 12 April 2011, UN Doc. A/HRC/RES/16/11, preamble; and Human Rights Council, Report of the

the Inter-American system of human rights—including the IACHR and REDESCA—have pointed out that “the risk of harm is particularly high for those segments of the population that are currently in a situation of marginalization or vulnerability or that, due to discrimination and pre-existing inequalities, have limited access to decision-making or resources.”<sup>90</sup>

36. People and communities may be in such situations due to factors such as poverty, race, geographic location, age, sex and gender, disability, and social inequality.<sup>91</sup> Multiple forms of discrimination, including racism, sexism and classism, may combine, overlap, or intersect.<sup>92</sup> Communities in the region who find themselves in particularly vulnerable situations include Indigenous Peoples, tribal and Afro-descendant communities, women, children, older adults, migrants, people with disabilities, as well as human rights and environmental defenders.<sup>93</sup>

### 1.2.1.a Rural and Indigenous communities

37. Indigenous and rural communities are among the “the most threatened segment of the world’s population in terms of social, economic and environmental vulnerability.”<sup>94</sup> Although rural populations in Latin America and the Caribbean comprise only 18% of the population, they represent 29% of the total population living in poverty and 41% in extreme poverty.<sup>95</sup> These communities rely heavily on natural resources<sup>96</sup> and have connections to the land stemming back generations, yet they are burdened by historical and systemic inequality. Understanding the risks faced by this sector and their potential negative effects is essential in order to develop appropriate policy responses.<sup>97</sup>
38. Climate change has disproportionate impacts in rural areas<sup>98</sup> and can erode the economic gains and livelihoods of rural communities in Latin America and the Caribbean,<sup>99</sup> with Indigenous Peoples and

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Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, para. 81).

<sup>90</sup> IACHR Resolution No. 03/2021, p. 6, 15-16.

<sup>91</sup> *Id.*

<sup>92</sup> Human Rights Council, *A/HRC/50/57: The impacts of climate change on the human rights of people in vulnerable situations*, 6 May 2022, UN Doc. No. A/HRC/50/57 [hereinafter Human Rights Council, A/HRC/50/57].

<sup>93</sup> *Id.*, paras. 48, 67-68. See also IACHR Resolution No. 03/2021, at p. 6, 7, 16; Inter-American Commission on Human Rights, *Business and Human Rights: Inter-American Standards*, 2019 [hereinafter IACHR Inter-American Standards], p. 43 Available at:

[http://www.oas.org/en/iachr/reports/pdfs/Business\\_Human\\_Rights\\_Inte\\_American\\_Standards.pdf](http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf),

<sup>94</sup> International Labor Office (ILO), *Indigenous Peoples and Climate Change. From victims to change agents through decent work*, 2017, available at: [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_551189.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_551189.pdf).

<sup>95</sup> Economic Commission for Latin America and the Caribbean (ECLAC), based on national household surveys and estimates. Household Surveys Database (BADEHOG) and Social Panorama of Latin America 2017 (ECLAC, 2018).

<sup>96</sup> FAO, *Overview of Rural Poverty in Latin America and the Caribbean* [hereinafter FAO, Overview of Rural Poverty], 2018, page 68. Available here: <https://www.fao.org/publications/card/es/c/CA2275EN/>

<sup>97</sup> FAO, Overview of Rural Poverty, page 68.

<sup>98</sup> Atkinson, C.L.; Atkinson, A.M. Impacts of Climate Change on Rural Communities: Vulnerability and Adaptation in the Global South. *Encyclopedia* 2023, 3, 721–729. <https://doi.org/10.3390/encyclopedia3020052>.

<sup>99</sup> FAO, Overview of Rural Poverty, page 68.

other groups in vulnerable situations being exposed to heightened inequality.<sup>100</sup> While Indigenous Peoples comprise only 5% of the world's population, they represent 15% of the world's poor.<sup>101</sup> In Latin America alone, there are over 800 Indigenous groups that constitute roughly 10% of the region's population, playing key roles in protecting their historical land and contributing to the vibrant diversity of the Americas. Yet over the 30 years since the Indigenous Tribal Peoples Convention of 1989 was adopted, and the rights of Indigenous Peoples were recognized in international law, Indigenous Peoples continue to experience greater repression, poverty, criminalization and discrimination than other groups.<sup>102</sup>

39. The ecosystems under threat from climate change constitute their tangible and intangible heritage. The loss of, and displacement from, their ecosystems pose a significant threat to their sense of belonging, autonomous self-expression, cultural heritage and practices, identity, and home.<sup>103</sup> As climate change progresses, these losses may be irreversible.<sup>104</sup> Indigenous communities are being increasingly burdened and displaced from their land due to the increasing frequency of forest fires, driven by the compounding effects of climate change and land use.<sup>105</sup> Migration to urban centers has not been the solution. Instead, it has presented new hardships and challenges as Indigenous Peoples and rural communities encounter a dearth of job opportunities and limited access to healthcare and education.<sup>106</sup>
40. Climate change is also altering precipitation patterns, significantly changing how Indigenous Peoples and rural communities occupy and use their territories, and impacting food production to devastating effect.<sup>107</sup> In 2020, hurricanes Eta and Iota were among the most destructive events for Latin America and the Caribbean. According to the World Meteorological Organization (WMO), the Category 4 storms "affected over 8 million people in Central America. Guatemala, Honduras and Nicaragua were the worst-affected countries, with damage to 1 million hectares of crops and disruptions to the agricultural livelihoods of people living in the indigenous territories. (...) Guatemala had to deal with

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<sup>100</sup> Atkinson, C.L.; Atkinson, A.M. Impacts of Climate Change on Rural Communities: Vulnerability and Adaptation in the Global South. *Encyclopedia* 2023, 3, 721–729.

<sup>101</sup> International Labour Office (ILO), *Indigenous Peoples and Climate Change. From victims to change agents through decent work*, 2017, available at: [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_551189.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_551189.pdf).

<sup>102</sup> FAO, Overview of Rural Poverty, page 68. Press Release, "It is Urgently Necessary to Achieve the Full Inclusion of Indigenous Peoples in Fulfillment of the 2030 Agenda, Guaranteeing the Exercise of their Collective Rights, United Nations Economic Commission for Latin America and the Caribbean" (June 11, 2020).

<sup>103</sup> IPCC AR6 SYR, p. 51; Operação Amazônia Nativa (OPAN), *Mudanças Climáticas e a Percepção Indígena* [hereinafter OPAN, *Mudanças Climáticas e a Percepção Indígena*], 2018, p. 22, available at: [https://www.redejuruenavivo.com/wp-content/uploads/2019/02/2a-ed\\_mudancas-climaticas\\_port\\_web.pdf](https://www.redejuruenavivo.com/wp-content/uploads/2019/02/2a-ed_mudancas-climaticas_port_web.pdf).

<sup>104</sup> *Id.*

<sup>105</sup> IPCC AR6 WGII SPM, p. 68, TS.C.11.8. See also Mariara Folly and Erika Pires Ramos, *Climate Change Is Already Driving Migration in the Brazilian Amazon, Climate Diplomacy* (Mar. 18, 2021), available at: <https://climate-diplomacy.org/magazine/conflict/climate-change-already-driving-migration-brazilian-amazon>.

<sup>106</sup> *Relatório do Clima Revela Desafios Sociais na Amazônia, Diz Co-autora*, UN NEWS (Mar. 2, 2022), available at: <https://news.un.org/pt/story/2022/03/1781392>.

<sup>107</sup> OPAN, *Mudanças Climáticas e a Percepção Indígena*, p. 21, 22.

the effects of Eta in 18 of its 22 departments, particularly the extensive damage to agriculture, livestock and rural livelihoods, which contributed to worsening the existing food insecurity.”<sup>108</sup>

41. An egregious example is in Tabasco, Mexico, from one of the first rural communities to be displaced by climate change impacts in the Americas region (*see* Annex). For approximately five years, the community of El Bosque, a small village located in the peninsula between the Grijalva River and the Gulf of Mexico, has been experiencing first-hand the disproportionate impacts accelerated sea level rise and floods caused by heavy rains and other extreme weather events. Sixty homes and the primary school have been lost due to sea level rise and other homes are next in line to disappear. Some families that have lost their homes due to sea level rise have been forced to move to other towns or municipalities, while others cannot afford to do so due to economic and mobility reasons.
42. Most people from El Bosque rely on the natural resources provided by the river and the sea for their food and income. Moving from El Bosque would entail expenses that many community members cannot afford. As a result, many elderly people, children, women and men have nowhere to go and are asking the government to relocate them to another place where they can maintain their fishing activities, the basis of their livelihood, while being safe from sea level rise. As expressed by the community, “*somos uno de los primeros pueblos en México en perderlo todo ante el cambio climático.*”<sup>109</sup> El Bosque resident Aurea Sanchez (43 years old) described their situation: “[*h*]oy, el cambio climático está afuera de nuestras casas, afuera de la escuela de nuestros hijos, está llevándose la tierra de nuestras familias y nuestra posibilidad de tener un futuro. No importa que nosotros no seamos los culpables del cambio climático, igual lo estamos pagando.”<sup>110</sup> (*See* Annex.)

### 1.2.1.b Women, youth, children and future generations

43. Climate change affects women, youth, and children disproportionately due to existing inequalities, and the fact that these groups are often deprived of societal power and autonomous decision-making ability. The “existing gender discrimination, inequality and inhibiting gender roles” that women face compound the already devastating impacts of climate change.<sup>111</sup> Extreme weather events kill women at a markedly higher rate than men,<sup>112</sup> and environmental degradation and disasters have had the downstream effect of triggering domestic violence, forced marriage, human trafficking, and forced prostitution.<sup>113</sup>
44. For children at risk, climate change disproportionately affects their rights to education, identity, housing, water, and sanitation (*see* Annex).<sup>114</sup> Climate change-induced extreme weather events increase

<sup>108</sup> WMO, State of the Climate in Latin America and the Caribbean 2020 WMO-No. 1272.

<sup>109</sup> Comunicado El Bosque, Tabasco, 7 de noviembre del 2022 (*See* Annex)

<sup>110</sup> English translation: Today, climate change is outside our homes, outside our children's schools, taking away our families' land and our chance at a future. It doesn't matter that we are not to blame for climate change, we are still paying for it."

<sup>111</sup> IACtHR OC-23/2017, para. 67 (citing UN A/HRC/10/61, para. 45).

<sup>112</sup> IACtHR OC-23/2017, para. 67. This is due to reasons such as women being more likely to be looking after children, to be wearing clothes which inhibit movement, and to be less likely to be able to swim.

<sup>113</sup> UN Environment Programme, *Gender and the environment: a preliminary analysis of gaps and opportunities in Latin America and the Caribbean*, 2021, at p. 26, available at <https://wedocs.unep.org/handle/20.500.11822/34929>.

<sup>114</sup> IACHR Resolution No. 03/2021, para. 21. UN A/HRC/50/57, para. 13.

vector-borne diseases, malnutrition, child mortality and morbidity, heat stress, and displacement, among other impacts.<sup>115</sup> There is also a “clear emerging link between environmental harm and children’s mental health, such as depression and eco-anxiety.”<sup>116</sup> Today, more than one billion children around the globe are at “extremely high risk” of impacts from the climate crisis.<sup>117</sup> In Latin America and the Caribbean, increasing violence, instability and climate-related disasters are increasing displacement and forced migration.<sup>118</sup> The proportion of children on the move along major migration routes in the region has significantly increased in the past three years.<sup>119</sup> Globally, “children make up 13 per cent of the migrant population, but in this region, about one in four people on the move (25 per cent) is a child,”<sup>120</sup> “with those under 11 years now accounting for up to 91 per cent of all children on the move at some key transit points.”<sup>121</sup> As reported by UNICEF, “[t]he physical risks along irregular migration routes are innumerable, especially for children. In addition to the dangerous terrain they traverse (from jungles and rivers to railways and highways), children can also suffer violence, exploitation and abuse.”<sup>122</sup>

45. In addition to having a heightened effect on today’s younger generations, climate change also disproportionately impacts future generations. As referenced above, every increment of warming will magnify existing climate harms,<sup>123</sup> which will therefore bring greater impacts on those who live all or significant portions of their lives in the future—when these impacts will be more severe. Like children, future generations face significantly greater harm from climate change by virtue of their birth cohorts. According to the IPCC, “today’s children and future generations are more likely to be exposed and vulnerable to climate change and related risks such as flooding, heat stress, water scarcity, poverty, and hunger.”<sup>124</sup> Indeed, one study found that under current warming trajectories—as informed by current climate policy pledges—“children born in 2020 will experience a two- to sevenfold increase in extreme events, particularly heat waves, compared with people born in 1960.”<sup>125</sup>

<sup>115</sup> Human Rights Council, *Summary of the panel discussion on the adverse impact of climate change on States’ efforts to realize the rights of the child and related policies, lessons learned and good practices - Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. No. A/HRC/35/14, paras. 6, 48.

<sup>116</sup> Committee on the Rights of the Child, General Comment No. 26 (2023), para. 41.

<sup>117</sup> *One Billion Children at “Extremely High Risk” of the Impacts of the Climate Crisis*, UNICEF (Aug. 20, 2021), <https://www.unicef.org/turkiye/en/press-releases/one-billion-children-extremely-high-risk-impacts-climate-crisis-unicef>.

<sup>118</sup> UNICEF, *Comunicado de Prensa de 7 Septiembre 2023 - El número de niños, niñas y adolescentes en movimiento en América Latina y el Caribe alcanza nuevo récord, en medio de la violencia, inestabilidad y cambio climático* [hereinafter UNICEF Comunicado de Prensa 7 September 2023] accessed December 13, 2023, available at: <https://www.unicef.org/lac/comunicados-prensa/ninez-migracion-movimiento-america-latina-caribe-record-violencia-inestabilidad-cambio-climatico-reporte>.

<sup>119</sup> UNICEF Comunicado de Prensa 7 Septiembre 2023

<sup>120</sup> UNICEF Press release 7 September 2023, September 7, 2023, available at: <https://www.unicef.org/press-releases/number-migrant-children-moving-across-latin-america-and-caribbean-hits-new-record>.

<sup>121</sup> UNICEF Press release 7 September 2023.

<sup>122</sup> *Id.*

<sup>123</sup> IPCC 1.5°C SR SPM, at A.3 and B.5.

<sup>124</sup> IPCC, *FAQ 3: How Will Climate Change Affect the Lives of Today’s Children Tomorrow, If No Immediate Action Is Taken?* (2022), accessed 13 December 2023, available at: <https://www.ipcc.ch/report/ar6/wg2/about/frequently-asked-questions/keyfaq3/>.

<sup>125</sup> Wim Thiery et al, *Intergenerational inequities in exposure to climate extremes*, *Science* 374 (2021), p. 158.

### 1.2.1.c Older adults

46. Older adults are especially impacted by climate change due to physical, political, economic and social factors that place them in more vulnerable situations. These adults face many of the same human rights risks as other population segments, but they are amplified due to age-related discrimination, social marginalization, and poverty risks that older individuals face.<sup>126</sup> Physical limitations and isolation, such as “reduced mobility or lack of access to information about evacuation and services,” during climate disasters increase their risk of bodily injury and death.<sup>127</sup>
47. Older people have been found to have a higher difficulty in regulating body temperature, particularly women.<sup>128</sup> Studies emphasize the heightened vulnerability of women over 75 years to heat-related health damages, leading to a greater risk of premature mortality and disruptions to their lives and relationships due to climate change-induced extreme heat.<sup>129</sup> The IPCC reports also confirm that older adults, women, and those with chronic illnesses are at the highest risk of temperature-related health morbidity and mortality.<sup>130</sup>
48. In Latin American cities, people 65 and older were found to have a “consistently higher” risk of death from extreme temperatures.<sup>131</sup> This trend is worsening due to increasing urbanization and an aging Latin American population.<sup>132</sup> By 2053, the region will become an ‘aging society,’ where those over 60 years will outstrip all other age groups in terms of population. This trend demands concerted actions

<sup>126</sup> UN Office of the High Commissioner for Human Rights [OHCHR], *Summary of the panel discussion on the human rights of older persons in the context of climate change*, Doc. A/HRC/49/61 [hereinafter UN OHCHR, Doc. A/HRC/49/61], 2021, para. 6.

<sup>127</sup> UN OHCHR, Doc. A/HRC/49/61, paras. 7, 23.

<sup>128</sup> IPCC 1.5°C SR, Full Report, Ch.3, p. 240-241; IPCC AR6 WGII, Full Report, Chapter 7 (“Health, Wellbeing and the Changing Structure of Communities”) [hereinafter IPCC AR6 WGII, Full Report, Ch.7], p. 1073.

<sup>129</sup> Ragettli/Röösli, *Hitzebedingte Sterblichkeit im Sommer 2019, Primary and Hospital Care 2021*, 21(03):90-95, 2021, available online at: <https://doi.org/10.4414/phc-d.2021.10296>; Foen, *Hitze und Trockenheit im Sommer 2018*, Bern 2019 [hereinafter ‘Foen, Hitze 2018’], available online at: <https://www.bafu.admin.ch/bafu/de/home/themen/klima/publikationen-studien/publikationen/hitze-und-trockenheit.html>, p. 27, 29; Robine et al., *Report on excess mortality in Europe during summer 2003*, available online at: [https://ec.europa.eu/health/ph\\_projects/2005/action1/docs/action1\\_2005\\_a2\\_15\\_en.pdf](https://ec.europa.eu/health/ph_projects/2005/action1/docs/action1_2005_a2_15_en.pdf), Feb. 2007, Figure 5; Robine et al., *Death toll exceeded 70,000 in Europe during the summer of 2003*, C. R. Biologies 331 (2008) 171–178, available online at: <https://doi.org/10.1016/j.crv.2007.12.001>, p. 174; World Health Organization, *Gender, Climate Change and Health* (Geneva: World Health Organization, 2014), <https://iris.who.int/handle/10665/144781>, ISBN: 9789241508186, p. 9; Thommen et al., *Gesundheitliche Auswirkungen der Klimaänderung mit Relevanz für die Schweiz*, Nov. 2004, p. 33. See also Foen et al., *Management Summary: Climate Change in Switzerland, Indicators of driving forces, impact and response*, Bern 2020 [hereinafter ‘Foen et al., Management Summary’], p. 9. Swiss Tropical and Public Health Institute TPH, see: <https://www.swisstph.ch/en/>; Saucy et al., *The role of extreme temperature in cause-specific acute cardiovascular mortality in Switzerland: A case-crossover study, Science of The Total Environment*, Vol. 790, 10 Oct. 2021, available online at: <https://doi.org/10.1016/j.scitotenv.2021.147958>.

<sup>130</sup> IPCC 1.5°C SR, Full Report, Ch.3, p. 240; IPCC AR6 WGII Full Report, Ch.7, p. 1073.

<sup>131</sup> Josiah L. Kephart et al., *City-level impact of extreme temperatures and mortality in Latin America*, *Nature Medicine*, June 2022, Vol 28, p. 1700-05, available at: <https://www.nature.com/articles/s41591-022-01872-6>.

<sup>132</sup> *Id.*

to prioritize instituting frameworks and institutions to protect older persons from climate change impacts.<sup>133</sup>

### 1.2.1.d Afro-descendants

49. Many Afro-descendants in the Americas lack the resources necessary to adapt and ameliorate the negative impacts of climate change due to their historical and ongoing economic, political and social marginalization. Racial justice is intrinsically linked to environmental justice. Afro-descendants and Indigenous communities are disproportionately represented in the world’s “racial sacrifice zones”—places where residents suffer devastating physical and mental health consequences and human rights violations as a result of living in pollution hotspots and heavily contaminated areas.<sup>134</sup> In these proliferating sacrifice zones, activities producing extensive environmental pollution and exacerbating the climate crisis are carried out with disregard for the rights and welfare of local communities.<sup>135</sup> Many Afro-descendants find their environment sacrificed, and substandard infrastructure and conditions disproportionately expose them to climate-induced disasters such as hurricanes, floods, and extreme heat.<sup>136</sup> The subsequent post-disaster responses perpetuate the same entrenched, structural discrimination, and unjust systems that prevent access to remedies that could help alleviate the aftermath of these disasters.<sup>137</sup>
50. For example, French colonialism in the 17th century deprived Martinique and Guadeloupe of self-determination and the opportunity to develop their own economies as the islands were centers of slavery and plantations that produced export crops for Europe.<sup>138</sup> Despite the abolition of slavery, the subsequent enactment of racist pro-industry policies deprived local residents of meaningful opportunities to accumulate wealth.<sup>139</sup> Today, the islands’ largest plantations are owned by the

<sup>133</sup> Caribbean Economic Commission for Latin America CEPAL, *ECLAC Examines Current Outlook for Ageing in the Region as Well as Progress and Challenges for Older Persons’ Inclusion and the Exercise of Their Rights*, (Economic Commission for Latin America and the Caribbean), accessed December 13, 2023, <https://www.cepal.org/en/news/eclac-examines-current-outlook-ageing-region-well-progress-and-challenges-older-persons>.

<sup>134</sup> Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. No. A/HRC/49/53, 2022, [hereinafter Human Rights Council, UN Doc. No. A/HRC/49/53].

<sup>135</sup> UNGA, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume: Ecological crisis, climate justice and racial justice*, UN Doc. No. A/77/549, 2022, October 25, 2022, [hereinafter UNGA, Report from E. Tendayi Achiume, UN Doc. No. A/77/549], para. 19.

<sup>136</sup> UN A/HRC/50/57, para. 11.

<sup>137</sup> UNGA, Report from E. Tendayi Achiume, UN Doc. No. A/77/549, para. 53. *See also* NYU Global Justice Clinic, Action for Reforestation and Defense of the Environment (AREDE), et al, Submission to the UN Special Rapporteur on Contemporary Forms of Racism (July 6, 2022), pp. 7-9, available at <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/cfi-hrc-53-session/submissions/2022-11-28/Global-Justice-Clinic-1.pdf> (explaining how a history of systematic racial oppression, natural resource exploitation, and the economic, political, and social marginalization of Haitians by colonial powers have contributed to existing situations of vulnerability experienced by the population, including those posed by climate change).

<sup>138</sup> European Network Against Racism (ENAR), *The Climate Crisis is a (Neo)Colonial Capitalist Crisis*, 2021, at 7, 26, available at: [https://www.enar-eu.org/wp-content/uploads/2022\\_report-climatechangeandrace\\_final.pdf](https://www.enar-eu.org/wp-content/uploads/2022_report-climatechangeandrace_final.pdf). [hereinafter ENAR].

<sup>139</sup> ENAR, at 26.

descendants of slave-holders and most crops—still cash crops—are exported to their benefit. Faced with soil erosion, sea-level rise, drought, and more frequent hurricanes, many historically marginalized and Black populations are left without means to reinforce or repair their homes, or maintain food security.<sup>140</sup> Similar histories and patterns are common across the Americas as many countries transitioned from colonialism to independence.

### 1.2.2 Such injustices stem from and are perpetuated by business enterprises that drive climate change and colonial history

51. The existence of structural inequalities is not a coincidence; current activities perpetrated by business enterprises are a reflection of the colonial history imposed on the Global South.<sup>141</sup> Namely, the “racist colonial regimes that underpinned the extraction of coal, gas and oil, forged a global capitalist system dependent on the maintenance of racial hierarchies, and are thus at the heart of the global ecological crisis.”<sup>142</sup>
52. Scholars and historians characterized European colonial expansion of the 1500s in the Americas as one of “systemic resource exploitation,” which often destroyed Indigenous peoples and other groups in situations of vulnerability.<sup>143</sup> ‘Colonialism by corporation,’ where international trade led to the control of and sovereignty over foreign populations and resources, established settler cultivation and plantation frameworks that inform modern capitalism.<sup>144</sup> Capitalism is based on exploitation and is marked by exclusion: the extraction of wealth is appropriated at the expense of racialized and marginalized communities.<sup>145</sup> Transnational business enterprises are a product of and reproduce those unequal structures, fueling extraction and funneling wealth towards the Global North and privileged national and local elites globally.<sup>146</sup>
53. The dynamics of colonial and racial dispossession are prevalent in the Americas today. The current vulnerability of Latin America and the Caribbean region to climate change is indeed due to the continuing legacy of colonial and corporate exploitation that remains entrenched in the region.<sup>147</sup>

<sup>140</sup> ENAR, at 27.

<sup>141</sup> UNGA, Report from E. Tendayi Achiume, UN Doc. No. A/77/549, para. 6.

<sup>142</sup> UNGA, Report from E. Tendayi Achiume, UN Doc. No. A/77/549, para. 12.

<sup>143</sup> Guriminder K. Bhambra and Peter Newell, More than a metaphor: ‘climate colonialism’ in perspective, *Global Social Challenges Journal*, Oct. 2022 [hereinafter Bhambra and Newell], p. 1-9, pp. 1-3, available at: <https://bristoluniversitypressdigital.com/gsc/view/journals/gscj/aop/article-10.1332-EIEM6688/article-10.1332-EIEM6688.xml>.

<sup>144</sup> Bhambra and Newell, 3.

<sup>145</sup> ENAR, 6-7.

<sup>146</sup> UNGA, Report from E. Tendayi Achiume, UN Doc. No. A/77/549, paras. 2 and 7. *See also* Bhambra and Newell, p. 4.

<sup>147</sup> *See generally* IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II. Doc. 47/15, 2015, available at: <https://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf> [hereinafter IACHR Doc. 47/15]; UN Economic Commission for Latin America and the Caribbean (ECLAC), *The social inequality matrix in Latin America*, 2016, available at <https://repositorio.cepal.org/server/api/core/bitstreams/e64bcb7d-c8dc-4346-8f75-f05f588db647/content>; Judith Morrison, *Race and Poverty in Latin America: Addressing the Development Needs of African Descendants*, United

Business enterprises engage in activities that drive and impede actions needed to combat climate change.<sup>148</sup> These long-standing corporate practices further impact communities in vulnerable situations that have been facing inequities since colonization and the expansion of global capitalism. To the extreme detriment of the planet and human rights, these practices and emissions-intensive activities have made business enterprises the primary physical and social drivers of climate change.

## 2. THE CONDUCT OF BUSINESS ENTERPRISES IS DRIVING CLIMATE CHANGE

54. Climate change is driven by both physical changes to Earth’s atmosphere and social determinants that govern vulnerability, public discourse and policy. As a physical process, a century of producing and burning fossil fuels and degrading ecosystems has led to an accumulation of GHGs in the atmosphere, raising global temperatures, acidifying oceans, and amplifying extreme weather events.<sup>149</sup> These physical changes have largely been shaped by a relatively small number of GHG-intensive business enterprises, which produce and sell fossil fuels<sup>150</sup> and rely on deforestation for agricultural production (i.e. physical drivers of climate change).<sup>151</sup> Recent advances in climate source and event attribution science allow researchers to pinpoint the role of climate change in extreme events<sup>152</sup> and quantify the contribution of GHG emissions from particular sources.<sup>153</sup>
55. Although climate science has provided strong physical evidence of climate change for decades, GHG-intensive business enterprises have used their social and political influence to mislead the public and delay climate action to protect their business model and ensure profits<sup>154</sup> (i.e. social drivers of climate change).

### 2.1. Physical Drivers: Business enterprises are generating GHG emissions and destroying carbon sinks

#### 2.1.1. Physical science of climate change

56. As established in Section 1, producing and using fossil fuels for more than a century, deforestation, and destruction of other natural carbon sinks have released GHG emissions into the atmosphere, warming

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Nations Chronicle, <https://www.un.org/en/chronicle/article/race-and-poverty-latin-america-addressing-development-needs-african-descendants> (last visited Oct. 8, 2023).

<sup>148</sup> See *infra* Section 2.2.

<sup>149</sup> IPCC AR6 SYR SPM, A.1

<sup>150</sup> Heede, R., *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*, Climatic Change 122 (2014), available at <https://doi.org/10.1007/s10584-013-0986-y>.

<sup>151</sup> Greenpeace, *How JBS is still Slaughtering the Amazon* (2020), p. 49, available at [https://www.greenpeace.org/static/planet4-international-stateless/2020/08/60e2cd00-greenpeace\\_stillslaughtering\\_pages-1.pdf](https://www.greenpeace.org/static/planet4-international-stateless/2020/08/60e2cd00-greenpeace_stillslaughtering_pages-1.pdf).

<sup>152</sup> IPCC AR6 SYR A.2.1

<sup>153</sup> Ekwurzel, B. *et al.*, “The rise in global atmospheric CO<sub>2</sub>, surface temperature, and sea level from emissions traced to major carbon producers” (2017) Climatic Change 144 available at <https://doi.org/10.1007/s10584-017-1978-0>

<sup>154</sup> IPCC AR6 WGII, Full Report [hereinafter IPCC AR6 WGII Full Report], Chapter 14 (“North America”), p. 1982.

the planet,<sup>155</sup> altering its climate, and increasing the frequency, likelihood, and intensity of extreme weather events.<sup>156</sup> While many natural processes impact the gas composition of the atmosphere, overwhelming evidence demonstrates that observed increases of GHGs are the direct result of human activity.<sup>157</sup> Indeed, current atmospheric concentrations of CO<sub>2</sub> and methane are higher than at any point in human history, and in the last 800,000 years.<sup>158</sup> These increases have initiated a cascade of impacts from sea-level rise, flooding, and ocean acidification to extended drought, extreme heatwaves, and severe wildfires.<sup>159</sup> The consequences of these impacts have already resulted in significant damages and losses across terrestrial, freshwater, cryospheric (ice-related), coastal, and open oceans ecosystems.<sup>160</sup> Some losses, like climate-driven species extinction are already irreversible, while others like glacial retreat and permafrost thaw are nearing a state of irreversibility.<sup>161</sup> Without intervention and a drastic reduction in GHG emissions, such adverse impacts and related losses will escalate, while the risks associated with climate change will become increasingly complex and difficult to manage.<sup>162</sup>

57. GHG emissions are calculated using emissions accounting methods. According to the Greenhouse Gas Protocol,<sup>163</sup> a carbon-accounting methodology that has become a global standard, emissions produced from sources owned or operated by an entity are classified as Scope 1; emissions from energy a company buys to fuel its operations are Scope 2; and Scope 3 emissions are generated along the remainder of the “value chain,” including use of a company’s products or services by a company’s customers. More specifically, Scope 3 is defined as all other indirect emissions that occur as a result of the organization’s activities, but are not directly owned or controlled by the organization. This category can include emissions from the entire value chain, such as supply chain, transportation, use of products, and disposal of products.<sup>164</sup> Scope 3 emissions are an important and scientifically appropriate component of emissions accounting because they represent a comprehensive approach to assessing an organization's entire carbon footprint.

### 2.1.2. Corporate contributions to climate change

<sup>155</sup> IPCC AR6 SYR SPM, A.1.

<sup>156</sup> IPCC AR6 WGII SPM, B.1.

<sup>157</sup> IPCC AR6 SYR SPM, A.1.3.

<sup>158</sup> IPCC, Working Group I Contribution to the Sixth Assessment Report of the IPCC, Climate Change 2022: The Physical Science Basis, Summary for Policymakers [hereinafter IPCC AR6 WGI SPM], A.2.1, available at [https://report.ipcc.ch/ar6/wg1/IPCC\\_AR6\\_WGI\\_FullReport.pdf](https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf).

<sup>159</sup> IPCC AR6 WGII SPM, B.1.1.

<sup>160</sup> IPCC AR6 WGII SPM, B.1.2.

<sup>161</sup> *Id.*

<sup>162</sup> See generally IPCC, 2023: *Climate Change 2023: Synthesis Report*. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, Doi: 10.59327/IPCC/AR6-9789291691647 [hereinafter IPCC AR6 SYR].

<sup>163</sup> See World Business Council for Sustainable Development (WBCSD) & World Resources Institute (WRI), *The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard* (revised ed.) (2004), available at <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf> [hereinafter WBCSD & WRI, *GHG Protocol*] (providing guidance for companies preparing a greenhouse gas emissions inventory).

<sup>164</sup> See WBCSD & WRI, *The Greenhouse Gas Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard* (2011), available at [https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporting-Standard\\_041613\\_2.pdf](https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporting-Standard_041613_2.pdf) (providing guidance on the categories of Scope 3 emissions).

58. GHG-intensive business enterprises, like fossil fuel companies, cement manufacturers, and agro-industrial corporations, have significantly contributed to the historical rise of GHGs in the atmosphere. Nearly two-thirds of global industrial CO<sub>2</sub> and methane emissions since 1751 can be traced to just 90 ‘Carbon Majors’ (see Section 1.1).<sup>165</sup> Their contributions represent both Scope 1 and 3 emissions, which include direct emissions from these entities’ activities as well as downstream emissions from use and combustion of their products.<sup>166</sup> Such a rapid increase in the concentration of atmospheric GHGs has led to profound changes in Earth’s climate, with more than 40% of the increase in global mean surface temperature between 1880 and 2010 being traceable to the combustion of their products.<sup>167</sup> More than 35% of this attributable temperature increase has occurred in the last 50 years,<sup>168</sup> and an even smaller subset of carbon producers have played an outsized role. Emissions traced to the top 20 investor and State-owned companies, including ExxonMobil, Chevron, Pemex, PDVSA, and Petrobras, which are based in the Americas region,<sup>169</sup> contributed to nearly 25% of the increase in global mean surface temperature between 1880 and 2010.<sup>170</sup>
59. In addition to GHGs and temperature, the Carbon Majors contributed roughly 55% of the increase in ocean acidification between 1880 and 2015,<sup>171</sup> and 26-32% of the increase in global sea level rise between 1880 and 2010.<sup>172</sup> When evaluating investor-owned enterprises alone, emissions traced to 48 ‘Carbon Majors’ contributed 15% of the increase in both global average temperature and ocean acidification<sup>173</sup> (Figure 1b). Put another way, a small number of GHG-intensive business enterprises are responsible for a significant share of global temperature change and the subsequent impacts that are adversely impacting human rights.

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<sup>165</sup> See Heede, R., *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*, Climatic Change 122, pp. 229–241 (2014).

<sup>166</sup> Hertwich, E.G. and Wood, R., *The growing importance of scope 3 greenhouse gas emissions from industry*, Environmental Research Letters 13:10 (2018).

<sup>167</sup> Ekwurzel, B. et al., *The rise in global atmospheric CO<sub>2</sub>, surface temperature, and sea level from emissions traced to major carbon producers*, Climatic Change 144 (2017), p. 586.

<sup>168</sup> *Id.*, p. 585.

<sup>169</sup> Heede, R., *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*, Climatic Change 122 (2014), p. 237.

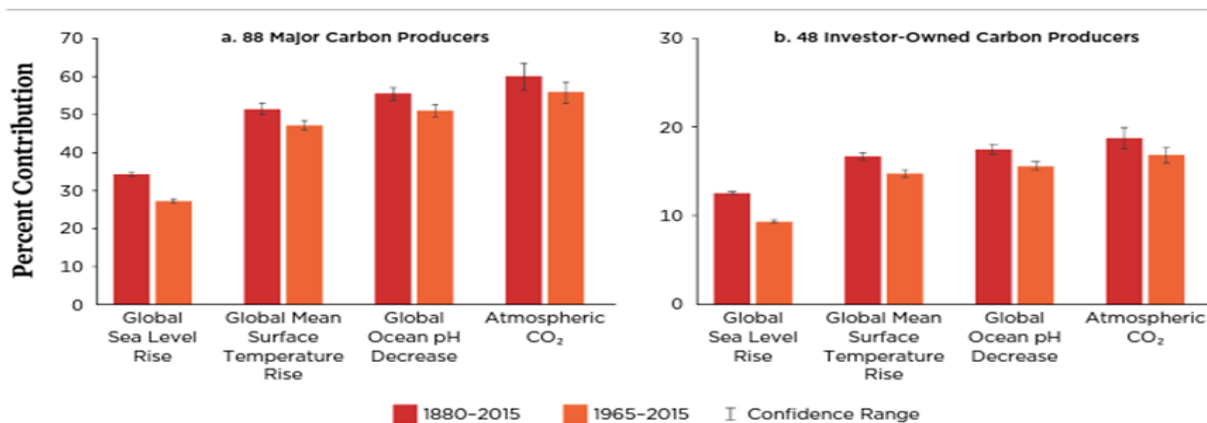
<sup>170</sup> Ekwurzel, B. et al., *The rise in global atmospheric CO<sub>2</sub>, surface temperature, and sea level from emissions traced to major carbon producers*, Climatic Change 144 (2017), p. 586.

<sup>171</sup> Licker, R. et al., *Attributing ocean acidification to major carbon producers*, Environmental Research Letters 14, (2019), p. 5.

<sup>172</sup> Ekwurzel, B. et al., *The rise in global atmospheric CO<sub>2</sub>, surface temperature, and sea level from emissions traced to major carbon producers*, Climatic Change 144 (2017), p. 579.

<sup>173</sup> Licker, R. et al., *Attributing ocean acidification to major carbon producers*, Environmental Research Letters 14, (2019), p. 11.

**Figure 1a and 1b. Contribution of Major Carbon Producers to Climate Impacts and Ocean Acidification, 1880-2015 and 1965-2015**



Researchers calculated the amount of atmospheric CO<sub>2</sub>, ocean acidification, global average temperature increase, and global sea level rise between 1880 and 2015 resulting from emissions traced to 88 industrial carbon producers as well as a subset of the 48 investor-owned carbon producers including BP, Chevron, ExxonMobil, Royal Dutch Shell, and others. Most of the contribution to atmospheric CO<sub>2</sub> and subsequent impacts have occurred since 1965, by which time fossil fuel companies were well aware of the risks of their products.

Note: All numbers represent the best estimate full forcing case.

SOURCE: LICKER ET AL. 2019.

60. Similarly, more than 80% of deforestation globally results from agricultural production—including that of beef, soy, and palm oil<sup>174</sup>—with just a small number of large, multinational companies managing the majority of these commodities.<sup>175</sup> The extent and impact of deforestation is particularly evident in the Amazon. Despite achieving an 83% reduction in Amazon deforestation from 2004 to 2012,<sup>176</sup> subsequent years witnessed a notable reversal of this trend with nearly three times the area cleared in 2020 relative to 2012's minimum.<sup>177</sup> Deforestation alone releases large quantities of GHGs to the atmosphere,<sup>178</sup> but the consequences of land conversion extend beyond initial direct emissions. Such changes in land use reduce the strength of carbon sinks, which have historically absorbed more than 25% of total CO<sub>2</sub> emissions.<sup>179</sup> In some cases, as is true for parts of the Amazon, deforestation to clear land for beef and soy production can transform rainforests to a source of carbon dioxide to the atmosphere, rather than a sink.<sup>180</sup> Loss of forest can also heighten and compound existing climate

<sup>174</sup> Greenpeace, *How JBS is still Slaughtering the Amazon* (2020), available at [https://www.greenpeace.org/static/planet4-international-stateless/2020/08/60e2cd00-greenpeace\\_stillslaughtering\\_pages-1.pdf](https://www.greenpeace.org/static/planet4-international-stateless/2020/08/60e2cd00-greenpeace_stillslaughtering_pages-1.pdf), p. 49.

<sup>175</sup> Levy, S.A. et al, *Deforestation in the Brazilian Amazon could be halved by scaling up the implementation of zero-deforestation cattle commitments*, Global Environmental Change 80 (2023), p. 1.

<sup>176</sup> Ministério do Meio Ambiente do Brasil, REDD+ Brasil, *PPCDAm*, (Nov. 3, 2016), <http://redd.mma.gov.br/en/legal-and-public-policy-framework/ppcdam>.

<sup>177</sup> Silva Junior, C.H.L et al., *The Brazilian Amazon deforestation rate in 2020 is the greatest of the decade*, Nature Ecology & Evolution 5 (2021), p. 144.

<sup>178</sup> Friedlingstein, P. et al, *Global Carbon Budget 2021*, Earth System Science Data 14:4 (2022), p. 1917.

<sup>179</sup> IPCC, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, Summary for Policymakers, 2019, A.3.

<sup>180</sup> See Gatti, L. et al., *Amazonia as a carbon source linked to deforestation and climate change*, Nature 595 (2021).

impacts. The intensification of extreme droughts due to climate change is also increasing fire incidence and associated carbon emissions.<sup>181</sup>

61. For countries within the Amazon region, cattle ranching is the cause of 80% of land clearing,<sup>182</sup> and soy cultivation for animal feed is the second largest driver.<sup>183</sup> While small landholders and farmers contribute to land clearing, large meatpacking companies dominate Brazil's cattle industry and play an outsized role.<sup>184</sup> JBS is one of the biggest business enterprises in the Brazilian cattle industry. Its operations have been estimated to produce around 50% of the annual CO<sub>2</sub> emissions of 'Carbon Majors' like ExxonMobil, Shell or BP.<sup>185</sup> In spite of agreements to end the purchase of cattle production linked to deforestation in the Amazon, slave labor, forced displacement, or the illegal occupation of Indigenous lands, JBS and its network of subsidiaries have continuously been linked to suppliers engaging in all these practices.<sup>186</sup> Out of 50 traders, retailers, producers and consumer goods business enterprises surveyed by Greenpeace with supply chains for, *inter alia*, cattle, dairy and soy products<sup>187</sup>—such as consumer goods companies like Nestlé, Unilever, fast food chains like McDonald's and Burger King, and retailers like Carrefour, Casino, Tesco and Costco—not a single one was able to show progress towards eliminating links to deforestation in 2019.<sup>188</sup> The few business enterprises out of the 50 surveyed that chose to disclose some or all of their suppliers demonstrated significant weaknesses in the implementation of their corporate 'no deforestation' commitments, "either showing the continued presence of problematic producers in their supply chains or, where only direct suppliers were disclosed, revealing suppliers with documented links to such producers."<sup>189</sup>

## 2.2. Social Drivers: Business enterprises have misinformed, obfuscated and obstructed climate action for decades

62. Taken together, a small cadre of GHG-intensive business enterprises have extensively contributed to physical changes in Earth's climate while manipulating social and political discourse. Since at least the early 1960s, and in some cases before then, the fossil fuel industry and its trade groups understood that continued use of their products would increase the concentration of GHGs in the atmosphere with

<sup>181</sup> Aragão, L.E.O.C. et al., *21st Century drought-related fires counteract decline of Amazon deforestation carbon emissions*, Nature Communications 9 (2018), p. 1.

<sup>182</sup> Wasley A et al, Record Number of Fires Rage Around Amazon Farms that Supply the World's Biggest Butchers, The Bureau of Investigative Journalism (Dec. 10, 2019), <https://www.thebureauinvestigates.com/stories/2019-12-10/hundreds-of-thousands-of-fires-rage-around-farms-that-supply-the-worlds-biggest-butcher>.

<sup>183</sup> Greenpeace, *How JBS is still Slaughtering the Amazon* (2020), p. 13 (internal citations omitted).

<sup>184</sup> Skidmore, M.E. et al, *Cattle ranchers and deforestation in the Brazilian Amazon: Production, location, and policies*, Global Environmental Change 68 (2021), p. 1.

<sup>185</sup> DeSmog, *World's largest meat company, JBS, increases emissions in five years despite 2040 net zero climate target, continues to greenwash its huge climate footprint*, Institute for Agriculture and Trade Policy (Apr. 21, 2022), <https://www.iatp.org/media-brief-jbs-increases-emissions-51-percent/>.

<sup>186</sup> Greenpeace, *How JBS is still Slaughtering the Amazon* (2020), p. 27.

<sup>187</sup> Greenpeace, *Countdown to Extinction: What Will it Take Companies to Act?*, (2019), available at [https://www.greenpeace.org/static/planet4-international-stateless/2019/09/98db6c73-gp\\_cte\\_report\\_lowres.pdf](https://www.greenpeace.org/static/planet4-international-stateless/2019/09/98db6c73-gp_cte_report_lowres.pdf), pp. 26-31.

<sup>188</sup> Greenpeace, *How JBS is still Slaughtering the Amazon* (2020), pp. 12-13.

<sup>189</sup> *Id.*, p. 13.

dangerous consequences for the planet.<sup>190</sup> Despite this knowledge and extensive internal research into the risks of climate change,<sup>191</sup> the fossil fuel industry initiated a coordinated campaign of doubt and disinformation to undermine climate science and stave off regulation and legislation that could undercut their profitability.<sup>192</sup>

63. Business enterprises in the fossil fuel and agroindustrial sectors have contributed and continue to contribute to climate change via (mis)use of their social and political influence, through: (2.2.1) denying and promoting disinformation about climate science; (2.2.2) greenwashing campaigns that include “climate-washing”, the use of unsubstantiated or misleading claims about, or selective disclosure of, the climate-related impacts of companies; (2.2.3) corporate capture of and exertion of undue influence on the legislative or political processes that seek to regulate the industries in which they operate; and (2.2.4) the misuse of judicial, quasi-judicial and other forms of dispute mechanisms.

### **2.2.1. Business enterprises have known of anthropogenic climate change’s physical drivers and impacts for at least 60 years, yet publicly undermined climate science and delayed action**

64. Business enterprises, particularly those in the fossil fuel industry, have been aware of the realities of climate change for more than sixty years. Indeed, it is well-documented that as early as 1954 and certainly by the early 1960s, the fossil fuel industry had identified and accurately predicted global warming trends, and was aware that its products drive the emissions causing climate change.<sup>193</sup> By the 1970s and 1980s, the industry calculated and used its own climate change projections to better its business and operational planning,<sup>194</sup> repeatedly predicting global warming “correctly and skillfully”<sup>195</sup> and internally acknowledging that climate change “posed a significant global threat.”<sup>196</sup>
65. Despite having this information, business enterprises continued profiting from climate change-inducing activities and engaged in a concerted, industry-wide public relations campaign to foster skepticism

<sup>190</sup> Benjamin Franta., *Early Oil Industry Knowledge of CO2 and Global Warming*, Nature Climate Change 8 (November 2018), pp. 1024-26.

<sup>191</sup> See Geoffrey Supran, Stefan Rahmstorf, and Naomi Oreskes, *Assessing ExxonMobil’s Global Warming Projections*, Science 379:6628 (Jan. 2023).

<sup>192</sup> See generally Naomi Oreskes and Erik M. Conway, *Merchants of Doubt* (2010), at pp. 205-209.

<sup>193</sup> Franta, B., *Early Oil Industry Knowledge of CO2 and Global Warming*, Nature Climate Change 8 (November 2018), pp. 1024-26.

<sup>194</sup> For example, while externally casting doubt on climate science, Exxon was factoring in its researchers’ advice to consider how rising sea levels would threaten its onshore infrastructure, and to plan for maintenance and repair costs for pipelines that crossed under permafrost that would thaw as the Arctic warmed. See Sara Jerving et al, *What Exxon Knew About the Earth’s Melting Arctic*, Los Angeles Times (Oct. 9, 2015), <https://graphics.latimes.com/exxon-arctic/>.

<sup>195</sup> Geoffrey Supran, Stefan Rahmstorf, and Naomi Oreskes, *Assessing ExxonMobil’s Global Warming Projections*, Science 379:6628 (Jan. 2023).

<sup>196</sup> These corporations include fossil fuel industry leaders such as ExxonMobil, Shell, and organizations such as the API, among others. See Memorandum from James F. Black, Scientific Advisor, Exxon Products Research Division, to F. G. Turpin, Vice President, Exxon research and Engineering Co. (Jun. 6, 1978), available at <https://insideclimatenews.org/wp-content/uploads/2015/09/James-Black-1977-Presentation.pdf>.

about climate science, prevent regulation, and delay global action on climate change.<sup>197</sup> Led by major oil and gas companies like Exxon and Shell, headquartered in the Global North, as well as by industry trade organizations such as the Global Climate Coalition (GCC) and the International Petroleum Industry Environmental Conservation Association (IPIECA), the fossil fuel industry opposed climate legislation and regulation across multiple jurisdictions,<sup>198</sup> funded and promoted climate disinformation in the form of paid newspaper editorials,<sup>199</sup> and launched targeted campaigns against IPCC scientists to discredit their work.<sup>200</sup>

66. Throughout the 2000s and 2010s, the fossil fuel industry continued to fund and promote climate disinformation and oppose climate mitigation actions.<sup>201</sup> As climate change concerns gained global attention and became increasingly impossible to deny, the fossil fuel industry further adapted its techniques to delay climate action. In other words, while business enterprises began to publicly acknowledge the existence of climate change, they simultaneously created barriers to climate action by questioning the severity of impacts and raising doubts over the feasibility of reducing emissions.<sup>202</sup> They have further created debates around redirecting responsibility to consumers, advocated for ineffective and unproven technological solutions, and argued for the fallacy that the cost of action is higher than the downside risk of climate change.<sup>203</sup>

<sup>197</sup> This campaign has been well documented. See, e.g., Franta, B., *Early Oil Industry Knowledge of CO2 and Global Warming*, Nature Climate Change 8 (November 2018); CIEL, *Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis* (2017) [hereinafter *Smoke and Fumes*], available at: <https://www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf>; Neela Banerjee, *Exxon's Oil Industry Peers Knew About Climate Dangers in the 1970s, Too*, Inside Climate News (Dec. 22, 2015), <https://insideclimatenews.org/news/22122015/exxon-mobil-oil-industry-peers-knew-about-climate-change-dangers-1970s-american-petroleum-institute-api-shell-chevron-texaco/>.

<sup>198</sup> See generally Robert J. Brulle, *Advocating Inaction: A Historical Analysis of the Global Climate Coalition*, Environmental Politics 32:2 (April 2023), pp. 185-206 [hereinafter *Advocating Inaction*].

<sup>199</sup> ExxonMobil's internal and external communications on climate change between 1977 and 2014 show that the company misled the public and document a dramatic discrepancy between internal and external documents. More than 80% of ExxonMobil's internal documents acknowledged that climate change is real and caused by humans. However, just 12% of its public-facing advertisements and editorials acknowledge this reality, with 81% expressing doubts about climate change's veracity. Geoffrey Supran and Naomi Oreskes, *Assessing ExxonMobil's climate change communications* (1977–2014), Environ. Res. Lett. 12 (2017), pp. 1, 8, 9.

<sup>200</sup> See Avery, S. K., P. D. Try, R. A. Anthes, and R. E. Hallgren, *An open letter to Ben Santer*, Bull. Amer. Meteor. Soc. 77, 1961-1966 (July 25, 1996), available at [https://www.realclimate.org/docs/BAMS\\_Open\\_Letter.pdf](https://www.realclimate.org/docs/BAMS_Open_Letter.pdf); See also Christophe Bonneuil, Pierre-Louis Choquet, and Benjamin Franta, *Early warnings and emerging accountability: Total's responses to global warming, 1971–2021*, Global Env. Change 71 (2021), p. 5.

<sup>201</sup> CIEL, *Smoke and Fumes*, p. 17.

<sup>202</sup> See generally Geoffrey Supran and Naomi Oreskes, *Rhetoric and Frame Analysis of ExxonMobil's Climate Change Communications*, One Earth 4:5, 696-719 (May 2021); Frumhoff, P.C., Heede, R. and Oreskes, N., *The climate responsibilities of industrial carbon producers*, Climatic Change 132, 157–171 (2015).

<sup>203</sup> For example, in 2000, BP's advertisers coined and campaigned on the “carbon footprint,” a calculation of an individual's carbon-intense lifestyle, to focus responsibility on individual action. Mark Kaufman, *The Carbon Footprint Sham*, Mashable, <https://mashable.com/feature/carbon-footprint-pr-campaign-sham>; Sara Hastings-Simon, *Opinion: Beware of Climate Delay, Masquerading as Climate Action*, CBC (Sept. 10, 2020), <https://www.cbc.ca/news/canada/calgary/alberta-climate-delay-hyperloop-train-small-modular-reactors-1.5717438>; William F. Lamb et al., *Discourses of Climate Delay*, in Global Sustainability (2020), p. 3.

67. Similarly, agroindustry actors have known for years about the harmful effects of their business activities but have repeatedly failed to monitor their supply chains and continue to buy from deforesters despite having made commitments to reduce or eliminate deforestation.<sup>204</sup> In Brazil, for example, efforts to implement a traceability system in the beef supply chain started in 2000 and resulted in the creation of the Identification and Certification System in 2002 and the signing of binding Conduct Adjustment Agreements in 2009,<sup>205</sup> whereby major slaughterhouse operators promised to not purchase cattle linked to post-2009 deforestation in the Amazon.<sup>206</sup> Despite such commitments and the availability of supply chain traceability tools,<sup>207</sup> deforestation grew exponentially in the years that followed the signing of the agreements.<sup>208</sup> In 2020, a comparison between 2009 commitments made by JBS resulted in a clear discord between JBS's commitments and what it was actually doing. The 2009 analysis found that the company did not control deforestation taking place in biomes other than the Amazon, that its traceability system depended on the voluntary participation of its suppliers, and that the company did not control its indirect suppliers, where the majority of violations take place.<sup>209</sup> In 2023, it was revealed that JBS was being supplied by cattle farmers that raised cattle illegally on Indigenous lands, which is forbidden by the Brazilian Constitution, and engaged in cattle laundering to conceal their illegal origin.<sup>210</sup>

### 2.2.2. Business enterprises 'climate-wash' their products and operations

68. In response to widespread reporting and lawsuits detailing their historical denial and disinformation, the industry's tactics have shifted to deception regarding the climate impacts of their operations and products, portraying themselves as part of the climate solution. As public concern about climate change has grown, business enterprises in the fossil fuel and agro-industrial sectors, along with those in other sectors, have become increasingly vocal about their climate policies and pledges. Yet many of these claims constitute a form of greenwashing more specifically known as "climate-washing"—the use of

<sup>204</sup> Freitas, H., Dallabrida P. (2022), *At COP27, agribusiness giants pledge to end environmental destruction while they keep buying soy from deforesters*, Repórter Brasil, <https://reporterbrasil.org.br/2022/12/at-cop27-agribusiness-giants-pledge-to-end-environmental-destruction-while-they-keep-buying-soy-from-deforesters/>.

<sup>205</sup> Brazilian Coalition on Climate, Forests and Agriculture, Brazilian Coalition publishes study on Brazil's beef chain traceability, WWF (Sept. 23, 2020), <https://www.wwf.org.br/?77051/Brazilian-Coalition-publishes-study-on-Brazils-beef-chain-traceability#:~:text=Efforts%20to%20implement%20a%20traceability,are%20free%20from%20illegal%20deforestation>.

<sup>206</sup> Joana Faggin, Alexandra Christopoulou, and Matt Piotrowski, *GPA's (Casino Group) Beef Supply Chain Exposed to Deforestation Risks*, Chain Reaction Research (April 2019), available at <https://chainreactionresearch.com/wp-content/uploads/2019/04/GPAs-Beef-Supply-Chain-Exposed-to-Deforestation-Risks-4.pdf>, p. 5.

<sup>207</sup> Envol Vert, *Groupe Casino, Eco-responsable de la deforestation* (June 2020), available at [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210302\\_13435\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210302_13435_complaint.pdf), pp. 22-23.

<sup>208</sup> *Id.*, p. 12.

<sup>209</sup> Sarah Lake, *Fact Check: JBS Exaggerates Deforestation Commitment*, Mighty Earth (Oct. 5, 2020), <https://www.mightyearth.org/2020/10/05/fact-check-jbs-exaggerates-deforestation-commitment/>.

<sup>210</sup> André Campos and Gil Alessi, *Fornecedores da JBS criaram ilegalmente gado em terra indígena em MT*, Repórter Brasil (Jun. 5, 2023) <https://reporterbrasil.org.br/2023/06/fornecedores-da-jbs-criaram-ilegalmente-gado-em-terra-indigena-em-mt/>.

unsubstantiated or misleading claims about, or selective disclosure of, the climate-related impacts of company operations or best practices to consumers for commercial or political gain.<sup>211</sup> Climate-washing particularly “seeks to preserve the status quo of a profit-driven business model while harming the public through stalled progress in addressing the climate emergency.”<sup>212</sup> Its contribution to climate change is two-fold: 1) by obscuring climate change-causing behavior from regulation and public scrutiny, it undercuts and delays effective measures to reduce GHGs at the source; and 2) by not providing consumers with relevant information about products they are purchasing or businesses they are patronizing, it leads to more emissions than would otherwise occur. If consumers were fully and accurately informed about the climate impacts of products they were consuming, it is likely many would choose—and would have chosen—those that contribute less to climate change.<sup>213</sup> And if the public and policymakers were fully and accurately informed, it is likely that more robust and rapid climate policy measures would be adopted.<sup>214</sup>

69. Climate-washing is widespread, takes various forms, and is being challenged in courts and administrative proceedings around the world. Over the last two years, more than fifty climate-washing

<sup>211</sup> This definition was adapted from the Climate Social Science Network’s definition of greenwashing. See Akriti Bhargava et al, *CSSN Research 2022:1: Climate-Washing Litigation: Legal Liability for Misleading Climate Communications* (2022), p. 4, available at: <https://cssn.org/wp-content/uploads/2022/01/CSSN-Research-Report-2022-1-Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf>. See also Randall S. Abate, *Fool Me Once, Shame On You: Promoting Corporate Accountability for the Human Rights Impacts of Climate Washing*, *Intercultural Human Rights Law Review Symposium* 18:1 (October 2022) [hereinafter *Fool Me Once, Shame On You*], p. 3.

<sup>212</sup> *Fool Me Once, Shame On You*, p. 3.

<sup>213</sup> Historical examples such as declining tobacco use demonstrates that if consumers are aware of the harmful effects or qualities of products, they often choose to stop purchasing them, reduce their purchases, or make different purchasing decisions. This is especially true regarding products with a harmful impact on the public health or the environment. For example, increased consumer awareness of the role of plastics in degrading the natural environment and harming human and animal health has spurred a growing market for plastic-free products and packaging or increased recyclability. Growth in consumer demand for environmentally-friendly products, and willingness to spend more on such products, has been documented in recent years. See Greg Petro, *Consumers Demand Sustainable Products And Shopping Formats*, *Forbes* (Mar. 11, 2022), <https://www.forbes.com/sites/gregpetro/2022/03/11/consumers-demand-sustainable-products-and-shopping-formats/?sh=5ecd68fd6a06>; Jordan Bar Am et al, *Consumers care about sustainability—and back it up with their wallets*, *McKinsey & Company* (Feb. 6, 2023), <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets>.

<sup>214</sup> The U.N. has found that purposefully ambiguous, false and misleading information in corporate zero-waste pledges undermines good faith efforts by State actors, thereby “creating both confusion, cynicism and a failure to deliver urgent climate action.” United Nations High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (2022), p. 12, available at [https://www.un.org/sites/un2.un.org/files/high-level\\_expert\\_group\\_n7b.pdf](https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf). Industry trade organizations’ inconsistent messaging and withholding of pertinent information from the public hinders meaningful government action that “benefit[s] the companies’ business as usual operations and delay[s] the transition to clean energy.” Carolyn B. Maloney & Ro Khanna, *Investigation of Fossil Fuel Industry Disinformation Memorandum*, Congress of the United States House of Representatives: Committee on Oversight & Reform (2022), pp. 14-15, [https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022-12-09.COR\\_Supplemental\\_Memo-Fossil\\_Fuel\\_Industry\\_Disinformation.pdf](https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022-12-09.COR_Supplemental_Memo-Fossil_Fuel_Industry_Disinformation.pdf).

cases have been filed against business enterprises in courts and administrative bodies, such as consumer protection agencies, for inadequate or inaccurate disclosures.<sup>215</sup>

### 2.2.2.a Business enterprises fail to align their conduct with climate commitments

70. Numerous business enterprises have made public statements of their purported action on climate, such as their commitments to reach “net zero” emissions,<sup>216</sup> or to eradicate deforestation in their business activities, but are not on track to meet them.<sup>217</sup> Although half of the world’s 2,000 biggest listed business enterprises have set a target to get to net-zero emissions by 2050, just 4% meet criteria set out by the United Nations’s Race to Zero campaign for what constitutes a quality pledge.<sup>218</sup> This includes: setting a specific net zero target; covering all GHGs (Scopes 1, 2 and 3) for business enterprises;<sup>219</sup> setting clear conditions for the use of carbon offsets; publishing a plan; implementing immediate emission-cutting measures; and reporting annually progress on both interim and longer-term targets.<sup>220</sup> This trend holds true for the largest business enterprises associated with the UN’s Race to Zero campaign in eight “major-emitting sectors,”<sup>221</sup> where many of their net-zero pledges are not in fact meaningful reductions but are vague, ambiguous, or lacking explicit emission reduction commitments.<sup>222</sup> This has been the case, for example, with Shell’s net emissions targets, which the company claims are aligned with the Paris Agreement, but which in fact have been calculated to decrease by only 5% by 2030 relative to

<sup>215</sup> Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (2023), p. 4, available at:

[https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global\\_trends\\_in\\_climate\\_change\\_litigation\\_2023\\_snapshot.pdf](https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf) [hereinafter *Global Trends in Climate Change Litigation: 2023 Snapshot*].

<sup>216</sup> Net zero emissions are achieved when anthropogenic emissions of GHGs are balanced by anthropogenic removals over a specified period. IPCC, *Global Warming of 1.5°C. An IPCC Special Report, Annex I: Glossary* (2018), p. 555.

<sup>217</sup> Net Zero Tracker, *New analysis: Half of world’s largest companies are committed to net zero* (Nov. 5, 2023), <https://zerotracker.net/analysis/new-analysis-half-of-worlds-largest-companies-are-committed-to-net-zero> [hereinafter Net Zero Tracker analysis].

<sup>218</sup> *Id.*

<sup>219</sup> Scope 1 emissions are direct emissions from sources that are owned or controlled by a company. Scope 2 are indirect emissions from energy that is purchased or brought into a company’s organizational bounds. Scope 3 are all indirect emissions that occur in a company’s value chain. WWBCSD & WRI, *GHG Protocol*, p. 25. Scope 3 emissions are typically responsible for 70-90% of an organization’s carbon footprint. Carbon Trust, *An Introductory Guide to Scope 3 Emission* (2023), p. 5, available at: <https://ctprodstorageaccountp.blob.core.windows.net/prod-drupal-files/documents/resource/restricted/Scope-3-emissions-guide.pdf>.

<sup>220</sup> Net Zero Tracker analysis.

<sup>221</sup> The eight sectors assessed are the following: automotive manufacturers, electronics, fashion retail, food and agriculture, information and communication technology, shipping and aviation, steel and cement, and supermarket retail. Thomas Day et al., *Corporate Climate Responsibility Monitor 2023: Assessing the Transparency and Integrity of Companies’ Emission Reduction and Net-Zero Targets* (2023), p. 70, available at <https://carbonmarketwatch.org/wp-content/uploads/2023/02/CorporateClimateResponsibilityMonitor2023.pdf> [hereinafter Thomas Day et al., *Corporate Climate Responsibility Monitor 2023*].

<sup>222</sup> *Id.*, p. 7.

2019 emission levels.<sup>223</sup> A key reason for this discrepancy is companies' exclusion of value chain or "Scope 3" emissions from their calculations, which in Shell's case account for more than 90% of overall emissions.<sup>224</sup> For agroindustry actors, companies' commitments are often hollow due to a lack of supply chain oversight or control. For example, the French supermarket chain Casino has been sued over allegations that in its required annual due diligence plans, it committed to eliminating deforestation from its supply chain while its Brazilian and Colombian subsidiaries knowingly sourced cattle from deforested areas.<sup>225</sup>

71. In addition to being incompatible with the Paris Agreement's temperature limit of 1.5°C, which is informed by best available science, these practices allow business enterprises to mislead consumers and policymakers regarding their contribution to and inaction regarding climate change.<sup>226</sup> Further, business enterprises profit off of their false commitments. For example, a complaint filed before the U.S. Securities and Exchange Commission against meat giant JBS alleges that the company sold "green bonds" on the premise that it will reach net zero emissions by 2040 while actually increasing its emissions.<sup>227</sup> Research indicates that JBS increased its annual greenhouse gas emissions by 51% between 2016 and 2021.<sup>228</sup> Despite its commitments to "meet Paris targets" and to net zero emissions by 2040, the company reportedly refuses to disclose its full emissions and only plans to cut Scope 1 and 2 emissions by 2030, which account for less than 10% of its climate footprint.<sup>229</sup>
72. Such false or unbacked commitments have become widespread. It is predicted that 93% of the world's largest 2,000 companies that have made net-zero commitments will fail to achieve their goals if they do not at least double the pace of emissions reduction by 2030.<sup>230</sup> While corporate climate leadership has the potential to unlock greater mitigation ambition, "the rapid acceleration of corporate climate pledge setting, combined with the fragmentation of approaches and the general lack of regulation or oversight" makes it difficult to distinguish between the two, further obfuscating effective action.<sup>231</sup>

<sup>223</sup> Press Release, Client Earth, *ClientEarth files climate risk lawsuit against Shell's Board with support from institutional investors* (Feb. 9, 2023), <https://www.clientearth.org/latest/press-office/press/clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/>.

<sup>224</sup> *Id.* Only 37% of corporate net zero targets fully cover Scope 3 emissions. Net Zero Tracker analysis.

<sup>225</sup> *Envol Vert et al. v. Casino*, Saint-Étienne Judicial Court, 22/04723 [complaint] (2021), available at chrome-extension://efaidnbmnnnibpcajpgclclefindmkaj/[https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210302\\_13435\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210302_13435_complaint.pdf)

<sup>226</sup> Thomas Day et al, *Corporate Climate Responsibility Monitor 2023*, p. 6.

<sup>227</sup> *Mighty Earth Files Complaint with US Securities and Exchange Commission Against JBS 'Green Bonds'*, Mighty Earth (Jan. 18, 2023), <https://www.mightyearth.org/whistleblower-complaint-to-the-securities-and-exchange-commission-against-jbs/>.

<sup>228</sup> DeSmog, *World's largest meat company, JBS, increases emissions in five years despite 2040 net zero climate target, continues to greenwash its huge climate footprint*, Institute for Agriculture and Trade Policy (Apr. 21, 2022), <https://www.iatp.org/media-brief-jbs-increases-emissions-51-percent/>.

<sup>229</sup> *Id.*

<sup>230</sup> *Nearly All Companies Will Miss Net Zero Goals Without At Least Doubling Rate of Carbon Emissions Reductions by 2030, Accenture Report Finds*, Accenture (Nov. 1, 2022), [https://newsroom.accenture.com/news/2022/nearly-all-companies-will-miss-net-zero-goals-without-at-least-doubling-rate-of-carbon-emissions-reductions-by-2030-accenture-report-finds#:~:text=NEW%20YORK%3B%20Nov.,Accenture%20\(NYSE%3A%20ACN\)](https://newsroom.accenture.com/news/2022/nearly-all-companies-will-miss-net-zero-goals-without-at-least-doubling-rate-of-carbon-emissions-reductions-by-2030-accenture-report-finds#:~:text=NEW%20YORK%3B%20Nov.,Accenture%20(NYSE%3A%20ACN).).

<sup>231</sup> Thomas Day et al, *Corporate Climate Responsibility Monitor 2023*, at p. 13.

### 2.2.2.b Business enterprises make deceptive claims about the climate impact of products or operations, often in reliance on unproven or risky mitigation measures

73. Many business enterprises in the fossil fuel and agroindustry sectors claim that their products are “net-zero,” “CO<sub>2</sub>-neutral,” or “deforestation free.” For example, many business enterprises that are part of the Brazilian beef industry—the largest driver of deforestation in the Amazon—allege that their cattle are deforestation-free.<sup>232</sup> However, the resistance in using traceability systems to control the cattle laundering of indirect meat suppliers, even when most violations occur among such suppliers,<sup>233</sup> means that consumers often unknowingly purchase meat connected to deforestation.<sup>234</sup> As a result, despite formal pledges signed by the meat industry and supermarket chains with the Brazilian federal government to combat deforestation, deforestation has grown exponentially in the years that followed these agreements.<sup>235</sup>
74. In the fossil fuel industry, attempts have been made to portray GHG-intensive products as “green” or “clean.” For example, ExxonMobil has marketed a motor oil product as “green,” claiming it “contribute[s] to [] carbon-emission reduction efforts,”<sup>236</sup> while failing to disclose “that any potential emissions-reducing benefits of [the product] are miniscule by comparison with the emissions generated by ExxonMobil's business.”<sup>237</sup> Shell has claimed that its oil and gas “produces fewer emissions,” coupled with green and environmentally-focused imagery.<sup>238</sup> And Chevron has claimed that its gasoline has “cleaning technology,” repeatedly discussed “advancing a lower carbon future” in its marketing materials, and solicited consumers who “care for the environment.”<sup>239</sup> These claims mislead the general public about the climate impacts of their products, and fail to disclose climate risks associated with the purchase and consumption of fossil fuel products. Notably, this deceptive product marketing extends far beyond the fossil fuel and agro-industry sectors, and cases have also been brought against, for

<sup>232</sup> For example, in 2009, 75 companies operating slaughterhouses in the Amazon signed a Conduct Adjustment Agreement (Termo de Ajustamento de Conduta - TAC), a legal agreement with the Federal Public Ministry (MPF), to combat deforestation. Under this agreement, these companies have undertaken not to buy cattle from farms involved in deforestation. The Brazilian supermarket association also signed a TAC in 2013, where it committed to ensure that supermarkets' supply chains were not linked to deforestation in the Amazon. TAC No. 1.31.000.001060/2009-64 (2013) [contract], available at

<https://apps.mpf.mp.br/aptusmpf/index2#/detalhe/41000000000049210963?modulo=0&sistema=portal>.

<sup>233</sup> Catarina Barbosa, *MPF diz que frigoríficos podem, sim, identificar todas as fazendas em que gado passou antes do abate*, Repórter Brasil, December 12, 2022, available at: <https://reporterbrasil.org.br/2022/12/mpf-diz-que-frigorificos-podem-sim-identificar-todas-as-fazendas-em-que-gado-passou-antes-do-abate/>.

<sup>234</sup> Center for Climate Crime Analysis and Open Society Justice Initiative, *Mémorandum sur les impacts négatifs de l'industrie du bœuf au Brésil et l'implication de la chaîne d'approvisionnement du groupe Casino* (2021).

<sup>235</sup> Envol Vert, *Groupe Casino, Eco-responsable de la deforestation* (June 2020), available at [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210302\\_13435\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210302_13435_complaint.pdf), pp. 22–23.

<sup>236</sup> *People v. Exxon Mobil Corp.*, Dkt. No. T-23-1342, Cal. Super. Ct. [complaint] (Sept. 15, 2023) (USA), para. 134(b), available at <https://www.gov.ca.gov/wp-content/uploads/2023/09/FINAL-9-15-COMPLAINT.pdf>.

<sup>237</sup> *Id.*, para. 138.

<sup>238</sup> *Id.*, para. 134(c).

<sup>239</sup> *Id.*, para. 134(d).

example, food companies, consumer product manufacturers, and airlines.<sup>240</sup> Nearly three-quarters of people in 17 advanced economies are very or somewhat concerned about climate change's impacts, and four in five said they were willing to make changes to help reduce the effects of global climate change.<sup>241</sup> Were consumers fully and accurately informed about the climate impacts of products they were consuming, it's likely they would choose those that use fewer fossil fuels and thus contribute less to climate change.

75. Misleading claims about the climate impacts of a business enterprise's products or operations often rely on mitigation measures that are ineffective, unproven at scale, and/or introduce independent and additional risks to human rights and the environment, such as carbon capture and carbon offsets.
76. Carbon capture and storage (CCS) refers to technological processes that aim to trap or "capture" carbon dioxide (CO<sub>2</sub>) from an emitting source—like a fossil fuel power plant—and then compress and transport it for storage, use, or both.<sup>242</sup> Despite being portrayed as an innovative climate solution, CCS is a decades-old technology that has a history of failure, is unproven at scale, and has been identified by the IPCC as one of the highest-cost mitigation measures with the lowest potential for reducing emissions by 2030, the most critical period for avoiding catastrophic levels of warming.<sup>243</sup> CCS technology has been used by the fossil fuel industry since the 1970s, primarily to extract more oil out of existing wells,<sup>244</sup> through a process known as "enhanced oil recovery." Its history has "largely been

<sup>240</sup> The Netherlands' Advertising Code Commission (RCC) ruled that a sticker on Chiquita bananas that said "CO<sub>2</sub> neutral" was misleading, because Chiquita as a company has not achieved net zero emissions. Reclame Code (Netherlands), No. 2022/00295 (Aug. 16, 2022), <https://www.reclamecode.nl/uitspraken/uitspraak/voeding-en-drank-2022-00296/383414/>. In the U.S. District Court for the Central District of California, an ongoing class action suit taking aim at Delta Airlines's "carbon neutral" representations similarly alleges that an unreliable carbon offset market renders the company's statements false and misleading. *Berrin v. Delta Air Lines Inc.*, Dkt. No. 2:23-CV-04150 [complaint], C.D. Cal. (May 5, 2023), para. 5, available at: [https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230530\\_docket-223-cv-04150\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230530_docket-223-cv-04150_complaint.pdf) [hereinafter *Berrin v. Delta Air Lines Inc. Complaint*]. A regional court in Stuttgart, Germany, determined that a vinegar advertised as "climate neutral" was misleading because the company's calculations of emissions did not encompass the product's entire life cycle. Press Release, *Weiteres Gericht untersagt Werbung mit "klimaneutral" Aussagen* [Another court bans advertising with "climate neutral" statements], Werner & Mertz (Jan. 16, 2023), <https://werner-mertz.de/presscenter/weiteres-gericht-untersagt-werbung-mit-klimaneutral-aussagen/>.

<sup>241</sup> James Bell et al, *In Response to Climate Change, Citizens in Advanced Economies Are Willing to Alter How They Live and Work*, Pew Rsch. Ctr. (Sept. 14, 2021), <https://www.pewresearch.org/global/2021/09/14/in-response-to-climate-change-citizens-in-advanced-economies-are-willing-to-alter-how-they-live-and-work/>.

<sup>242</sup> *Carbon Capture, Utilisation and Storage*, International Energy Agency, <https://www.iea.org/energy-system/carbon-capture-utilisation-and-storage> (last visited Oct. 9, 2023).

<sup>243</sup> IPCC AR6 WGIII SPM, Figure SPM.7.

<sup>244</sup> Bruce Robertson, *Carbon Capture Has a Long History. Of Failure.*, Institute for Energy Economics and Financial Analysis (Sept. 2, 2022), [https://ieefa.org/resources/carbon-capture-has-long-history-failure?gclid=Cj0KCQjwvL-oBhCxARIsAHkOiu1Xvk5AtyrpiUPT7v5j5UxKcaMussccDdrK465eMpoPu47nP0nOanQaAvTnEALw\\_wcB](https://ieefa.org/resources/carbon-capture-has-long-history-failure?gclid=Cj0KCQjwvL-oBhCxARIsAHkOiu1Xvk5AtyrpiUPT7v5j5UxKcaMussccDdrK465eMpoPu47nP0nOanQaAvTnEALw_wcB).

one of underperformance” and “unmet expectations;”<sup>245</sup> CCS projects implemented to date have systematically overpromised and under-delivered on emissions reductions.<sup>246</sup>

77. Another technology to which industrial polluters are increasingly turning to justify their continued emissions is direct air capture (DAC), the process of pulling CO<sub>2</sub> directly from ambient air. The technology remains unproven at scale, extremely energy- and input-intensive, and a distraction from necessary measures to avoid emitting the CO<sub>2</sub> in the first place. Cautioning against oil and gas industry’s “excessive expectations and reliance on CCUS,”<sup>247</sup> the International Energy Agency (IEA) noted that “it is not a way to retain the status quo,”<sup>248</sup> and that the projected levels of capture needed to support continued oil and gas production and use “would require an inconceivable 32 billion tonnes of carbon captured for utilisation or storage by 2050, including 23 billion tonnes via direct air capture to limit the temperature rise to 1.5°C.”<sup>249</sup> To operate by 2050, this “would require 26 000 terawatt hours of electricity generation (...), which is more than global electricity demand in 2022. And it would require over USD 3.5 trillion in annual investments all the way from today through to mid-century, which is an amount equal to the entire industry’s annual average revenue in recent years.”<sup>250</sup>
78. Although DAC is promoted as a carbon dioxide removal (CDR) or “negative emissions” technology, the large amounts of new GHG emissions it generates through the use of energy, heat, and chemical inputs—and the buildout of new infrastructure required to pull it off—undercut its purported climate benefits.<sup>251</sup> The technology is also extremely costly compared to renewable energy alternatives that could be deployed at scale for a fraction of the price of DAC.<sup>252</sup> More fundamentally, reliance on DAC risks delaying efforts to phase out fossil fuels and prolonging reliance on oil, gas, and coal.<sup>253</sup> For the

<sup>245</sup> International Energy Agency, *Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach* (2023), pp. 15, 132, available at [https://iea.blob.core.windows.net/assets/13dab083-08c3-4dfd-a887-42a3ebe533bc/NetZeroRoadmap\\_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf](https://iea.blob.core.windows.net/assets/13dab083-08c3-4dfd-a887-42a3ebe533bc/NetZeroRoadmap_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf). See also Christian von Hirschhausen, Johannes Herold, and Pao-Yu Oei, *How a “Low Carbon” Innovation Can Fail—Tales from a “Lost Decade” for Carbon Capture, Transport, and Sequestration (CCTS)*, *Economics of Energy & Env. Policy* 1:2 (March 2012), pp. 116-117.

<sup>246</sup> Bruce Robertson and Milad Mousavian, *The Carbon Capture Crux: Lessons Learned*, Institute for Energy Economics and Financial Analysis (IEEFA) (2022), p. 71.

<sup>247</sup> IEA, *The Oil and Gas Industry in Net Zero Transitions*, World Energy Outlook Special Report (Nov. 2023), p. 16, available at <https://iea.blob.core.windows.net/assets/7a4b0c4e-d78c-4a8e-998c-6cde10a4e49b/TheOilandGasIndustryinNetZeroTransitions.pdf>.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> CIEL, *Direct Air Capture: Big Oil’s Latest Smokescreen* (2023), pp. 4-6, available at <https://www.ciel.org/wp-content/uploads/2023/11/Direct-Air-Capture-Big-Oils-Latest-Smokescreen-November-2023.pdf> [hereinafter CIEL, *DAC - Big Oil’s Latest Smokescreen*]. See generally, Timothy J. Skone, *Life Cycle Greenhouse Gas Analysis Direct Air Capture Systems* [presentation delivered at DAC Virtual Kickoff Meeting, February 24-25, 2021], available at [https://netl.doe.gov/sites/default/files/netl-file/21DAC\\_Skone.pdf](https://netl.doe.gov/sites/default/files/netl-file/21DAC_Skone.pdf). See also IPCC AR6 WGIII, pp. 346- 348.

<sup>252</sup> CIEL, *DAC - Big Oil’s Latest Smokescreen*, p. 6.

<sup>253</sup> See IPCC AR6 WGIII, Ch. 12 (“Cross sectoral perspectives”), p. 1263 (discussing concerns that deployment of large-scale CDR could obstruct near-term emissions reduction efforts). See also SEI, Climate Analytics, E3G, IISD, and UNEP, *The Production Gap: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises* (2023), p. 2, available at [https://productiongap.org/wp-content/uploads/2023/11/PGR2023\\_web\\_rev.pdf](https://productiongap.org/wp-content/uploads/2023/11/PGR2023_web_rev.pdf) (noting that, given risks and uncertainties of CDR, fossil fuels should be phased out even faster than many scenarios reliant on CDR project).

fossil fuel industry, this impact is a feature, not a bug. As the CEO of Occidental Petroleum admitted, DAC can “preserve” the industry and give it “a license to continue to operate for the [next] 60, 70, 80 years.”<sup>254</sup>

79. Beyond feasibility constraints and low efficacy, carbon capture poses significant, independent environmental and safety risks if deployed at scale, threatening basic human rights. The IPCC has recognized, for instance, that the huge energy demands of DAC could lead to environmental damage and undermine its sequestration potential,<sup>255</sup> and that its deployment could “significantly impact food prices via demand for land and water.”<sup>256</sup> DAC also cannot deliver on its purported climate benefits without the use of CCS to manage the captured CO<sub>2</sub>. CCS brings its own costs and risks, including health and safety hazards associated with the compression, piping, and storage of captured carbon—such as land disturbance, water contamination, and risk of explosions and other accidents.<sup>257</sup> Indeed, the IPCC has cautioned against reliance on the technology, given “concerns about storage safety and cost”<sup>258</sup> as well as the “non-negligible risk of carbon dioxide leakage from geological storage and the carbon dioxide transport infrastructure.”<sup>259</sup> The IPCC noted that in light of these feasibility and sustainability concerns, as well as the risks associated with CCS deployment at large scales, reducing GHG emissions at their source should be prioritized.<sup>260</sup>
80. Another category of purported climate mitigation measures championed by industry, including the fossil fuel<sup>261</sup> and agribusiness<sup>262</sup> sectors, is carbon offset schemes wherein companies receive “carbon credits” that they can deduct from their own emissions for investing in projects like renewable energy and prevention of deforestation.<sup>263</sup> The notion of tradable “carbon credits” is premised on a false

<sup>254</sup> Ben Lefebvre, *Oil industry sees a vibe shift on climate tech*, Politico (March 8, 2023), <https://www.politico.com/news/2023/03/08/oil-industry-shift-climate-tech-00085853>.

<sup>255</sup> IPCC AR6 WGIII, Ch. 3 (“Mitigation Pathways Compatible with Long-term Goals”), p. 348; Ch. 12 (“Cross-sectoral Perspectives”), 12.3.1.1, pp. 1265-68.

<sup>256</sup> IPCC AR 6 WGII, Ch. 4 (“Water”), 4.7.6, p. 654. *See also* J. Sekera & A. Lichtenberger, *Assessing Carbon Capture: Public Policy, Science, and Societal Need*, Biophys. Econ. Sust. 5:14 (2020), p. 14 (finding that using DAC to remove 1 gigaton of CO<sub>2</sub> may require a land area roughly 10 times the size of Delaware and could use prodigious amounts of water).

<sup>257</sup> *See* IPCC SR 1.5, Chapter 2, 2.3.4.2 (pointing out that “DACCS and BECCS rely on CCS and would require safe storage space in geological formations, including management of leakage risks and induced seismicity”). *See also* Center for International Environmental Law, *Confronting the myth of carbon-free fossil fuels: Why carbon capture is not a climate solution* (2021), pp. 10-11.

<sup>258</sup> IPCC 1.5°C SR, Ch. 4 (“Strengthening and Implementing the Global Response”), p. 388, Table 4.13. *See also* IPCC, AR6 WGIII, at Ch. 6, 6.4.2.5, p. 642.

<sup>259</sup> IPCC 1.5°C SR, Ch. 5, Section 5.4.1.2, p. 461.

<sup>260</sup> IPCC AR6 SYR SPM, B.6.4, B.7.3.

<sup>261</sup> Gregory Trencher, Mathieu Blondeel, Jusen Asuka, *Do all roads lead to Paris? Comparing pathways to net-zero* by BP, Shell, Chevron and ExxonMobil, Climate Change (2023), p. 5.

<sup>262</sup> *See generally* Claire Kelloway and Jason Davidson, Open Markets Institute and Friends of the Earth, *Agricultural Carbon Markets, Payments, and Data: Big Ag's Latest Power Grab*, Policy Brief (March 2023).

<sup>263</sup> *See, e.g.*, Josh Gabbatis and Tom Pearson, *Analysis: How some of the world's largest companies rely on carbon offsets to 'reach net-zero'*, Carbon Brief (Sept. 28, 2023), <https://interactive.carbonbrief.org/carbon-offsets-2023/companies.html>; *Berrin v. Delta Air Lines Inc.* Complaint, para. 5; *See generally* Claire Kelloway and Jason Davidson, Open Markets Institute and Friends of the Earth, *Agricultural Carbon Markets, Payments, and Data: Big Ag's Latest Power Grab*, Policy Brief (March 2023).

equivalency of fossil carbon and terrestrial (ecosystem) carbon, which are not fungible<sup>264</sup> but rather differ in terms of stability, longevity, and resilience of carbon stocks depending on the source.<sup>265</sup> Moreover, the climate effect of CO<sub>2</sub> removal at scale remains unknown and is not equivalent to the climate effect of avoiding the same quantity of CO<sub>2</sub> emissions.<sup>266</sup> These differences mean that one type of carbon emission cannot be readily “offset” with another type of carbon removal or sink. Yet carbon market offset schemes treat them as such, often allowing land-based offset credits to be used against fossil fuel-based emissions.<sup>267</sup>

81. Research indicates that offsets have failed to deliver promised climate benefits<sup>268</sup>—or in some cases increased emissions<sup>269</sup>—either because they do not represent mitigation activity that would not have otherwise occurred or because their emissions impacts are not permanent.<sup>270</sup> While the world’s top fossil-fuel producers and other business enterprises have used tens of millions of carbon credits to claim

<sup>264</sup> K. Dooley et al., *The Land Gap Report: 2022* (2022), p. 32, available at [https://landgap.org/downloads/2022/Land-Gap-Report\\_FINAL.pdf](https://landgap.org/downloads/2022/Land-Gap-Report_FINAL.pdf). See also Wim Carton, Jens Friis Lund, Kat Dooley, Undoing Equivalence: Rethinking Carbon Accounting for Just Carbon Removal, *Front. Clim.* 3 (2021); 41 Scientists, *10 myths about net zero targets and carbon offsetting, busted*, Climate Home News (Dec. 11, 2020), <https://www.climatechangenews.com/2020/12/11/10-myths-net-zero-targets-carbon-offsetting-busted/>.

<sup>265</sup> K. Dooley et al., *The Land Gap Report: 2022* (2022), p. 32

<sup>266</sup> IPCC, *Climate Change 2021: The Physical Science Basis - Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2021) [IPCC AR6 WGI], Technical Summary, 3.3.2 at p. 99 (2021) (“Asymmetry in the carbon cycle response to simultaneous CO<sub>2</sub> emissions and removals implies that a larger amount of CO<sub>2</sub> would need to be removed to compensate for an emission of a given magnitude to attain the same change in atmospheric CO<sub>2</sub>”); see also *id.* (“The century-scale climate–carbon cycle response to a CO<sub>2</sub> removal from the atmosphere is not always equal and opposite to the response to a CO<sub>2</sub> emission.”).

<sup>267</sup> K. Dooley et al., *The Land Gap Report: 2022* (2022), p. 10, available at [https://landgap.org/downloads/2022/Land-Gap-Report\\_FINAL.pdf](https://landgap.org/downloads/2022/Land-Gap-Report_FINAL.pdf).

<sup>268</sup> See, e.g., Dr. Martin Cames et al, How additional is the Clean Development Mechanism? Analysis of the application of current tools and proposed alternatives, Directorate-General for Climate Action, CLIMA.B.3/SER12013/0026 (March 2016), p. 11 (“Overall, 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 emissions reductions are additional and are not over-estimated.”). See also Carbon Market Watch, *Carbon Markets 101: The Ultimate Guide to Global Offsetting Mechanisms* (2020), p. 4; Micah Macfarlane, *Assessing the State of the Voluntary Carbon Market in 2022*, Carbon Direct, Blog (May 6, 2022); Heidi Blake, *The Great Cash-for-Carbon Hustle*, *The New Yorker* (Oct. 16, 2023), <https://www.newyorker.com/magazine/2023/10/23/the-great-cash-for-carbon-hustle>.

<sup>269</sup> Arthur Nelson, *Kyoto protocol's carbon credit scheme 'increased emissions by 600m tonnes'*, *The Guardian* (Aug. 24, 2015), <https://t.ly/od9dz>. See also Barbara K. Haya et al, Berkley Carbon Trading Project, *Quality assessment of REDD+ carbon credit projects* (Sept. 15, 2023), pp. 3–4.

<sup>270</sup> Lisa Song, *An Even More Inconvenient Truth: Why Carbon Credits For Forest Preservation May Be Worse than Nothing*, ProPublica (May 22, 2019), <https://features.propublica.org/brazil-carbon-offsets/inconvenient-truth-carbon-credits-dont-work-deforestation-redd-acre-cambodia/>; Jutta Kill et al, FERN, *Trading carbon: How it works and why it is controversial* (Aug. 2010), p. 59; M. Carnes et al., ‘How additional is the Clean Development Mechanism?: Analysis of the application of current tools and proposed alternatives’ (March 2016); M. Castagné et al., Carbon Market Watch, Secours Catholique, CCFD-Terre Solidaire & IATP, *Carbon Markets and Agriculture: Why offsetting is putting us on the wrong track* (2020), p. 6; Winston ChoiSchagrin, *Wildfires are ravaging forests set aside to soak up greenhouse gases*, *N.Y. Times* (Aug. 23, 2021), <https://www.nytimes.com/2021/08/23/us/wildfires-carbon-offsets.html>.

they have “cancelled out” significant percentages of their emissions in recent years,<sup>271</sup> many credit schemes have been exposed as “largely worthless,” with a recent investigation finding that more than 90% of the world’s leading certifier of rainforest offset credits are likely to be “phantom credits” that do not represent genuine carbon reductions.<sup>272</sup>

82. Another study estimates that only 12% of the total volume of existing carbon offset credits constitutes real emissions reductions.<sup>273</sup> Additionally, the credit-generating activities underlying these offset schemes have in many instances been documented to lead to the eviction of Indigenous Peoples and local communities, violation of their right to Free, Prior and Informed Consent, and threats to their rights to food, water, cultural heritage, and life,<sup>274</sup> and are a form of neo-colonialism and financialization of nature.
83. The focus on technologies and approaches that are ineffective, unproven at scale, and/or introduce independent and additional risks to human rights and the environment—in lieu of proven, available solutions to reduce emissions and protect sinks—prolongs and exacerbates business enterprises’ climate-destructive activities. So grave is the issue that the European Union has agreed to pass a directive that will ban generic environmental claims such as “climate neutral” without proof of relevant environmental performance,<sup>275</sup> and will disallow companies from claiming a product has a neutral, reduced or positive impact on the environment if these calculations are based on carbon offsetting schemes.<sup>276</sup>

<sup>271</sup> Josh Gabbatis and Tom Pearson, *Analysis: How some of the world’s largest companies rely on carbon offsets to ‘reach net-zero’*, Carbon Brief (Sept. 28, 2023), <https://interactive.carbonbrief.org/carbon-offsets-2023/companies.html>. See also Daisy Dunne and Yanine Quiroz, *Mapped: The impacts of carbon-offset projects around the world*, Carbon Brief (Nov. 8, 2023), <https://interactive.carbonbrief.org/carbon-offsets-2023/mapped.html>.

<sup>272</sup> Patrick Greenfield, *Revealed: More Than 90% of Rainforest Carbon Offsets by Biggest Certifier Are Worthless, Analysis Shows*, The Guardian (Jan. 18, 2023), <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe>. See also Nina Lakhani, *Revealed: top carbon offset projects may not cut planet-heating emissions*, The Guardian (Sept. 19, 2023), [https://www.theguardian.com/environment/2023/sep/19/do-carbon-credit-reduce-emissions-greenhouse-gases?CMP=Share\\_AndroidApp\\_Other](https://www.theguardian.com/environment/2023/sep/19/do-carbon-credit-reduce-emissions-greenhouse-gases?CMP=Share_AndroidApp_Other).

<sup>273</sup> Benedict Probst et al, ETH Zurich, *Systematic review of the actual emissions reductions of carbon offset projects across all major sectors* [Working Paper] (2023), p. 12, available at [https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/620307/230706\\_WP\\_full\\_vf.pdf?sequence=9&isAllowed=y](https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/620307/230706_WP_full_vf.pdf?sequence=9&isAllowed=y). See also Josh Gabbatis et al, *In-depth Q&A: Can ‘carbon offsets’ help to tackle climate change?*, Carbon Brief (Sept. 24, 2023), <https://interactive.carbonbrief.org/carbon-offsets-2023>.

<sup>274</sup> Daisy Dunne and Yanine Quiroz, *Mapped: The impacts of carbon-offset projects around the world*, Carbon Brief (Nov. 8, 2023), <https://interactive.carbonbrief.org/carbon-offsets-2023/mapped.html>; Daniel Grossman, *Dam Lies: Despite Promises, an Indigenous Community’s Land Is Flooded*, Pulitzer Center (Mar. 6, 2018), <https://pulitzercenter.org/stories/dam-lies-despite-promises-indigenous-communities-land-flooded#:~:text=The%20Ng%C3%A4be%20Bugl%C3%A9%20people%20in,banks%20of%20the%20Tabasar%C3%A1%20River>; Interim Report of the Special Rapporteur on the Right to Food, U.N. Doc. A/70/287 (2015), para. 68-69; J.P. Sarmiento Barletti and A. Larson, CIFOR, *Rights Abuse Allegations in the Context of REDD+ Readiness and Implementation: A Preliminary Review and Proposal for Moving Forward* (2017).

<sup>275</sup> Press Release, European Parliament, *EU to Ban Greenwashing and Improve Consumer Information on Product Durability* (Sept. 19, 2023), <https://www.europarl.europa.eu/news/en/press-room/20230918IPR05412/eu-to-ban-greenwashing-and-improve-consumer-information-on-product-durability>.

<sup>276</sup> *Id.*

### 2.2.2.c Overstating investments in or support for climate action

84. Business enterprises, particularly those in the fossil fuel industry, also capitalize on growing public concern about climate change by over-emphasizing or overstating their climate action or renewable energy investments through advertising campaigns when, in reality, these investments tend to make up a fraction of their businesses. Once focused upon actively denying climate change, fossil fuel actors now portray themselves as “fossil fuel saviors”<sup>277</sup> and attempt to convince the public that continued heavy reliance on fossil fuels is necessary even as the world transitions towards more renewable energy.<sup>278</sup> In 2021 alone, for example, the top five oil companies spent at least \$750 million on climate-focused communications.<sup>279</sup> These campaigns often portray companies positively and expound their proactive role in the energy transition.<sup>280</sup> However, in reality these major oil companies invest only a small fraction of their resources into renewable energy compared to their continued expansion of fossil fuel operations. Exxon’s announced goal to produce 10,000 barrels of biofuels per day by 2025, for example, would amount to 0.2% of their fossil fuel refinery capacity—“in essence, a rounding error.”<sup>281</sup> Shell has stated that it spends 12% of its overall expenditure on solar and wind power, when outside calculations found it only spends 1.5%.<sup>282</sup> BP’s campaigns promote renewables and use the slogan #NotBusinessAsUsual, despite less than 1% of their total energy supply stemming from low-carbon sources.<sup>283</sup> In addition, BP, Chevron, ExxonMobil, Shell, and TotalEnergies are all on track to increase oil and gas production between 2021 and 2026,<sup>284</sup> and are each making an annual profit of billions of

<sup>277</sup> See generally Geoffrey Supran and Naomi Oreskes, *Rhetoric and Frame Analysis of ExxonMobil's Climate Change Communications*, One Earth 4:5, 696-719 (May 2021).

<sup>278</sup> *Id.*, pp. 7, 14. As an example, in Shell’s 2021 “Powering Progress” strategy detailing possible future scenarios,” even the most optimistic option towards meeting the Paris agreement’s 1.5°C goal presents global oil and gas use as still 93% and 85% respectively of current levels in 2050. In its most recent 2023 report, the most optimistic scenario has decreased fossil fuel dependency somewhat, but still predicts both oil and natural gas at around 50% of current rates in 2050. Ilona Hartlief et al., *Still Playing the Shell Game: Four Ways Shell Impedes the Just Transition*, 2021, at p. 52-58, available at <https://www.somo.nl/still-playing-the-shell-game> [hereinafter *Still Playing the Shell Game*]; Shell, *The Energy Security Scenarios* (2023), at pp. 11-13, available at [https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/the-energy-security-scenarios/\\_jcr\\_content/root/main/section\\_926760145/promo\\_copy\\_142460259\\_1698265813/links/item0.stream/1679345012896/4dccc89eba3c80899dc0e61b43ce07839d7899ee/energy-security-scenarios-summary.pdf](https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/the-energy-security-scenarios/_jcr_content/root/main/section_926760145/promo_copy_142460259_1698265813/links/item0.stream/1679345012896/4dccc89eba3c80899dc0e61b43ce07839d7899ee/energy-security-scenarios-summary.pdf).

<sup>279</sup> Influence Map, *Big Oil’s Real Agenda on Climate Change 2022* (2022), available at: <https://influencemap.org/report/Big-Oil-s-Agenda-on-Climate-Change-2022-19585> [hereinafter *Big Oil’s Real Agenda on Climate Change 2022*].

<sup>280</sup> *Id.*

<sup>281</sup> Nicholas Cunningham, *ExxonMobil Algae Biofuel Exit Does Not Deter Investors*, Gas Outlook (Apr. 13, 2023), <https://gasoutlook.com/analysis/exxonmobil-algae-biofuel-exit-does-not-deter-investors/>.

<sup>282</sup> This is according to a complaint filed by Global Witness against Shell before the United States Securities and Exchange Commission (SEC). *Shell Faces Groundbreaking Complaint for Misleading US Authorities and Investors on Its Energy Transition Efforts*, Global Witness (Feb. 1, 2023), <https://www.globalwitness.org/en/campaigns/fossil-gas/shell-faces-groundbreaking-complaint-misleading-us-authorities-and-investors-its-energy-transition-efforts/>.

<sup>283</sup> Complaint against BP in respect of violations of the OECD Guidelines, UK National Contact Point for the OECD Guidelines for Multinational Enterprises (Dec. 4, 2019), para 6.1, available at [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20191204\\_NA\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20191204_NA_complaint.pdf).

<sup>284</sup> *Big Oil’s Real Agenda on Climate Change 2022*. See also Kate Yoder, *Oil Companies Say They’re Going Green, But Their Investments Tell Another Story*, Grist (Sept. 9, 2022), <https://grist.org/accountability/oil-companies-marketing-greenwashing-report/>.

dollars from fossil fuel exploitation.<sup>285</sup> The world's largest 20 oil and gas companies together are projected to spend \$932 billion developing new oil and gas fields by 2030, and \$1.5 trillion by the end of 2040.<sup>286</sup> In sum, as the U.S. House Committee on Oversight and Reform put it, these fossil fuel companies try “to create the impression that they are taking ambitious steps to reduce emissions—without actually doing so.”<sup>287</sup>

85. By portraying themselves as willing participants in the energy transition and selectively highlighting the small fraction of their businesses they invest in renewables, fossil fuel companies create the false impression that they are changing their business models to address climate change. This practice obscures businesses' efforts to preserve the status quo of a profit-driven business model based on fossil fuel extraction and consumption, which is incompatible with the urgent action necessary to address the climate emergency.

#### 2.2.2.d Non-disclosure of climate risks

86. Climate-related financial disclosures are crucial to helping global economies understand the risks and adapt to the impacts of climate change. They are also vital for investors and consumers to understand the climate-related risks that may lower a business enterprise's future value, whether they are related to “physical risks” stemming from extreme weather events and potential property destruction, or “transition risks” related to the move to a lower-carbon economy, such as increased environmental regulations or technological innovations that may make certain assets or business models obsolete, or growing litigation risk.<sup>288</sup> Failure by business enterprises or financial institutions to disclose climate risks that are “material” to investors and customers constitutes climate-washing because it obscures the climate impacts of their operations.<sup>289</sup> There has been increased demand by business enterprises'

<sup>285</sup> Katharine Sanderson, *How Oil Companies' Soaring Profits Compare with Green-Energy Investments*, Nature (May 15, 2023), <https://www.nature.com/articles/d41586-023-01599-5>.

<sup>286</sup> Press Release, Global Witness, *World's biggest fossil fuel firms projected to spend almost a trillion dollars on new oil and gas fields by 2030* (April 12, 2022), <https://www.globalwitness.org/en/press-releases/worlds-biggest-fossil-fuel-firms-projected-to-spend-almost-a-trillion-dollars-on-new-oil-and-gas-fields-by-2030/>.

<sup>287</sup> Memorandum to Members of the Committee on Oversight and Reform, 117th Congress, House of Representatives, Investigation of Fossil Fuel Industry Disinformation (Sept. 14, 2022), p. 2, available at <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022.09.14%20FINAL%20COR%20Supplemental%20Memo.pdf>.

<sup>288</sup> For more detail on the physical and transition risks, see U.S. Environmental Protection Agency, *Climate Risks and Opportunities Defined* (last updated Nov. 13, 2023), <https://www.epa.gov/climateleadership/climate-risks-and-opportunities-defined#:~:text=There%20are%20two%20categories%20of,physical%20impact%20of%20climate%20change>. See also CIEL, *Trillion Dollar Transformation: Fiduciary Duty, Divestment, and Fossil Fuels in an Era of Climate Risk* (2016), pp. 5-7 (discussing categories of climate risk); UNEP et al, *Global Climate Litigation Report 2023 Status Review* (2023) (documenting increase in climate litigation, including against companies) [hereinafter, UNEP Global Climate Litigation Report 2023].

<sup>289</sup> Material risk is a common financial concept used to guide company disclosures. According to the Sustainability Accounting Standards Board (SASB), information is financially material if “omitting, misstating, or obscuring it could reasonably be expected to influence investment or lending decisions that users make on the basis of their assessments of short-, medium-, and long-term financial performance and enterprise value.” SASB Standards, *How does the definition of “materiality” in the SASB Standards compare to that of the ISSB Standards and that of other disclosure frameworks?*, <https://help.sasb.org/hc/en-us/articles/360060351771-How-does-the-definition-of-materiality-in-the-SASB-Standards-compare-to-that-of-the-ISSB-Standards-and-that-of-other-disclosure-frameworks->.

shareholders<sup>290</sup> and attempts by regulatory bodies in the EU and the US to disclose these risks,<sup>291</sup> and many enterprises now choose to do so voluntarily through standardized procedures.<sup>292</sup> But disclosure still lacks reliability and uniformity, and both coverage and quality of disclosures in Central and South America are below the global average.<sup>293</sup>

87. This inadequate disclosure is being challenged in courts. In Brazil, for example, a lawsuit has been filed against the national development bank and its investment arm for failing to include climate criteria in its Environmental and Social Policy. The complaint alleges that the bank does not have a procedure in place to assess the impact of its investments on the climate, even though it is a shareholder in high-emitting companies.<sup>294</sup> Obscuring material climate risks contributes to climate change because by not factoring in physical and regulatory risks of GHG-intensive operations, investors and the public overvalue dirty businesses at the expense of those that are making real efforts to reduce or mitigate their impacts on the climate.<sup>295</sup>

### **2.2.3 Corporate capture and undue influence on the legislative or political processes that seek to regulate the industries in which they operate**

88. Corporate capture and undue influence by industry occur when private actors attempt to influence public policy and regulation through “opaque or disproportionate means.”<sup>296</sup> These may include the use of legal mechanisms to influence decision-making processes through, for example, donating to electoral campaigns, providing research, or hosting receptions with the expectation of favorable decisions in exchange.<sup>297</sup> In addition, companies engaging in corporate capture and undue influence often oppose regulatory measures to curb GHG emissions and that would enable effective oversight. The consequences of government capture by industry are inadequate government oversight of the private

<sup>290</sup> In the U.S., so-called “shareholder activists” have been increasingly successful in influencing management decisions on climate and environmental issues through small equity stakes. Merel Spierings, *2023 Proxy Season Preview – Compromise and Conflict Ahead*, 2023, Harvard Law School Forum on Corporate Governance, <https://corpgov.law.harvard.edu/2023/03/09/2023-proxy-season-preview-compromise-and-conflict-ahead/>.

<sup>291</sup> The EU’s Corporate Sustainability Reporting Directive entered into force in January 2023. See Council and Parliament Directive 2022/2464, 2022 O.J. (L 322) (EU). In the US, the SEC has proposed climate-related disclosure requirements for US issuers. See Press Release, SEC, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors* (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46>.

<sup>292</sup> Press Release, Task Force on Climate-Related Financial Disclosures, *TCFD Report Finds Steady Increase in Climate-Related Financial Disclosures Since 2017* (Oct. 13, 2022) (republished by Report Advisor), available at <https://reportadviser.com/news/tcfd-report-finds-steady-increase-in-climate-related-financial-disclosures-since-2017>.

<sup>293</sup> Ernst & Young, *Global Climate Risk Disclosure Barometer* (2021), available at [https://www.ey.com/en\\_bh/climate-change-sustainability-services/risk-barometer-survey-2021](https://www.ey.com/en_bh/climate-change-sustainability-services/risk-barometer-survey-2021).

<sup>294</sup> The plaintiffs argue that this lack of policy violates Brazil’s commitments under the Paris Agreement and its national policy on climate change. *Conectas Direitos Humanos v. BNDES and BNDESPAR*, 1038657-42.2022.4.01.3400, Ninth Federal Civil Court of the Federal District (2022) (Brazil), available at: <https://climaticasechart.com/non-us-case/conectas-direitos-humanos-v-bndes-and-bndespar/>.

<sup>295</sup> See generally Madison Condon, *Market Myopia’s Climate Bubble*, Utah L. Rev. (2022), pp. 63-126.

<sup>296</sup> Transparency International, *Conflicts of Interest and Undue Influence in Climate Action, Putting a stop to corporate efforts undermining climate policy and decisions* (2021), p. 3, available at <https://shorturl.at/awQY4>.

<sup>297</sup> Francesco Bosso, Maíra Martini and Iñaki Albisu Ardigó, *Introduction to Undue Influence on Decision-Making*, Transparency International (Dec. 15, 2014), <https://knowledgehub.transparency.org/guide/topic-guide-on-undue-influence/5191>.

sector and an unfair advantage to industry in policy decisions.<sup>298</sup> In the climate context, this has translated into maintenance of the status quo of fossil fuel extraction and profit maximization, at the expense of necessary climate action.

#### a. Establishing a revolving door

89. One of the key types of conduct that constitutes corporate capture is the establishment of a “revolving door” between the companies in an industry and its regulatory bodies. This entails employees circulating between their corporate jobs and public office positions.<sup>299</sup> As the world becomes increasingly globalized, both domestic and overseas entities may be seen to influence government decision-making in this way.<sup>300</sup> This practice often results in a policy that is significantly influenced in favor of the private sector, where regulatory agencies intentionally or subconsciously prioritize the interests of those they regulate—their former employers—over the public.<sup>301</sup>
90. Examples include the long-standing relationship between the Dutch government and Shell, in the form of an official exchange program between Shell employees and governmental ministries dating back to the early 20<sup>th</sup> century. This link was observed to allow Shell to exert its influence on public policy, in areas such as taxation and investment treaties.<sup>302</sup> Similarly, Colombia’s large coal sector has enjoyed close ties with local and national governments, through a revolving door coupled with political campaign financing and public-private partnerships engaged in social programs or sector performance.<sup>303</sup> Some public servants with links to the mining sector and decision-making powers also

<sup>298</sup> In the U.S., the problem of capture is “persistent” as public interest groups lack industry’s resources. Namely, “[t]he linchpin to understanding agency capture is the insight that industry groups will generally have enormous organizational advantages over the dispersed and apathetic public when it comes to lobbying Federal agencies. With some regularity, industry groups can exploit that organizational advantage to pressure regulators to attend to their private interests at the expense of the public interest.” Statement of Nicholas Bagley, Hearing before the Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, U.S. Senate, 111th Congress 2<sup>nd</sup> Session, Serial No. J-111-105 (Aug. 3, 2010), available at <https://www.govinfo.gov/content/pkg/CHRG-111shrg64724/html/CHRG-111shrg64724.htm> [hereinafter Senate Hearing 111-905]. See also Robert Glicksman, *Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence*, GW Law Faculty Publications & Other Works (2010) [hereinafter *Regulatory Blowout*], p. 3 (noting that Mineral Management Service “was ‘captured’ by the oil industry, [which] made regulators particularly subject to pressure and influences from industry, and led to an appalling lack of energy in its efforts to protect against industry excesses.”).

<sup>299</sup> Transparency International, *Revolving Door* (last visited Oct. 19, 2023), <https://www.transparency.org/en/corruptionary/revolving-door>.

<sup>300</sup> For example, Canadian-funded consulting firms influenced and helped entrench coal extraction and loosen oversight and protective standards in Colombia’s mining code, and domestic subsidiaries of international giants such as Exxon have been active since the 1980s. Felipe Corral-Montoya, Max Telias, and Nicolas Malz, *Unveiling the political economy of fossil fuel extractivism in Colombia: Tracing the processes of phase-in, entrenchment, and lock-in*, Energy Research & Social Science 88 (2022), pp. 9, 14.

<sup>301</sup> See generally National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Report to the President, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, (2011) (discussing how corporate capture affected Mexican agencies’ regulatory oversight of offshore drilling in the run up to the Deepwater Horizon oil spill).

<sup>302</sup> Ilona Hartlief et al, *Still Playing the Shell Game*, at p. 42.

<sup>303</sup> Felipe Corral-Montoya, Max Telias, and Nicolas Malz, *Unveiling the Political Economy of Fossil Fuel Extractivism in Colombia: Tracing the Processes of Phase-in, Entrenchment, and Pock-in*, Energy Research &

had ties to the World Bank and Inter-American Development Bank, among other external partners.<sup>304</sup> In the United States, concerns of regulatory agency and Congressional capture by industry, enabled in part by the revolving door phenomenon, have been addressed by the Senate.<sup>305</sup> Civil society documented the movement between the LNG industry and government positions.<sup>306</sup> A revolving door between industry and its regulators reportedly contributed to regulatory failures leading up to the BP Deepwater Horizon disaster.<sup>307</sup> Examples of a widespread phenomenon, these strong connections and bargaining power have resulted in increased subsidies and fiscal incentives for the fossil fuel industry.<sup>308</sup> In addition, the revolving door between an industry and regulatory bodies may reinforce the idea that fossil fuel extraction is in the public interest.<sup>309</sup>

91. Similar dynamics are present in the agribusiness sector. JBS's principal shareholders and senior executives, the Batista family (via holding company J&F Investimentos),<sup>310</sup> reportedly have been involved in several corruption scandals for allegedly systematically bribing Brazilian politicians<sup>311</sup> and using the funds obtained through their bribery scheme to expand their operations outside of Brazil.<sup>312</sup> It has been reported that the family's political links and relationships with the government and the National Bank for Economic and Social Development (BNDES) have been essential to its growth.<sup>313</sup> With 20.81% shares ownership, BNDES "is the second-largest shareholder of JBS"<sup>314</sup> after J&F Investimentos,<sup>315</sup> and it is known to have provided financing to JBS for landmark acquisitions like Pilgrim's Pride.<sup>316</sup> Furthermore, JBS is known for financing presidential campaigns in Brazil.<sup>317</sup>

## b. Lobbying

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Social Science 88 (June 2022), p. 10 [hereinafter *Unveiling the Political Economy of Fossil Fuel Extractivism in Colombia*].

<sup>304</sup> *Id.* at 10.

<sup>305</sup> Senate Hearing 111-905.

<sup>306</sup> See generally Lee Fang & Steve Horn, Republic Report and Desmog, *Natural Gas Exports: Washington's Revolving Door Fuels Climate Change* (2014).

<sup>307</sup> Robert Glicksman, *Regulatory Blowout*, p. 26.

<sup>308</sup> Claudia Strambo et al., *Privileged Coal: The Politics of Subsidies for Coal Production in Colombia*, Stockholm Environment Institute, Working Paper 2018-01 (2018) [hereinafter *Privileged Coal*], pp. 14, 19.

<sup>309</sup> *Unveiling the Political Economy of Fossil Fuel Extractivism in Colombia*, at p. 9.

<sup>310</sup> See Forbes, Wesley Batista, <https://www.forbes.com/profile/wesley-batista/?sh=2a42d94c721a>.

<sup>311</sup> Former JBS Chairman Joesley Batista confessed to bribing over 1,800 politicians. See Ricardo Brito, *Brazil court suspends part of leniency deal for JBS holding firm*, Reuters (Sept. 11, 2017), <https://www.reuters.com/article/us-brazil-corruption-jbs-j-f-idUKKCN1BM2NL/>.

<sup>312</sup> Press Release, Office of Public Affairs, U.S. Department of Justice, *J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over \$256 Million to Resolve Criminal Foreign Bribery Case* (Oct. 14, 2020), <https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign>.

<sup>313</sup> Debtwire, *Profile: Batista Family* (Oct. 3, 2016), p. 2, available at [https://s3.eu-west-2.amazonaws.com/acuris-live/Batista%20Shareholder%20Profile\\_0.pdf](https://s3.eu-west-2.amazonaws.com/acuris-live/Batista%20Shareholder%20Profile_0.pdf).

<sup>314</sup> *Id.*, p.6.

<sup>315</sup> JBS, *Ownership and Corporate*, <https://ri.jbs.com.br/en/esg-investors/corporate-governance/ownership-and-corporate/>.

<sup>316</sup> Debtwire, *Profile: Batista Family*, p. 2.

<sup>317</sup> *Id.*

92. Another type of conduct involves lobbying by well-organized industrial entities and private actor groups. Fossil fuel industry trade organizations such as the American Petroleum Institute, the GCC, and the IPIECA pursue policy goals and support legislation that maintain the extraction status quo, delay a green transition to a less GHG-intensive economy, and hinder action addressing climate change.<sup>318</sup> Individual companies do the same. In 2020, for example, campaigners revealed that despite making the climate pledges detailed above, Shell and BP were still members of several trade organizations that actively lobby against climate policies in the U.S. and Australia.<sup>319</sup> These lobbying groups' political demands include, *inter alia*, subsidies, such as those to attract foreign investment and industrial development,<sup>320</sup> relaxed oversight, the inclusion of investor-state dispute settlement (ISDS) clauses in investment treaties,<sup>321</sup> and support for the unproven or risky mitigation measures detailed above such as carbon capture.<sup>322</sup>

#### 2.2.4 Misuse of judicial, quasi-judicial and other forms of dispute mechanisms

93. Some business enterprises also exploit judicial and quasi-judicial mechanisms to enforce a system that protects corporate interests at the expense of local rule of law and due process, environmental regulations, and human rights protections. This conduct, which includes the growing use of investor-state dispute settlement (ISDS) mechanisms and Strategic Lawsuits Against Public Participation (SLAPPs), involves “unjust, undemocratic, and dysfunctional process[es]” that prevent business enterprises from being held accountable for violations of climate and environmental regulations they have committed.<sup>323</sup>
94. Increasingly, when host States take climate action that allegedly adversely affects a foreign investor's returns, investors are using ISDS proceedings to sue the State for compensation, before unaccountable, often confidential arbitration panels.<sup>324</sup> This growing use of ISDS to challenge State measures designed

<sup>318</sup> See generally Robert J. Brulle, *Advocating inaction: a historical analysis of the Global Climate Coalition*, Environmental Politics 32:2 (2023); Sara Hastings-Simon, *Opinion: Beware of Climate Delay, Masquerading as Climate Action*, CBC (Sept. 10, 2020), <https://www.cbc.ca/news/canada/calgary/alberta-climate-delay-hyperloop-train-small-modular-reactors-1.5717438>; William F. Lamb et al, *Discourses of Climate Delay*, Glob. Sustainability (2020), p. 3.

<sup>319</sup> Lawrence Carter and Zach Boren, *Revealed: BP and Shell back anti-climate lobby groups despite pledges*, Unearthed and HuffPost (Sept. 28, 2020), <https://unearthed.greenpeace.org/2020/09/28/bp-shell-climate-lobby-groups/#:~:text=But%20Shell%20and%20BP%20E%2080%95%20the,and%20HuffPost%20investigation%20has%20found.>

<sup>320</sup> *Privileged Coal*, p. 9.

<sup>321</sup> Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry*, International Institute for Sustainable Development (2021), p. 33, available at <https://www.iisd.org/system/files/2022-01/investor%2080%93state-disputes-fossil-fuel-industry.pdf>.

<sup>322</sup> Chloé Farand and Joe Lo, *Oil and gas trade show' promotes carbon capture at COP27*, Climate Home News (Nov. 13, 2022), <https://www.climatechangenews.com/2022/11/13/oil-and-gas-trade-show-promotes-carbon-capture-at-cop27/>.

<sup>323</sup> David R. Boyd, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*, UN Doc. A/78/168 (2023) [hereinafter *Paying polluters*], para. 1.

<sup>324</sup> *Id.*, para. 16, 21, 23. See also IISD, CIEL, and Clinet Earth, *Investor-State Dispute Settlement (ISDS) Mechanisms And The Right To A Clean, Healthy, And Sustainable Environment* (2023), pp. 1-2, available at

to reduce GHG emissions or their drivers is another form of corporate obstruction of State regulation. Investment treaties may require that States pay foreign investors significant compensation awards, sometimes in the billions of dollars, burdening public finances.<sup>325</sup> The mere threat of arbitration claims, which can result in enormous awards,<sup>326</sup> and can consume millions of dollars in defense fees even when unsuccessful,<sup>327</sup> can discourage countries from taking measures necessary to avoid climate-induced harm. The possibility of ISDS claims therefore looms as a deterrent to some of the most ambitious and urgently needed climate measures, leading to regulatory chill.<sup>328</sup>

95. Fossil fuel companies are among the biggest users of investor-state arbitration,<sup>329</sup> and countries in Latin America and the Caribbean have been a main target.<sup>330</sup> There are numerous recent examples of fossil fuel companies lodging arbitration claims demanding massive compensation amounts in response to climate measures, such as those that accelerate the shut-down of coal-fired power plants or prohibit oil and gas licensing.<sup>331</sup> Such claims can force governments that take climate action to pay polluters, rather than making polluters pay for climate destruction.

96. SLAPPs are another tactic used directly by corporate actors to abuse the judicial system through filing civil lawsuits or criminal complaints against NGOs or environmental defenders with the aim of harassing and intimidating them. These lawsuits often drag out in order to drain NGOs' resources, as

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[https://www.ciel.org/wp-content/uploads/2023/06/Investor-State-Dispute-Settlement-Mechanisms-and-the-Right-to-a-Clean-Healthy-and-Sustainable-Environment\\_June-2023.pdf](https://www.ciel.org/wp-content/uploads/2023/06/Investor-State-Dispute-Settlement-Mechanisms-and-the-Right-to-a-Clean-Healthy-and-Sustainable-Environment_June-2023.pdf).

<sup>325</sup> Kyle Tienhaara & Lorenzo Cotula, *Raising the Cost of Climate Action?*, International Institute for Environment and Development (2020), pp. 19-20, 22. See also Jonathan Bonnitcha and Sarah Brewin, *Compensation Under Investment Treaties: What are the problems and what can be done?*, International Institute for Sustainable Development, Policy Brief (Dec. 2020).

<sup>326</sup> The UN Conference on Trade and Development (UNCTAD) records indicate that more than 100 ISDS claims filed have sought damages over \$1 billion. See UNCTAD, *Investment Dispute Settlement Navigator*, Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-dispute-settlement> (last modified Dec. 31, 2022). Moreover, “[t]he ISDS system has the highest average claim for damages and the highest average awards of any legal system in the world.” *Paying polluters*, UN A/78/168, para. 13 (citing OECD, “Investment treaties and climate change: the alignment of finance flows under the Paris Agreement”, background note for the seventh annual Conference on Investment Treaties (May 10, 2022)). See also *id.*, paras. 30-32 (discussing massive ISDS awards).

<sup>327</sup> *Paying polluters*, UN A/78/168, para. 42 (“Governments spend an average of \$5 million to defend ISDS claims, even when they are successful.”) (citing Matthew Hodgson, Yarik Kryvoi, and Daniel Hrecka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, British Institute of International and Comparative Law (2021)).

<sup>328</sup> *Paying Polluters*, UN A/78/168, para. 73 (The U.N. Special Rapporteur noted the ISDS’s system’s roots in colonialism and its effect of “detering, delaying and watering down States’ climate and environmental policy decisions. As concerning as the astronomical costs associated with ISDS arbitration are the chilling effects that threats of such proceedings have on climate and environmental action.”).

<sup>329</sup> UNCTAD, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, IIA Issue Note (2022), p. 23, available at [https://unctad.org/system/files/official-document/diaepcbinf2022d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf). Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry*, International Institute for Sustainable Development (2021), pp. 4-5, 8-12, 35-36.

<sup>330</sup> “States in Latin America have been subject to 327 ISDS claims, with a growing number from extractive industries, especially mining, oil and gas. In 62 per cent of these cases investors were successful, resulting in damages or negotiated settlements worth more than \$33 billion.” *Paying Polluters*, UN A/78/168, para. 8 (internal citations omitted).

<sup>331</sup> See, e.g., David Boyd, UN Special Rapporteur on Human Rights and the Environment, *Annex 2: Examples of ISDS Claims Launched in Response to Climate Actions*, Annex 2 to UN Doc. A/78/168 (2023).

well as to distract and deflect discussions on corporate social responsibility.<sup>332</sup> The Americas is one of the regions most affected in the world by the use of SLAPPs—of the 385 cases identified globally by 2021, 149 took place in the region.<sup>333</sup> SLAPPs regarding climate have been filed against civil servants and climate activists, seeking to disincentivize civil society from using the court system to accelerate climate action and require business enterprises to respect their legal obligations.<sup>334</sup>

97. Corporate conduct is driving climate change in significant ways, through both physical drivers (contributing to rising GHG emissions) and social drivers (using business enterprises' influence to mislead the public and delay climate action). Given the resulting human rights harms that come from these actions, States and business enterprises have duties to act to prevent, minimize and remediate industry conduct that drives climate change.

### 3. STATES HAVE A DUTY TO PREVENT, REGULATE, AND REMEDIATE INDUSTRY CONDUCT THAT DRIVES CLIMATE CHANGE

98. **States have a duty to do everything within their power to keep warming below 1.5°C.** As detailed above in Section 1, current levels of warming are adversely affecting human rights, and those impacts worsen with every fraction of degree of warming. Warming of 1.5°C is not safe for most people and natural ecosystems.<sup>335</sup> And if temperature rise exceeds 1.5°C, even temporarily, it would unleash further irreversible harm, with foreseeable catastrophic impacts for human rights and ecosystems.<sup>336</sup> Every ton of GHG emissions and every fraction of a degree of warming heightens the risk of irreversible harm to human rights and erodes adaptation capacity.<sup>337</sup> In the face of these foreseeable harms and their known causes, States have a duty to implement measures capable of rapidly halting the emissions driving climate change and enhancing human and natural resilience to withstand the changing climate. Doing so requires curbing the primary drivers of climate change: fossil fuel and agroindustrial activity. Climate science makes clear that we cannot keep warming below 1.5°C—and thereby avoid even further violations of human rights due to accelerating climate change—*unless* we immediately halt the expansion of fossil fuel production, accelerate the shut-down of existing fossil fuel production facilities and infrastructure, and cease deforestation. In the context of their human rights obligations, that incontrovertible reality compels States to adequately regulate the business enterprises pursuing climate-

<sup>332</sup> Annalisa Ciampi, UN Special Rapporteur on the Rights To Freedom of Peaceful Assembly and of Association, *Info Note On Slapps And FOAA Rights*, available at <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>.

<sup>333</sup> See generally Business & Human Rights Resource Centre, *SLAPPs in Latin America: Strategic Lawsuits against Public Participation in the Context of Business and Human Rights* (2022), available at [https://media.business-humanrights.org/media/documents/2022\\_SLAPPs\\_in\\_LatAm\\_EN\\_v7.pdf](https://media.business-humanrights.org/media/documents/2022_SLAPPs_in_LatAm_EN_v7.pdf).

<sup>334</sup> *Global Trends in Climate Change Litigation: 2022 Snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (2022), p. 23.

<sup>335</sup> IPCC 1.5°C SR TS, p. 44; IPCC 1.5°C SR Longer Report, Ch. 5 (“Sustainable Development, Poverty Eradication and Reducing Inequalities”), p. 447.

<sup>336</sup> IPCC AR6 WGII SPM, at B.3; see also IPCC AR6 WGII, p.vii (“The assessment underscores the importance of limiting global warming to 1.5°C if we are to achieve a fair, equitable and sustainable world.”), IPCC AR6 WGII TS, C.1.2.

<sup>337</sup> IPCC AR6 WGII TS, at C.1.2, D. 2.2.

destructive activities and thwarting effective climate action, and hold them accountable for the resultant harm.

99. **Climate change, driven by the actions and influences of a relatively small number of business enterprises, triggers State duties to respect, protect and remedy.** Given the link between environment and human rights,<sup>338</sup> this Court has made clear that “States must refrain from any practice or activity that denies or restricts access...to the requisites of a dignified life,” by causing or contributing to environmental damage,<sup>339</sup> and “use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment.”<sup>340</sup> To this end, States must, *inter alia*, regulate, supervise, and monitor activities that could potentially cause such harm, require and approve environmental impact assessments, mitigate harms “when environmental damage has occurred,”<sup>341</sup> and investigate and punish the conduct of actors who cause or contribute to such harm.<sup>342</sup> International human rights treaty bodies and experts as well as other regional human rights courts have likewise affirmed the duty of States to take adequate measures to curb environmental threats to human rights.<sup>343</sup> These include “govern[ing] the licensing, setting up, operation, security and supervision of the activity in question,” and “mak[ing] it obligatory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.”<sup>344</sup> As the IACHR has observed, it is a “priority for the States to guarantee access to justice and to reparation of environmental damage,” which entails the obligation to ensure “accessible, affordable, timely, and effective mechanisms to challenge those actions or omissions that may affect human rights due to climate change and environmental degradation...whether these actions come from the State or the behavior of business entities.”<sup>345</sup>

100. Given the undeniable impacts of climate change on human rights (*see* Section 1) and the demonstrable contribution of corporate conduct to those violations—both through the generation of

<sup>338</sup> IACtHR OC-23/2017, paras 47-69, 124.

<sup>339</sup> IACtHR OC-23/2017, para. 117.

<sup>340</sup> IACtHR OC-23/2017, para. 142.

<sup>341</sup> IACtHR OC-23/2017, para. 145.

<sup>342</sup> IACtHR OC-23/2017, para. 154.

<sup>343</sup> Human Rights Committee, General Comment No. 36, para. 62; Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, *Statement on human rights and climate change*, UN Doc. No. HRI/2019/1, 14 May 2020 [hereinafter UN Human Rights Treaty Bodies’ joint statement on human rights and climate change], para. 10; ECtHR, *Kolyadenko & Others v. Russia*, no. 17423/05, 28 Feb. 2012, paras. 157, 190 (measures include “put[ting] in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life”); Afr. Comm’n Human and Peoples’ Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Comm. No. 155/96, 27 Oct. 2001, para. 52.

<sup>344</sup> IACtHR OC-23/2017, para. 148 (citing ECtHR, *Case of Öneriyildiz v. Turkey* [GS], No. 48939/99. Judgment of November 30, 2004, para. 90, and ECtHR, *Case of Budayeva and Others v. Russia*, Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02. Judgment of March 20, 2008, para. 132.)

<sup>345</sup> IACHR Inter-American Standards, para. 251 (citing *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/74/161, 15 July 2019, para. 64.c).

emissions and obstruction of climate action (*see* Section 2)—States must refrain from supporting climate-destructive conduct of business enterprises, adequately regulate it, and guarantee effective remedy for violations. United Nations Treaty Bodies have clarified that States’ human rights obligations in relation to climate change require States to regulate business enterprises, “including by holding them accountable for harm they generate both domestically and extraterritorially.”<sup>346</sup> This duty applies with particular force to States in the Global North, whose corporate nationals have had, and continue to have, an outsized impact on climate change, including within the Americas.

### 3.1. State duties to respect, protect, and ensure effective remedy apply to human rights violations from corporate-driven climate change

101. **States must respect and protect human rights from harmful conduct by both public and private actors subject to their jurisdiction and control, including through adequate regulation.** The ACHR requires States to *respect* Convention-protected rights and freedoms by refraining from conduct that foreseeably causes or contributes to human rights violations.<sup>347</sup> Such conduct can include participating in, authorizing, or facilitating—through financing or other material support—the commission of an act that breaches international obligations,<sup>348</sup> including the well-established obligation not to cause or contribute to transboundary harm.<sup>349</sup> The ACHR also requires States to *protect*, or “ensure,” human rights,<sup>350</sup> by adequately regulating the conduct of third parties, including business enterprises, that poses a foreseeable risk of human rights violations.<sup>351</sup> According to the Court, States’ duty to regulate requires them to ensure that business enterprises adequately assess the human

<sup>346</sup> UN Human Rights Treaty Bodies’ joint statement on human rights and climate change, para 12.

<sup>347</sup> ACHR, art. 1. *See also* IACtHR OC-23/2017, para 117.

<sup>348</sup> *See* International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)* [hereinafter ILC, ARSIWA], Nov. 2001, p. 66, art. 16 cmt., para. 5 (“There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.”). Other bodies of law also recognize financing as a type of conduct that can incur liability when it has contributed to an act or omission resulting in harm. *See, e.g.*, S.T.J., REsp 995321, Realtor: Min. Benedito Gonçalves, 15.10.2007, R.S.T.J., 15.12.2009 (Brazil); UN Environment Programme & Research Bureau of People’s Bank of China, *Establishing China’s Green Financial System: Detailed Recommendation 13* (2015), p.8; U.N. Environment Programme, *Lenders and Investors Environmental Liability* (2016) (discussing several jurisdictions).

<sup>349</sup> *Infra*, Section 3.2.3.

<sup>350</sup> ACHR, art. 1 (protection of the right to life), art. 2 (obligation to adopt measures to give effect to rights), art. 11 (protection of the right to privacy); IACtHR OC-23/2017, paras. 104 (holding that State parties “have the obligations to respect and to ensure the rights recognized in [the ACHR] to all persons subject to their jurisdiction”), 108 (obligating States “to ensure the creation of the necessary conditions for the full enjoyment and exercise of [the right to life],” as “the realization of other rights depends on its protection.”).

<sup>351</sup> *See* IACtHR OC-23/2017, paras. 118-119 (the duty to ensure human rights “encompasses the duty to prevent third parties from violating the protected rights in the private sphere”); 146-151 (discussing the duty to regulate), 153 (noting the ICJ’s finding that States must exercise some form of administrative control over public and private agents). *See also* IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname*, Judgment, 25 November 2015, para. 224-226 [IACtHR, *Kaliña and Lokono Peoples v. Suriname*]; IACtHR, *Case of Ximenes Lopes v. Brazil*, Judgment of July 4, 2006 Merits, Reparations, and Costs), Ser C No. 149, para. 141-146 (regulation of health care service providers) [hereinafter *Ximenes Lopes v. Brazil Judgement*]; IACtHR, *Case of the Xucuru Indigenous People and its members v. Brazil*, Judgment of Feb. 5, 2018 (Preliminary objections, merits, reparations and costs), Serie C No. 346, para. 117 (interference with Indigenous communities’ enjoyment of land rights by third parties).

rights risks posed by their activities and take “effective and proportional measures” to mitigate these risks.<sup>352</sup> And while “[b]usinesses should adopt, at their own expense, preventive measures to protect [human rights],”<sup>353</sup> States have a duty to implement reasonable and appropriate measures to ensure human rights are protected.<sup>354</sup>

102. **Taking “all necessary measures”<sup>355</sup> to protect human rights from harmful business conduct requires that States do the utmost to obtain the desired results.** The due diligence with which States must comply with their Convention obligations<sup>356</sup> entails not only the adoption of appropriate rules and measures, which must have a reasonable likelihood averting the risk of violations,<sup>357</sup> but also “a certain level of vigilance in their enforcement ... applicable to public and private operators, such as the monitoring of activities undertaken by such operators.”<sup>358</sup> In protecting human rights in the face of foreseeable harm, States must “employ all means reasonably available to them” in order to reach the intended outcome “so far as possible.”<sup>359</sup> The levels of protection the measures afford must be proportional to the risks the activities pose,<sup>360</sup> mandating a stricter standard of due diligence for riskier activities.<sup>361</sup> Moreover, “measures considered sufficiently diligent at a certain moment may become not diligent enough in light...of new scientific or technological knowledge.”<sup>362</sup>

<sup>352</sup> IACtHR, *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil*, Judgment of July 15, 2020 (Preliminary objections, merits, reparations and costs), Serie C No. 407, para. 174.

<sup>353</sup> IACtHR, *Miskito Divers (Lemoh Morris Et Al.) v. Honduras*, Judgment of August 31, 2021, para. 51. [hereinafter *Miskito Divers* Judgment].

<sup>354</sup> IACHR Inter-American Standards, para. 89; *Di Sarno & Others v. Italy*, no. 30765/08, Eur. Ct. H.R., Judgment of Jan. 10, 2012, para. 110 (finding that States should ensure relevant authorities adopt “adequate measures to avoid real risks to human rights originating from the activities of businesses, of which they have or should have knowledge, from materializing.” Then, “once the possible impacts and specific risks are identified, the States should adopt, or where appropriate, request and ensure that the business involved implement, the corresponding corrective measure.”).

<sup>355</sup> IACtHR OC-23/2017, para. 104(g).

<sup>356</sup> IACtHR OC-23/2017, para. 123.

<sup>357</sup> Measures can only be deemed “appropriate” if they are “agreeable to reason and not arbitrary,” and thus have a reasonable likelihood of success. International Tribunal for the Law of the Sea [ITLOS], *Advisory Opinion on the Responsibilities and obligations of States with respect to activities in the Area*, Case no. 17, February 1st, 2011, ITLOS Rep. 2011, para. 228 [hereinafter, ITLOS Seabed Chamber AO], para. 228.

<sup>358</sup> International Court of Justice, *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Reports 14, para. 197. See also ITLOS Seabed Chamber AO, paras. 115, 239; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case no. 21, Advisory Opinion of April 2, 2015, ITLOS Rep. 2015, para 131; *The South China Sea Arbitration (The Republic of Philippines v. the People’s Republic of China)*, PCA Case no. 2013-19, Arbitral Award, ICGJ 495 (Arbitral Tribunal constituted under Annex VII of UNCLOS, 2016), para 944; ILC, *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, text and commentaries reproduced in Yearbook of the International Law Commission, 2001, vol. II, Part Two, commentary to Article 3, para. 10.

<sup>359</sup> ICJ, *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment of Feb. 26, 2007, 2007 I.C.J. Rep. 43, para. 430. See also ITLOS Seabed Chamber AO, para. 110.

<sup>360</sup> ITLOS Seabed Chamber AO, para. 117.

<sup>361</sup> *Id.* See also Timo Koivurova & Kritika Singh, *Due Diligence*, Max Planck Encyclopedia of Public International Law (2022), para. 32.

<sup>362</sup> ITLOS Seabed Chamber AO, para. 117 (emphasis added).

103. **The duty to protect requires States to guarantee effective remedy and reparations for human rights violations, including those perpetrated by business enterprises.** Effective remedy,<sup>363</sup> which has both procedural and substantive dimensions, involves (i) examining and addressing human rights violations as wrongful acts, thereby resulting in the punishment of those responsible, and (ii) ensuring reparations to victims for the negative consequences of those violations.<sup>364</sup> The procedural dimension of the right to remedy requires remedial mechanisms to be accessible to complainants and capable of providing suitable, effective, and prompt remedy. Under the ACHR,<sup>365</sup> in addition to being formally available<sup>366</sup> to all persons under the State's jurisdiction,<sup>367</sup> effective remedies must be suitable to adequately address a specific claim,<sup>368</sup> identify and adjudicate violations, and provide redress.<sup>369</sup> They must also be capable of execution to safeguard declared or recognized rights.<sup>370</sup> A judiciary's lack of independence,<sup>371</sup> incomplete treatment of claims,<sup>372</sup> vague orders,<sup>373</sup> or any other denial of justice can

<sup>363</sup> "States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy." Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 21 March 2011, UN Doc. No. A/HRC/17/31, [hereinafter UNGPs], Principle 25.

<sup>364</sup> IACtHR OC-23/2017, p. 49. See also *Ximenes Lopes v. Brazil*, paras. 147 ("[O]ne of the conditions to effectively guarantee the right to life and personal integrity is the compliance with the duty to investigate the violation of such rights, which is derived from Article 1(1) of the Convention.").

<sup>365</sup> The procedural dimension of the right to remedy has been extensively developed by the Inter-American jurisprudence under the interpretation of articles 8 and 25 of the ACHR in relation to articles 1.1 and 2 of the same instrument.

<sup>366</sup> IACtHR, *Case of Duque v. Colombia*, Judgment of Feb. 26, 2016 (Preliminary objections, merits, reparations and costs), Serie C No. 310 [hereinafter *Duque v. Colombia*], para. 149; IACtHR, *Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary objections, merits, reparations and costs), para. 177 [hereinafter *Saramaka People v. Suriname*]; IACtHR, *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin v. Colombia (Operation Genesis)*, Judgment of Nov. 20, 2013, Series C No. 270, para. 404.

<sup>367</sup> IACtHR, *Kaliña and Lokono peoples v. Suriname*, para. 239; IACtHR, *Case of Wong Ho Wing v. Peru*, Judgment of June 30, 2015 (Preliminary objection, Merits, Reparations, and Costs) [hereinafter *Wong Ho Wing v. Peru*], Series C No. 297, para. 196; IACtHR, *Case of Flor Freire v. Ecuador*, Judgment of Aug. 31, 2016 (Preliminary objection, merits, reparations and costs), Serie C No. 3159, para. 199.

<sup>368</sup> *Duque v. Colombia*, para. 149.

<sup>369</sup> *Id.*

<sup>370</sup> IACtHR, *Case of the Kaliña and Lokono peoples v. Suriname*, Judgment of Nov. 25, 2015 (Merits, Reparations and Costs), Series C, No. 309, para. 239 [hereinafter *Kaliña and Lokono Peoples v. Suriname*]; IACtHR, *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, Judgment of Nov. 19, 1999 (Merits), Series C No. 63, para. 237 [hereinafter *Case of the "Street Children"*]; IACtHR, *Wong Ho Wing v. Peru*.

<sup>371</sup> IACtHR, *Case of Ríos Ávalos et al. v. Paraguay*, Judgment of Aug. 19, 2021 (Merits, reparations and costs), Serie C No. 42964, para. 158. Additionally, pursuant to Article 25(2)(c) of the Convention, "the State's responsibility does not end when the competent authorities deliver a ruling or judgment, but also requires the State to ensure the means to execute final judgments in order to provide effective protection to the rights that have been declared. Specifically, the Court has indicated that execution of judgment must be governed by those standards that respect the principles, inter alia, of judicial protection, due process, legal certainty, judicial independence, and the rule of law."

<sup>372</sup> IACtHR, *Case of Barbani Duarte et al. v. Uruguay*, Judgment of Oct. 13, 2011 (Merits, Reparations, and Costs), Serie C No. 234, paras. 218-220. [hereinafter *Barbani Duarte et al. v. Uruguay*].

<sup>373</sup> IACtHR, *Case of Mejía Idrovo v. Ecuador*, Judgment of July 5, 2011 (Preliminary Objections, Merits, Reparations, and Costs), Serie C No. 228, para. 97-98.

render a remedy ineffective.<sup>374</sup> This Court has joined other international human rights bodies<sup>375</sup> in recognizing that the right to an effective remedy includes the right to a prompt, thorough, independent, and impartial investigation of human rights abuses,<sup>376</sup> including business-related abuses.<sup>377</sup> Such investigation should establish the truth and prosecute all those liable.<sup>378</sup> The UN Guiding Principles on Business and Human Rights reinforce this interpretation.<sup>379</sup> Finally, remedies should be prompt and diligent based on the nature of the violation, the vulnerability of the plaintiff, and the imminence or irreversibility of the harm.<sup>380</sup> The substantive dimension of the right to an effective remedy requires States to provide adequate redress, which can take, and may require, multiple forms, including but not limited to: (i) restitution, (ii) compensation, (iii) rehabilitation, (iv) measures of satisfaction, and (v) guarantees of non-repetition.<sup>381</sup> This Court has pioneered innovative forms of remedy and opened the door for a broad range of reparative measures.<sup>382</sup>

<sup>374</sup> IACtHR, *Case of Usón Ramírez v. Venezuela*, Judgment of November 20, 2009 (Preliminary Objections, Merits, Reparations, and Costs), Serie C No. 207, paras. 128, 130-132; IACtHR, *Case of Fornerón and daughter v. Argentina*, Judgment of April 27, 2012 (Merits, Reparations, and Costs), para. 107; *Barbani Duarte et al. v. Uruguay*, para. 232.

<sup>375</sup> ECtHR, *Aksoy v. Turkey*, Judgment of 18 December 1996, Reports of Judgments and Decisions of the ECtHR, 1996-VI, para. 98; ECtHR, *Aydın v. Turkey*, Judgment of 25 September 1997, Reports of Judgments and Decisions of the ECtHR, 1997-VI, para. 103.

<sup>376</sup> IACtHR, *Case of Blake v. Guatemala*, Judgment of January 24, 1998 (Merits), Series C no. 36, para 97; *Case of the "Street Children"*, para 225; United Nations Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15; UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005 [hereinafter UNGA Basic Principles and Guidelines on the Rights to a Remedy and Reparation], Doc No. A/RES/60/147, at II (Scope of obligations) (b). For more on the elements of the duty to investigate, see Livio Zilli, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide*, International Commission of Jurists, October 2018, pp. 84-116.

<sup>377</sup> UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, RES 17/4 (June 16, 2011) at Principle 25, commentary [hereinafter *Implementing the UN 'Protect, Respect and Remedy' Framework*].

<sup>378</sup> *Ximenes Lopes v. Brazil*, para 148.

<sup>379</sup> "[U]nless States take appropriate steps to investigate... business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless." *Implementing the UN 'Protect, Respect and Remedy' Framework*, Principle 25.

<sup>380</sup> IACtHR, *Case of San Miguel Sosa et al. v. Venezuela*, Judgment of Feb. 8, 2018, Serie C No. 348, para. 198.

<sup>381</sup> See UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005 [hereinafter UNGA Principles and Guidelines on the Rights to a Remedy and Reparation], Doc No. A/RES/60/147, paras. 18, 23. This remedial approach, which identifies five forms that reparations can take, is also reflected in the sections of the UN's Updated Principles to Combat Impunity that deal with the right to reparation and guarantees of non-recurrence. Although these forms of reparations have been developed mainly within the context of human rights violations for which states are responsible, the Working Group on Business and Human Rights recognizes that "they provide a useful reference point to understand what would constitute an effective, including rights-compatible, remedy under the Guiding Principles [UNGPs]." UN General Assembly, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. No. A/72/162, 18 July 2017 [hereinafter UNGA Report on Human Rights and Transnational Corporations], at p. 13.

<sup>382</sup> Article 63 (1) of the ACHR provides for a remedy and fair compensation paid to the injured party in cases where the Inter-American Court on Human Rights (IACtHR) finds that there has been a violation of a right or freedom

104. **These duties extend extraterritorially, to the foreseeable human rights impacts of climate-destructive corporate conduct, regardless of where those impacts occur.** As this Court has affirmed, “the jurisdiction of the States, in relation to the protection of human rights under the American Convention, is not limited to their territorial space.”<sup>383</sup> States must “refrain from interfering directly or indirectly with the enjoyment of [] rights by persons outside their territories,”<sup>384</sup> including by hindering other States’ fulfillment of their human rights obligations in their respective jurisdictions.<sup>385</sup> The duty to protect requires States to prevent activities within their jurisdiction or control from causing transboundary harm to human rights,<sup>386</sup> including by adequately regulating the conduct of third parties subject to their jurisdiction, to prevent them from violating rights when operating abroad.<sup>387</sup> This duty is consonant with the established obligation under international environmental law to prevent transboundary environmental harm, pursuant to which States may be held “responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority.”<sup>388</sup> States “must provide prompt, adequate and effective redress to the persons and States that are victims of transboundary harm resulting from activities carried out in their territory or under their jurisdiction, even if the action which caused this damage is not prohibited by international law.”<sup>389</sup>

105. **The duties to respect and protect human rights from corporate-driven climate change apply to both present and future generations.** Human rights law does not limit the guarantee of rights only to present generations.<sup>390</sup> As former Court President Judge Cançado Trindade articulated, “[h]uman solidarity manifests itself not only in a spatial dimension—that is, in the space shared by all the peoples of the world—but also in a temporal dimension—that is, among the generations who succeed each other in the time, taking the past, present and future altogether. It is the notion of human solidarity, understood in this wide dimension, *and never that of State sovereignty*, which lies on the basis of the whole contemporary thinking on the rights inherent to the human being.”<sup>391</sup> The individual and collective right

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protected by this Convention. This Convention also refers to “adequate compensation” in Article 10 and “compensatory damages” in Article 68.

<sup>383</sup> IACtHR OC-23/2017, para. 104(c) (“The jurisdiction of the States, in relation to the protection of human rights under the American Convention, is not limited to their territorial space.”)

<sup>384</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, U.N. Doc. E/C.12/GC/24, June 23 2017 [hereinafter CESCR General Comment No. 24], para. 29.

<sup>385</sup> IACtHR OC-23/2017, paras. 94, 101. *See also* CESCR General Comment No. 24, para. 29; Human Rights Committee, General Comment No. 36, paras. 22, 63; CEDAW, General Recommendation No. 34 on the Rights of Rural Women, U.N. Doc. CEDAW/C/GC/34, 2016 [hereinafter CEDAW General Recommendation No. 34], para. 13.

<sup>386</sup> IACtHR OC-23/2017 paras. 101-103, 133.

<sup>387</sup> CEDAW General Recommendation No. 34, para. 13; CESCR General Comment No. 24, paras. 30-32.

<sup>388</sup> IACtHR OC-23/2017, para. 103.

<sup>389</sup> IACtHR OC-23/2017, para. 103.

<sup>390</sup> *Maastricht Principles on The Human Rights of Future Generations*, 3 February 2023 (endorsed by 58 UN current and former mandate holders, and experts) [hereinafter *Maastricht Principles*], at pmb1. I, <https://giescr.org/en/our-work/on-the-ground/principles-of-the-human-rights-of-future-generations>.

<sup>391</sup> IACtHR, *Case of Bámaca-Velásquez v. Guatemala*, Judgment of Nov. 25, 2000, Ser. C No. 70, Separate Opinion of Judge A.A. Cancado Trindade, para. 23 (emphasis added).

to a healthy environment, specifically, “constitutes a universal value that is owed to both present and future generations”—a “fundamental right for the existence of humankind.”<sup>392</sup> Because future generations have as much right as past and present generations to equal enjoyment of all human rights, including that to a healthy environment, States must refrain from and protect against climate-destructive corporate conduct, which foreseeably discriminates against future generations.<sup>393</sup>

### **3.2 The Court should interpret the scope and content of State duties in relation to climate-destructive corporate conduct harmoniously with relevant principles and concurrent obligations under international law**

106. In interpreting what the ACHR requires of States vis-a-vis corporate conduct driving climate change and resultant harms, the Court should look to other relevant sources of international law. Consistent with Article 31(3)(c) of the Vienna Convention on the Law of Treaties,<sup>394</sup> the ACHR recognizes the principle of harmonious interpretation,<sup>395</sup> according to which an international legal instrument is to be read in light of other relevant rules of international law. Recognizing that the ACHR is part of a larger system of legal norms,<sup>396</sup> this Court has long taken an integrative approach, drawing on other applicable legal instruments and frameworks in interpreting Convention rights.<sup>397</sup> Pursuant to the *pro personae* principle, enshrined in the ACHR,<sup>398</sup> and the evolutive approach,<sup>399</sup> the Court treats international human rights agreements as “living instruments whose interpretation must keep abreast of the passage of time and current living conditions,”<sup>400</sup> and be as protective as possible of human rights.

107. The Court’s assessment of what States must do to prevent and remediate climate change-related human rights violations should be consistent with, and no less stringent than, States’ obligations under other relevant bodies and principles of international law, including those detailed below. The measures that will satisfy a State’s duties to respect and protect human rights from violations perpetrated by business enterprises will necessarily evolve with changing realities of a warming planet and our evolving scientific understanding of the best means of mitigating climate change. Only maximally

<sup>392</sup> IACtHR OC-23/2017, para. 23.

<sup>393</sup> See Maastricht Principles at Principle 6.

<sup>394</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force on 27 January 1980) [hereinafter the VCLT], at art 31(3)(c). See also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. Rep. 16, 1970, para. 53 (“An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”).

<sup>395</sup> ACHR, art. 29.

<sup>396</sup> IACtHR, *Advisory Opinion OC-16/99 on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Ser. A No. 16, Oct. 1, 1999, para. 115.

<sup>397</sup> IACtHR OC-23/2017, para. 55 (noting that the Court may avail itself to the principles, rights, and obligations of international environmental law given the “interdependence and indivisibility of human rights and environmental protection”). See also IACtHR, *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Judgment of November 28, 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 257 [hereinafter “*In Vitro Fertilization*” v. *Costa Rica*, para. 191 (interpreting right to life).

<sup>398</sup> ACHR, art. 29.

<sup>399</sup> IACtHR, *Advisory Opinion OC-18/03 on the Juridical Condition and Rights of the Undocumented Migrants*, Series A No. 18, September 17, 2003, para. 120

<sup>400</sup> “*In Vitro Fertilization*” v. *Costa Rica*, para. 254.

ambitious and scientifically-sound mitigation measures are consistent with States’ duties to respect and protect.

***3.2.1. The UNFCCC and Paris Agreement inform but do not define or limit State duties under human rights law to act on climate change***

108. **International climate law, the UNFCCC and the Paris Agreement, are relevant to the questions before the Court, but they do not and cannot fully answer those questions.** States’ human rights obligations with respect to climate change derive from human rights law. These obligations have bound States for decades, predating climate agreements, and their full scope is therefore not defined or limited by the UNFCCC and Paris Agreement. Moreover, the climate regime sets forth State duties inter-se—that is, horizontal obligations—and addresses the distribution of those duties among States, according to their common but differentiated responsibilities and respective capabilities. The principal focus of human rights law, in contrast, is State duties vis-a-vis individuals and communities—that is, vertical duties. The climate regime thus does not limit the scope or content of States’ human rights duties with respect to climate change.

109. **Instead, the objectives, principles, and obligations set forth in the UNFCCC and Paris Agreement build on and complement States’ concurrent duties under other bodies of international law,** including the fundamental duty under human rights law to prevent, minimize, and remediate foreseeable violations of human rights. The preambles of the UNFCCC and the Paris Agreement, and text of subsequent decisions thereunder, indicate that they were adopted against the backdrop of States’ existing legal obligations and established principles of international law, such as the transboundary harm principle.<sup>401</sup> As the Paris Agreement recognizes, human rights obligations must be respected in and through climate action.<sup>402</sup> Declarations made by some State parties upon ratification or accession to the UNFCCC reinforced the understanding that “signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law.”<sup>403</sup>

<sup>401</sup> United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107 (entered into force on 21 March 1994) [hereinafter UNFCCC], Preamble. (“Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”); Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, 3156 U.N.T.S. (entered into force on 4 November 2016) [hereinafter Paris Agreement], Preamble; *see also* UNFCCC, COP 27, Decisions 1/CP.27 and 1/CMA.4, 2022, at Preamble [Sharm el-Sheikh Implementation Plan].

<sup>402</sup> In the preamble to the Agreement, the Parties acknowledged that they “should, when taking action to address climate change, respect, promote and consider their obligations on human rights....” Paris Agreement, Preamble. *See also* Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, 16th session, 15 March 2011, Cancun Agreements, 1/CP.16, UN Doc. No. FCCC/CP/2010/7/Add.1, para. 8 (acknowledging for the first time in a UNFCCC decision that Parties should fully respect human rights in all climate actions).

<sup>403</sup> *See* Declarations submitted by Fiji, Kiribati, Nauru and Papua New Guinea, in UNFCCC, Declarations by parties, available at <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties>.

110. **In looking to the UNFCCC and Paris to inform its interpretation of human rights law, the Court should consider the overall objectives, principles, and obligations set forth in the climate regime, not isolated provisions.** To fulfill their human rights obligations with respect to the environment, States must, at minimum, comply in good faith, and in line with the principle of equity,<sup>404</sup> with their collectively-agreed objectives and existing obligations to protect against transboundary or global environmental harm, while continually reassessing whether those obligations suffice to ensure a clean, healthy, and sustainable environment.<sup>405</sup> The climate regime reflects the Parties’ understanding that the actions required to achieve the overarching objective of the UNFCCC, to prevent “dangerous anthropogenic interference with the climate system,” must evolve with the best available scientific knowledge.<sup>406</sup> This notion of climate action progressing over time is expressly enshrined in Article 4(3) of the Paris Agreement, which requires States’ “nationally determined contributions” to reflect their “highest possible ambition,” in view of common but differentiated responsibilities and respective capabilities and different national circumstances. The regime is thus fundamentally non-regressive, consistent with the principle of non-retrogression under human rights law, discussed *infra* para. 114
111. **Ultimately, human rights obligations require States to adopt more ambitious action than that pledged in Paris as the science evolves.**<sup>407</sup> This is especially so given mounting evidence that current levels of warming are already causing significant human rights impacts, and at a faster rate than anticipated by governments and the scientific community when the Paris Agreement’s targets were set.<sup>408</sup> The conspicuous silence of the climate agreements on fossil fuels, the principal driver of anthropogenic climate change, and resultant human rights violations,<sup>409</sup> illustrates that the UNFCCC and Paris Agreement are not exhaustive when it comes to State duties in relation to climate change.<sup>410</sup> Authoritative findings, including from the Secretariat of the UNFCCC, demonstrate the insufficiency of the Paris Agreement—and States’ implementation of its voluntary provisions—to prevent dangerous anthropogenic interference with the climate system, climate breakdown, violations of human rights and harm to natural ecosystems.<sup>411</sup> While fulfillment of a State’s obligations under the climate regime

<sup>404</sup> UNFCCC, Preamble.

<sup>405</sup> UN Special Rapporteur on Human Rights and the Environment, Framework Principles on Human Rights and the Environment, UN Doc. A/HRC/37/59, Jan. 24, 2018, Annex 1 at Principle 13.

<sup>406</sup> UNFCCC, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, Decision 1/CP.16, FCCC/CP/2010/7/Add.1, 2011[Cancun Agreement], para. 4.

<sup>407</sup> *Neubauer et al v. Germany*, Bundesverfassungsgerichtshof (BverfG) (Federal Constitutional Court), 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (Apr. 29, 2021) [*hereinafter* Neubauer Federal Constitutional Court Case], at para. 212 (noting that best available science could mean that the Constitutional requirements, in this instance in Germany, require setting emissions reductions targets to go beyond what is necessary to achieve the Paris temperature targets).

<sup>408</sup> IPCC WGII SPM, at B.1.2 (“The extent and magnitude of climate change impacts are larger than estimated in previous assessments (*high confidence*)”).

<sup>409</sup> Amnesty International, Public Statement: Urgent Fossil Fuel Phase-Out Critical to Protect Rights, April 4, 2022, available at <https://www.amnesty.org/fr/wp-content/uploads/2022/04/IOR4054052022ENGLISH.pdf>.

<sup>410</sup> See Harro van Asselt, “Governing fossil fuel production in the age of climate disruption: Towards an international law of ‘leaving it in the ground’”, *Earth System Governance*, Volume 9, 2021.

<sup>411</sup> See United Nations Environment Programme et al., *Emissions Gap Report 2022: The Closing Window — Climate crisis calls for rapid transformation of societies*, 2022; UNFCCC Subsidiary Body for Scientific and Technological Advice, Technical dialogue of the first global stocktake, FCCC/SB/2023/9, Sept. 8, 2023; United

represents a welcome step for required climate action,<sup>412</sup> in discharging its duties under the UNFCCC or Paris Agreement, a State does not thereby discharge its duties domestically and extraterritorially, under human rights law, to protect against the infringement of rights by climate change, including through the effective regulation of business enterprises.

### **3.2.2. International law requires States to align their climate action with the best available science**

112. **International climate law requires States to align the measures they take to regulate emissions-intensive business enterprises with the best available science.**<sup>413</sup> It is also a foundational principle of international climate agreements, which affirm that the measures required of States to avoid dangerous anthropogenic interference with the climate system should evolve with advancements in scientific understanding.<sup>414</sup> In the context of climate action, national courts in various jurisdictions have interpreted “best available science” to consist of the latest research and observations from organizations such as the IPCC and the WMO, the UN Environment Programme (UNEP) and expert independent research institutes, peer-reviewed academic research, and evidence from national scientific or specialist bodies.<sup>415</sup> As elaborated in Section 2 above, the climate science is unequivocal: It is not possible to keep global warming below 1.5°C without urgently reducing the production and use of fossil fuels, through cessation of new fossil fuel supply projects and early retirement of existing fossil fuel production facilities, and halting agroindustrial deforestation.

113. **International human rights law also requires States to rely on the best available science in designing and implementing protective measures to limit business enterprises’ climate-**

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Nations Environment Programme [UNEP] et al., *The Production Gap Report* (2021) [hereinafter *The Production Gap Report* 2021], available at: <http://productiongap.org/2021report>; United Nations Framework Convention on Climate Change Secretariat, *Nationally determined contributions under the Paris Agreement- Synthesis report by the secretariat*, FCCC/PA/CMA/2022/4, Oct. 26, 2022.

<sup>412</sup> See CESCR, *Climate Change and the International Covenant on Economic, Social and Cultural Rights*, Statement, Oct. 8, 2018, para. 3.

<sup>413</sup> See United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3 (entered into force on 16 November 1994) [hereinafter UNCLOS], at art. 61(2), art. 119 (requiring States to be guided by the “best scientific evidence available” in formulating measures for conserving living marine resources); Convention for the protection of the marine environment of the North-East Atlantic, 22 September 1992, 2354 U.N.T.S. 67 (entered into force on 25 March 1998) [hereinafter OSPAR Convention], at art. 2 and Annex I; Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79 (entered into force on 29 December 1993) [hereinafter the CBD], at art. 12 (c) (requiring States to “promote and cooperate in the use of scientific advances in biological diversity research in developing methods for conservation and sustainable use of biological resources”); Convention on the conservation of migratory species of wild animals, 23 June 1979, 1651 U.N.T.S. (entered into force on 1 November 1983) [hereinafter Convention on Migratory Species], art. III(2) (providing that the “best scientific evidence available” should inform decisions on whether to list a migratory species as endangered and thus subject to special protections under the Convention).

<sup>414</sup> UNFCCC, arts. 2 and 4(2)(d); Paris Agreement, pmbi; Glasgow Climate Pact, FCCC/PA/CMA/2021/10/Add.1, March 8, 2022, para. 1.

<sup>415</sup> *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment (Sup. Ct. Neth. Dec. 20, 2019) (Neth.) [hereinafter *Urgenda* Supreme Court Case], paras. 2.1, 4.1-4.8; Administrative Court of Berlin, 31 October 2019, Backsen and Others (German Family Farmers) v. Federal Republic of Germany, Judgment, VG 10 K 412.18 (unofficial translation), pp. 19, 20; *Neubauer* Federal Constitutional Court Case, at pp. 18-24.

**destructive conduct.**<sup>416</sup> The Universal Declaration of Human Rights provides that “everyone has the right to ... share in scientific advancement and its benefits,”<sup>417</sup> and the International Covenant on Economic, Social, and Cultural Rights—ratified by 171 States—recognizes the right of everyone “to enjoy the benefits of scientific progress and its applications.”<sup>418</sup> This right requires States to “align [...] government policies and programmes with the best available, generally accepted scientific evidence.”<sup>419</sup> U.N. human rights treaty bodies have relied on the IPCC reports in setting out States’ duties to avert the threat of climate change.<sup>420</sup> Aligning policies with what science shows is necessary to avoid even more catastrophic levels of warming not only requires States to do more to prevent climate-destructive corporate conduct through effective regulation. It also requires States to stop affirmatively supporting, enabling, and facilitating such conduct through policies and practices that authorize, incentivize, or finance such conduct, such as through direct and indirect subsidies for fossil fuel production and agroindustrial activity.

**114. Ensuring that protective measures reflect the best available science is also consistent with the principle of non-retrogression.**<sup>421</sup> The obligation of non-retrogression, which the Court applies,<sup>422</sup>

<sup>416</sup> IACtHR OC-23/2017, para. 172 (citing the International Law Commission, *Commentaries on the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, Yearbook of the International Law Commission 2006, vol. II, Part Two (A/61/10), Principle 5, paras. 1, 2 and 5); *see also e.g.* ECtHR, *Rees v. the United Kingdom*, Application No.9532/81, Judgment of October 17, 1986, para. 47; ECtHR, *Cossey v. The United Kingdom*, Application no. 10843/84, Judgment of September 27, 1990, para. 40; ECtHR, *Fretté v. France*, Application no. 36515/97, Judgment of May 26, 2002, para. 42; *cf.* ECtHR, *Oluic v. Croatia*, Application No. 61260/08, Judgment of August 20, 2010, Judgment, paras. 29-31. *See also Urgenda* Supreme Court Case, para. 5.4.3 (“According to ECtHR case law, an interpretation and application of the ECHR must also take scientific insights and generally accepted standards into account.”).

<sup>417</sup> UNGA, Universal Declaration of Human Rights, UN Doc. No. 217 A (III), 10 December 1948 [hereinafter UDHR], at art. 27(2).

<sup>418</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (entered into force on 3 January 1976) [hereinafter ICESCR], at art. 15(1)(b); Committee on Economic, Social and Cultural Rights, *General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. No. E/C.12/GC/25, April 30, 2020 [hereinafter CESCR General Comment No. 25], paras. 52, 83.

<sup>419</sup> CESCR General Comment No. 25, para. 52; *accord* Marcos Orellana (Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes), *Right to science in the context of toxic substances*, UN Doc. No. A/HRC/48/61, July 26, 2021 [hereinafter SR on Toxics, Right to Science report], para. 97.

<sup>420</sup> *See* Human Rights Committee, Daniel Billy et al. v Australia (Torres Strait Islanders Petition), Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019, September 22, 2022, U.N. Doc. CCPR/C/135/D/3624/2019 [hereinafter *Billy et al. v Australia*], Annex IV (Individual opinion of Committee Member Gentian Zyberi (concurring)), para. 5 (finding States should act with due diligence based on the best science when taking mitigation and adaptation action); *Chiara Sacchi et al. v. Argentina*, Committee on the Rights of the Child, Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019, CRC/C/88/D/104/2019, Oct. 8, 2021 [hereinafter *Chiara Sacchi et al. v. Argentina*], para. 3.8; UN Human Rights Treaty Bodies’ joint statement on human rights and climate change, paras. 2, 5, 6.

<sup>421</sup> UDHR, art. 30; ICESCR at art. 2(1); CESCR, General Comment No. 3 on the Nature of States Parties’ obligations (Art. 2, Para. 1, of the Covenant), UN Doc. E/1991/23, December 14, 1990, para. 9.

<sup>422</sup> IACtHR, *Case of Vera Rojas et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Serie C No. 439, Oct. 1, 2021, para. 96. *See also* IACtHR, *Case of Cuscul Pivaral et al. v. Guatemala*, Judgment (Preliminary objection, merits, reparations and costs), August 23, 2018, para. 143 (Corroborating the decision of the

prohibits States from deliberately reducing the level of protection afforded a right.<sup>423</sup> It is also reflected in the Paris Agreement, which requires States' progressive realization of their climate commitments.<sup>424</sup> In the face of an increasing threat from climate change, the failure to continuously increase the level of ambition, diligence, and timeliness with which States respond to and regulate climate-destructive industry conduct is retrogressive, and thus inconsistent with international law.<sup>425</sup> Rather, States must align their measures with the most up-to-date climate science, and, accordingly, require business enterprises to make rapid and continuous progress on reducing production and use of fossil fuels (and thereby their corresponding emissions), and halting the destruction of natural carbon sinks (*see* Section 3.3.1)

### ***3.2.3. The duty not to cause transboundary harm obliges States to prevent extraterritorial climate impacts of industrial activity within their jurisdiction or control***

115. **The duty of States to prevent transboundary harm constitutes customary international law and requires States not to knowingly allow their territories to be used “for acts contrary to the rights of other States,” as confirmed by the International Court of Justice.**<sup>426</sup> Importantly, that duty extends to protection against the extraterritorial effects of the activities of both public and private actors subject to a State's jurisdiction or control.<sup>427</sup> Furthermore, States must refrain from and prevent acts that “deprive another State of the ability to ensure that the persons within its jurisdiction may enjoy and exercise their right.”<sup>428</sup> The duty has long been understood to encompass environmental pollution that crosses territorial boundaries.<sup>429</sup> So while States may have a right to exploit their own resources, that

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of the UN Committee on Economic, Social and Cultural Rights (CESCR) affirming that “any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the [International Covenant on Economic, Social and Cultural Rights] and in the context of the full use of the maximum available resources”; See IACtHR, *Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller”) v. Perú*, Judgment (Preliminary Objection, Merits, Reparations and Costs), July 1, 2009, at art. 103 (deciding that “in order to evaluate whether a regressive measure is compatible with the American Convention, it is necessary to ‘determine if it was justified by strong reasons’”).

<sup>423</sup> See *The Future We Want*, outcome document adopted by the Rio+20 United Nations Conference on Sustainable Development, Brazil, 2012, available at <https://sustainabledevelopment.un.org/futurewewant.html>; *Robinson Township v. Commonwealth of Pennsylvania* (Pennsylvania Supreme Court) [USA], 83 A.3d 901, 2013.

<sup>424</sup> Paris Agreement, arts. 3, 4.3.

<sup>425</sup> The IACHR and REDESCA recognize the principles of progressivity and non-regression as fundamental for the realization of economic, social, cultural, and environmental rights and for the fulfillment of commitments assumed under international human rights and environmental law instruments in force. See *Climate Emergency: Scope of Inter-American Human Rights Obligations*, Resolution 3/2021 [hereinafter IACHR & REDESCA *Climate Emergency* report], at B (“Considerations”).

<sup>426</sup> ICJ, *The Corfu Channel Case (United Kingdom v. Albania)*, Judgment of April 9, 1949 (Merits), I.C. J. Reports 1949, p. 22.

<sup>427</sup> IACtHR OC-23/2017, para. 5, 101-104; Human Rights Committee, General Comment No. 36, para. 22.

<sup>428</sup> IACtHR OC-23/2017, para. 101.

<sup>429</sup> See UN Conference on the Human Environment held in Stockholm, 5-16 June 1972, *Stockholm Declaration on the Human Environment*, UN Doc. No. A/CONF.48/14/Rev. 1, 3 (1973), UN Doc. A/CONF.48/14, 2, Corr. 1 (1972), reprinted in 11 I.L.M. 1416 (1972) [hereinafter *Stockholm Declaration*], at Principle 21; UN Conference on Environment and Development held in Rio de Janeiro, 3-14 June 1992, *Rio Declaration on Environment and Development*, UN Doc. No. A/CONF.151/26/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992). [hereinafter *Rio Declaration*], at Principle 2. See also *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1941) (concerning

right is checked by States' duty not to knowingly cause "damage to the environment of other States or of areas beyond the limits of national jurisdiction,"<sup>430</sup> which necessarily includes the climate, atmosphere, high seas, and other global commons. Equally, States have a duty to regulate their corporate nationals' extraterritorial conduct, to ensure that those corporations do not cause harm through their operations abroad, and to hold them accountable when they do. That duty to regulate and provide access to remedy applies with particular force to the Global North home States of many fossil fuel and agribusiness corporations operating in the Americas, especially Central and South America (see Section 2). Those Global North States must prevent the climate-destructive conduct of their corporate nationals—including their subsidiaries and affiliates—in the Global South, which contributes to human rights violations both on the frontlines and fencelines of their operations, and through the accelerating impacts of climate change.

116. **The prevention and regulation of transboundary environmental pollution require international cooperation in the development and implementation of regulatory and governance regimes to respond to threats,<sup>431</sup> including those posed by industry.** Such international cooperation is critical to not only averting and mitigating environmental harm but also protecting affected human rights. Indeed, Principle 13 of the Framework Principles on Human Rights and the Environment, produced by the U.N. Special Rapporteur on Human Rights and the Environment, sets out that States should cooperate to establish, maintain, and enforce effective international legal frameworks in order to prevent, reduce, and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.<sup>432</sup> Such frameworks must address the accountability gap concerning transnational enterprises, largely from the Global North. As beneficiaries of gross power imbalances, those enterprises often evade judicial scrutiny<sup>433</sup> through complex corporate structures, opaque ownership and layered legal personalities. They are also often insulated from regulation and remedial obligations by investment protection regimes that afford foreign investors access to investor-state arbitration to challenge State measures that an investor alleges impose costs or infringe on its returns.<sup>434</sup>

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fumes from a Canadian smelter were crossing the border and damaging U.S. citizens and property); ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Rep. 242, July 8, 1996 (I) [hereinafter ICJ Nuclear Weapons Advisory Opinion], para. 29 (observing that the duty to not cause transboundary environmental harm is "now a part of the corpus of international law relating to the environment.")

<sup>430</sup> Stockholm Declaration at Principle 21, Rio Declaration at Principle 2.

<sup>431</sup> Office of the United Nations High Commissioner for Human Rights, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, healthy and Sustainable Environment - Individual Report No. 9 on global and regional environmental agreements* (Prepared for the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment), UN Doc. A/HRC/25/53, Dec. 30 2013, para. 148 (citing North American Environmental Cooperation Agreement, Espoo Convention, etc.)

<sup>432</sup> John Knox (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/HRC/37/59, January 24, 2018, at Annex ("Framework principles on human rights and the environment"), Principle 13.

<sup>433</sup> See generally, Hassan M Ahmed, *The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States*, 70:2 The American Journal of Comparative Law 227 (2022).

<sup>434</sup> See generally, David Boyd (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *Paying polluters: the catastrophic consequences of investor-*

117. **Fossil fuel production and land conversion for agribusiness cause transboundary environmental harm and result in human rights violations through their foreseeable GHG emissions.** Cross-border impacts occur whether those emissions are released within a State’s borders—for instance, when fossil fuels are extracted and forests cleared within a State’s own territory—or outside of them, as a foreseeable and inevitable result of activity further up or down a product’s supply chain, as when oil, gas, or coal produced is later used as intended. Indeed, the global nature of the climate system means that these activities’ acceleration of rising temperatures are not limited to the territories where they are carried out, but have transboundary and worldwide effects. The consequences of rising temperatures (such as catastrophic tropical storms, sea level rise, and extreme heat, etc.) materialize both within and outside a State’s borders (*See* Section 1.1.1 and 2.1.1).

### 3.2.4. *The precautionary principle requires urgent action capable of averting risks to human rights*

118. **States’ climate action must be informed by the precautionary principle, which calls for preemptive regulation or action when there is no conclusive evidence of a particular risk scenario, when the risk is uncertain, or until the risk is disproved.**<sup>435</sup> The principle is widely considered part of customary international law in the environmental field based on “the importance of preventive action in environmental governance.”<sup>436</sup> International human rights bodies have also endorsed and elaborated on the precautionary principle, recognizing its relevance and role in preventing violations of the right to life and other fundamental human rights.<sup>437</sup> This Court has also explicitly held that States must act in accordance with a precautionary approach in order to protect the rights to life and to personal integrity “where there are *plausible indications* that an activity could result in severe and irreversible damage to the environment.”<sup>438</sup>

119. **A lack of scientific or technical certainty about the full extent or scope of a risk is no excuse for delaying action or relying on speculative measures in lieu of proven approaches that pose less risk of human rights violations.** Consistent with the precautionary principle, States must take “effective” measures to ensure that business enterprises avoid the risk of human rights violations due

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*State dispute settlement for climate and environment action and human rights*, N Doc. No. A/78/168, 13 July 2023. *The American Journal of Comparative Law*, 2022.

<sup>435</sup> Patricia Birnlie, Alan Boyle & Catherine Redgwell, eds., *International Law and the Environment*, Oxford University Press, 3d, 2009, pp. 604-07. See Rio Declaration at Principle 15; OHCHR, Frequently Asked Questions on Human Rights and Climate Change, Fact Sheet No. 38, at p. 40.  
[https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38\\_FAQ\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf)

<sup>436</sup> Anja Lindroos & Michael Mehling, *From Autonomy to Integration? International Law, Free Trade and the Environment*, 77 *Nordic J. of Intl. L.*, 2008, at pp. 253, 265 (and references therein). Already decades ago, scholars argued that the precautionary principle “ha[d] evolved into a general principle of environmental protection at the international level.” See James Cameron, “*The Status of the Precautionary Principle in International Law*,” in Timothy O’ Riordan & James Cameron, eds., *Interpreting the Precautionary Principle* (London, Earthscan Publications), 1994, at p. 262 (and references therein).

<sup>437</sup> See, e.g., Human Rights Committee, General Comment No. 36, para. 62 (noting that States should “pay due regard to the precautionary approach.”); IACtHR OC-23/2017, para. 180 (finding States must “act diligently to prevent harm” to human rights and “act with due caution to prevent possible damage”).

<sup>438</sup> IACtHR OC-23/2017, para. 180.

to climate change.<sup>439</sup> To be effective, the measures States take within the scope of their powers must be reasonably regarded as capable of mitigating those risks.<sup>440</sup> The appropriate measures needed under a precautionary approach, this Court has pointed out, “may change over time, for example, in light of new scientific or technological knowledge.”<sup>441</sup> But it is clear from the science today that urgent action is required to effectively avert the risk of further climate change-induced human rights violations. In the face of the climate crisis, as the UNFCCC holds, “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing [prevention and mitigation] measures.”<sup>442</sup> Any lingering uncertainty about exactly where or how climate change-related violations will manifest or precisely at what speed cannot justify delaying adoption of available measures that have a reasonable likelihood of reducing GHG emissions and thereby helping avert rights violations.<sup>443</sup> When an activity can only increase the risk of a certain kind of adverse impact, never decrease it, preventive measures should be taken even if the precise extent of that added risk is uncertain. This is the case for new oil and gas development. Even if the precise quantity of oil and gas that will be produced at a given site is uncertain, the inevitability of emissions from any oil and gas produced, when used as intended, means that climate impacts must be considered and appropriate measures taken to prevent or mitigate them, at the earliest possible stage.

120. **Moreover, in responding to a reasonably foreseeable or known risk, the precautionary principle obliges States to prioritize measures that present a lower potential to cause harm.**<sup>444</sup> As the IPCC<sup>445</sup> and human rights authorities<sup>446</sup> have recognized, measures taken in response to climate

<sup>439</sup> *Id.*

<sup>440</sup> ECtHR, *Tătar v. Romania*, Application no. 67021/01, Judgment, January 27, 2009, para. 108 [hereinafter *Tătar v. Romania*].

<sup>441</sup> IACtHR OC-23/2017, para. 142

<sup>442</sup> UNFCCC, art. 3(3).

<sup>443</sup> *Urgenda* Supreme Court Case, paras. 5.3.2, 5.6.2 (holding that the State had a duty to act to address the risk of climate-induced harm even if it was uncertain whether the harm will occur); *Neubauer* Federal Constitutional Court Case, paras. 229, 247 (reiterating that protecting the rights of future generations includes not delaying action especially given the irreversibility of climate change, and that precautionary measures must be taken to manage the anticipated future reduction burdens in accordance with respect for fundamental rights).

<sup>444</sup> IACtHR OC-23/2017, at paras. 130, 133, 142, 180; *see also Tătar v. Romania*, paras. 108, 109.

<sup>445</sup> *See, e.g.,* IPCC AR6 WGII SPM B.5.4, SPM-19 (“Risks arise from some responses that are intended to reduce the risks of climate change, including risks from maladaptation and adverse side effects of some emission reduction and carbon dioxide removal measures (*high confidence*).”).

<sup>446</sup> *See* Ian Fry (Special Rapporteur on the promotion and protection of human rights in the context of climate change), *Report on the promotion and protection of human rights in the context of climate change*, U.N. Doc. A/78/255, July 28, 2023, para. 16 (asserting that “[n]ew mitigation technologies associated with atmospheric changes and geoengineering also have the potential for significant human rights impacts”); Ian Fry (Special Rapporteur on the promotion and protection of human rights in the context of climate change), *Initial planning and vision for the mandate*, UN Doc. No. A/HRC/50/3, June 24, 2022, paras. 52, 53 (noting that proposed technologies, such as CDR, stratospheric aerosol injection, and marine cloud brightening all have “potential negative impacts on the enjoyment of human rights” and that each “either currently contributes to human rights infringement or has the potential to infringe on the rights of individuals and communities”); David Boyd (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, July 15, 2019, U.N. Doc. A/74/161, para 83 (“Some proposed geoengineering strategies to mitigate climate change involve the large-scale manipulation of natural systems through measures such as fertilizing the oceans with iron, installing mirrors in outer space to reflect solar radiation, or shooting aerosols into the atmosphere (imitating the effects of

change may themselves pose risks to or harm people and the environment, underscoring the obligation of States to “respect, promote and consider their respective obligations on human rights”<sup>447</sup> in all climate action. States may not forgo available measures to ensure business enterprises rapidly reduce GHG emissions and halt the destruction of natural carbon sinks, or otherwise allow those enterprises to continue to pollute, in reliance on technologies that are unproven at scale, not currently deployable, and that pose new and independent risks to the environment and human rights. Some national courts have cited the precautionary principle in striking down States’ reliance on future measures they deemed were too speculative to justify delaying the implementation of reliable near-term action,<sup>448</sup> and have recognized uncertainty regarding the feasibility or impact of technologies like large-scale carbon dioxide removal.<sup>449</sup>

### ***3.2.5 Intergenerational equity precludes delaying effective regulation of business enterprises’ climate-destructive conduct***

121. Intergenerational equity demands a just balance and non-discrimination between the needs of present and future generations. The opening words of the UN Charter reflect the duty of present generations to protect future generations,<sup>450</sup> and since its adoption, the principle of intergenerational equity has been reaffirmed, elaborated, and operationalized in foundational documents setting forth the principles of international environmental law.<sup>451</sup> The principle has also been expressly incorporated in at least 44 legally-binding international agreements relating to the environment and climate,<sup>452</sup>

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large volcanic eruptions). These untested technological approaches could have massive impacts on human rights, severely disrupting ocean and terrestrial ecosystems, interfering with food production and harming biodiversity. These types of geoengineering strategies should not be used until their implications are much better understood”.); see also E. Tendayi Achiume (Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance), *Report of the Special Rapporteur on Ecological crisis, climate justice and racial justice*, UN Doc. No. A/77/549, October 25, 2022, para. 65 (noting that climate response measures potentially pose significant risks to human rights).

<sup>447</sup> Paris Agreement at Preamble.

<sup>448</sup> See, e.g., *Urgenda* Supreme Court Case, para. 7.2.5.

<sup>449</sup> See, e.g., Neubauer Federal Constitutional Court Case, paras. 222, 227; Supreme Court of Ireland, *Friends of the Irish Environment CLG v. the Government of Ireland*, Appeal No. 205/19, July 31, 2020 [hereinafter *Friends of the Irish Environment Case*], paras. 3.4, 6.46-6.47; see also England and Wales High Court of Justice - Administrative Court, *Friends of the Earth Limited et al. v. Secretary of State for Business, Energy and Industrial Strategy*, Case no. CO/126/2022, CO/163/2022, CO/199/2022, July 18, 2022 [hereinafter *Friends of the Earth UK case*], para. 250.

<sup>450</sup> See United Nations, *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI (entered into force on 24 October 1945), at Preamble. (stating “[w]e the Peoples of the United Nations determined to save succeeding generations from the scourge of war.”).

<sup>451</sup> Stockholm Declaration at Principle 1 (Providing that all people have “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”), Principle 2 (“The natural resources of the earth, including the air, water, land, flora and fauna . . . must be safeguarded for the benefit of present and future generations . . . .”); Rio Declaration at Principle 3 (“The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”).

<sup>452</sup> See CIEL, Submission to the UN Special Rapporteur on Human Rights and the Environment on the environment and the rights of the child, p. 3, Annex 2 (31 October 2017), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf> (listing 44 international environmental agreements with explicit references to intergenerational equity).

including the UNFCCC and the Paris Agreement,<sup>453</sup> and has been widely recognized by international and domestic courts,<sup>454</sup> including multiple ICJ decisions.<sup>455</sup>

122. Respect for and protection of intergenerational equity requires States and individuals to safeguard “[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems,” for “the benefit of present and future generations through planning or management, as appropriate.”<sup>456</sup> According to the Maastricht Principles on the Human Rights of Future Generations, the intergenerational discrimination from which future generations must be free includes but is not limited to: “i. The waste, destruction, or unsustainable use of resources essential to human life; ii. Shifting the burden of responding to present crises to future generations; and iii. According less value to future lives and rights than the lives and rights of present generations, including discounting the impacts and burdens of present conduct on the lives and rights of future generations.”<sup>457</sup>

**3.2.6. International law requires States to ensure meaningful and informed public participation when shaping every step of climate action, including regulation and remediation of climate-destructive business conduct**

123. **The duty to ensure public participation is enshrined in different international and regional instruments<sup>458</sup> and has been widely recognized in national and international jurisprudence.<sup>459</sup>** States must ensure that climate norms, policies, and actions are created “in a transparent and participatory manner with all social actors ensuring that climate actions do not adversely affect people’s rights, the possibility of submitting observations by appropriate means and of contesting decisions through judicial or administrative means.”<sup>460</sup>

<sup>453</sup> UNFCCC, at art. 3(1) (“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”). Paris Agreement, Preamble. (“Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to [. . .] intergenerational equity”).

<sup>454</sup> See, e.g. *Neubauer* Federal Constitutional Court Case, paras. 142-146 (finding that the “duty to afford protection against risks to life and health can also establish a duty to protect future generations” from burdens “being unilaterally offloaded onto the future”).

<sup>455</sup> See ICJ Nuclear Weapons Advisory Opinion, para. 29.

<sup>456</sup> Stockholm Declaration at Principle 2.

<sup>457</sup> See Maastricht Principles at Principle 6.

<sup>458</sup> See Rio Declaration at Principle 10; *Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters.*, June 25, 1998, 2161 U.N.T.S. 447, at arts. 6-8; CBD, art. 14; UNFCCC at art. 6; *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, Escazú, 4 March 2018 [hereinafter Escazú Agreement], United Nations, Treaty Series, vol. 3397 C.N.195.2018.

<sup>459</sup> See, e.g., High Court of South Africa, *Case Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others*, Case No. 3491/2021 (South Africa), Judgment of December 28, 2021; Human Rights Committee, *Daniel Billy et al. v Australia*.

<sup>460</sup> IACHR & REDESCA *Climate Emergency* report, C. I., 3.

124. IACHR and REDESCA emphasize the importance of adhering to Inter-American standards on the right to consultation and informed consent, especially for Indigenous and Afro-descendant peoples affected by business activities.<sup>461</sup> States are urged to create inclusive and participatory spaces to enable those potentially affected by business activities to voice their concerns and be heard.<sup>462</sup> Mechanisms for participation in business and human rights matters should be extensive and effective, actively engaging affected individuals, communities, human rights defenders, and civil society organizations.<sup>463</sup> States should consider the specific circumstances of each case, including the nature and extent of rights impacts, industry involvement, and affected populations.<sup>464</sup>

***3.2.7. Those responsible for pollution should bear the costs for mitigating and remedying the resulting harm.***

125. The “polluter pays” principle dictates that States adopt measures to ensure that polluters bear the costs of pollution control and prevention.<sup>465</sup> In its canonical form in Principle 16 of the Rio Declaration, the principle states that polluters should “internalize” the costs of their pollution to the environment and society.<sup>466</sup> Requiring responsible parties, including business enterprises, to cover the costs of remediating environmental harm stemming from their conduct is consistent with the right to remedy. The UN Working Group on Business and Human Rights has linked restitution measures with the ‘polluter pays’ principle: “if (...) an enterprise caused pollution, it should be required to restore the environment as part of the ‘polluter pays’ principle.”<sup>467</sup> In line with the human right to an effective remedy, ensuring that the actors responsible for pollution pay not only furthers reparatory aims, but also serves as a deterrent to future violations, advancing the principle of non-repetition.<sup>468</sup> The IACHR has linked the “polluters pays principle” to remedy in response to the human, environmental and labor tragedy in Brumadinho, Brazil, in 2018. The Commission called not only for the State to hold the

<sup>461</sup> IACHR & REDESCA *Climate Emergency* report, para. 343.

<sup>462</sup> IACHR & REDESCA *Climate Emergency* report, para. 49.

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> Rio Declaration at Principle 7; Stockholm Declaration at Principle 22; International Convention on Oil Pollution Preparedness, Response and Co-operation, 30 November 1990, 1891 U.N.T.S. 51, at Preamble (“taking account of the ‘polluter pays’ principles [as] a general principle of international environmental law”); Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to prevention and remedying of environmental damage, 30 April 2004, OJ L143, at Recital 2; European Union, Consolidated Version of the Treaty on the Functioning of the European Union, 13 December 2007, OJ C 326, at Article 191(2).

<sup>466</sup> Rio Declaration, Principle 7.

<sup>467</sup> UNGA Report on Human Rights and Transnational Corporations, at p. 13. On polluter pays, *see also* the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and the the SR on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Communication to Federation of Bosnia Herzegovina (BiH) and China due to coal fired plants in BiH, 17 March 2021, Ref: AL BIH 2/2021 (asking BiH and China to prevent negative human rights and environmental outcomes, e.g. by enforcing the polluter pays principle). *See also* *Commune de Mesquer v. Total France SA and Total International Ltd*, Case C-188/07, 24 June 2008, Judgment, European Court of Justice (Grand Chamber).

<sup>468</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para. 15 (“In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”).

company accountable, but for the company to “take all necessary measures to mitigate and prevent the aggravation of environmental damage, such as to assist and facilitate mechanisms of reparation for victims and their families.”<sup>469</sup>

### 3.3 Measures that States must take to satisfy their human rights obligations in the context of corporate-driven climate change

126. As detailed above, States’ science-aligned human rights obligation to do everything within their power to keep warming below 1.5°C cannot be achieved without adequately regulating GHG-intensive business enterprises, and ultimately reducing or eliminating their climate-destructive conduct. In light of the outsized role of the fossil fuel industry and agro-industrial sectors in driving global GHG emissions and the destruction of forests and other natural carbon sinks, effective regulation to prevent further foreseeable human rights violations due to corporate-induced climate change and to remedy current and continuing violations requires, at minimum, certain measures. The following section outlines some of those required measures. The list is not exhaustive, but rather illustrative of what measures are necessary and capable of satisfying States’ human rights obligations in the face of a climate emergency driven largely by the actions and influence of a small group of business enterprises.

#### 3.3.1 States must halt expansion and accelerate the phaseout of fossil fuel production and agroindustrial deforestation

127. **The duty to respect requires States to refrain from engaging in, approving, or supporting any new fossil fuel projects and large-scale land clearing for agroindustrial development, or infrastructure that facilitates such expansion.** Effective fossil fuel phase-out necessarily precludes States from granting licenses for new oil, gas, and coal exploration and production, as well as for transporting, processing, and burning extracted fossil fuels. In 2021, the International Energy Association declared that “there is no need for investment in new fossil fuel supply” in its scenario for achieving net zero emissions by 2050—a finding it reiterated again in 2023.<sup>470</sup> The IPCC echoed this point, stating that “[i]f investments in coal and other fossil infrastructure continue, energy systems will be locked-in to higher emissions, making it harder to limit warming to 2°C or 1.5°C (high confidence),”<sup>471</sup> and that limiting temperature increase requires “shifting energy investments away from fossil-fuels and towards low carbon technologies.”<sup>472</sup>

<sup>469</sup> Press Release, Organization of American States (OAS), *Special Rapporteurship ESCER of the IACHR expresses deep concerns about human, environmental and labor tragedy in Brumadinho (Minas Gerais, Brazil), and calls for the integral reparations for victims* (30 January 2019), [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/019.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/019.asp).

<sup>470</sup> International Energy Association (IEA), *Net Zero by 2050: A Roadmap for the Global Energy Sector*, 2021, p. 21; see also International Energy Agency, *Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach* (2023), available at [https://iea.blob.core.windows.net/assets/4ad26550-05c4-4495-9891-98e588cd0be8/NetZeroRoadmap\\_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf](https://iea.blob.core.windows.net/assets/4ad26550-05c4-4495-9891-98e588cd0be8/NetZeroRoadmap_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf), p. 16.

<sup>471</sup> IPCC, Working Group III Contribution to the Sixth Assessment Report of the IPCC, *Climate Change 2022: Mitigation of Climate Change, Technical Summary* [hereinafter IPCC AR6 WGIII TS], p. 89.

<sup>472</sup> IPCC AR6 WGIII TS, p. 85.

128. **Refraining from causing or contributing to foreseeable violations to human rights not only requires States not to permit, but also not to finance these GHG-intensive industries, whether directly or indirectly.** International human rights bodies have recognized the need for States to divest from and stop financing fossil fuel development, regardless of whether it is being led by public or private actors.<sup>473</sup> Likewise, they have noted that indirect support of fossil fuel expansion—in the form of subsidies, which hit record levels in 2022,<sup>474</sup> and other financial incentives—also drives climate change-related human rights violations.<sup>475</sup> In its landmark inquiry on climate change, for instance, the Commission on Human Rights of the Philippines stated that, pursuant to their duty to respect, States “must divest from, refrain from investing in, and deny subsidies or incentives to fossil fuel-related projects or activities, as well as cease from issuing new permits therefor.”<sup>476</sup> The IACHR and REDESCA similarly have recommended that States consider “minimizing all subsidies for fossil fuels, creating taxes on them and redistributing revenues towards clean, renewable, and non-polluting energy systems.”<sup>477</sup> The UN Special Rapporteur on human rights and the environment has called for the termination of fossil fuels subsidies and their redirection to climate action, which would free up more than \$1 trillion per year in direct subsidies (revenues spent or foregone in support for fossil fuel production and use)—a figure which does not include the indirect subsidies in the form of health and environmental costs borne by the public.<sup>478</sup>

<sup>473</sup> UN Human Rights Treaty Bodies’ joint statement on human rights and climate change (“States should also discontinue financial incentives or investments in activities and infrastructure which are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors”). The treaty bodies have also repeatedly expressed concern over public and private investment in the fossil fuel industry in the context of State reporting procedures. See, e.g., Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Luxembourg*, UN Doc. No. E/C.12/LUX/CO/4, 15 November 2022, paras. 10-11; Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, 90<sup>th</sup> session, UN Doc. No. CRC/C/Can/CO/5-6, 23 June 2022, para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report on Switzerland*, UN Doc. E/C.12/CHE/CO/4, 18 November 2019, paras. 18-19.

<sup>474</sup> See Simon Black, Antung A. Liu, Ian Parry and Nate Vernon, *IMF Fossil Fuel Subsidies Data: 2023 Update*, 24 August 2023, p. 3.

<sup>475</sup> See, e.g., Committee on the Rights of the Child, concluding observations on the combined 4th to 6th periodic reports of Greece, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, 90<sup>th</sup> session, UN Doc. No. CRC/C/GRC/CO/4-6, 28 June 2022, para. 15(d); Ian Fry (Special Rapporteur on the promotion and protection of human rights in the context of climate change), *Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation*, UN Doc. No. A/77/226, 26 July 2022, para. 92(e)(iv) (recommending a redirection of fossil fuel subsidies).

<sup>476</sup> Commission on Human Rights of the Philippines (CHRP), *National Inquiry on Climate Change Report*, 2022 [hereinafter CHRP Climate Change Report], [online] available at: [https://chr.gov.ph/wp-content/uploads/2022/12/CHRP\\_National-Inquiry-on-Climate-Change-Report.pdf](https://chr.gov.ph/wp-content/uploads/2022/12/CHRP_National-Inquiry-on-Climate-Change-Report.pdf), pp. 107, 112. (finding that, in transitioning away from fossil fuels, States must “engage with stakeholders in developing economic strategies that are fair, inclusive, and sustainable; and provide support to workers through the creation of local, inclusive and decent jobs.”).

<sup>477</sup> See IACHR & REDESCA *Climate Emergency* report, para. 57.

<sup>478</sup> David Boyd (UN Special Rapporteur on Human Rights and the Environment) and Stephanie Keene, *Policy Brief #5: Mobilizing Trillions for the Global South: The Imperative of Human Rights-based Climate Finance* (November 2023) [hereinafter Boyd and Keene, Policy Brief #5 2023], pp. 7, 14, available at: <https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/activities/SR-Environment-PolicyBrief-5.pdf>.

129. Similarly, preventing tipping points in the Amazon and other ecosystems that play a critical role in stabilizing the climate requires States to urgently halt the agroindustrial deforestation. To achieve this, States must implement stricter laws that hold companies that engage in illegal deforestation criminally liable, while also establishing corporate obligations to fully map supply chains (direct and indirect suppliers) and make those mappings public; assure participation of unions, NGOs, affected communities and other independent actors in the assessment, auditing, and monitoring of projects that may lead to deforestation; impose a corporate obligation to conduct climate impact assessments for any projects that may lead to deforestation; create an obligation for financial corporations to publicly announce the provision of financial services to any risky industry in the area of deforestation (e.g. the beef industry in the Amazon), and so forth.<sup>479</sup> States can also avert tipping points by passing regulations prioritizing sustainable agricultural activities and forestry practices, including the expansion of silvopastoral and agroforestry systems and the reforestation of degraded land.<sup>480</sup> States should also take measures to secure land tenure for Indigenous peoples and other traditional communities, whose management of forests have been shown to curb illegal encroachment and deforestation and also advance the regeneration of previously degraded ecosystems.<sup>481</sup>
130. A significant proportion of forests is privately-owned land that can be legally deforested, which impacts both the local climate and NDC goals.<sup>482</sup> Therefore, States should also take measures to slow legal deforestation, such as benefit-sharing and community contracting mechanisms. Benefit sharing refers to the arrangements aimed at distributing revenues from forest activities to local communities.<sup>483</sup> Community contracting refers to “communities who own or manage their forests, contracting directly with a third party to undertake forestry activities.”<sup>484</sup> Such measures create incentives to change deforestation and forest degradation behaviors, thereby reducing emissions while creating a more equitable and sustainable outcome.<sup>485</sup>
131. On a regional level, the new EU regulation on deforestation-free supply chains ensures that certain commodities consumed in the EU market will no longer contribute to global deforestation and forest

<sup>479</sup> See, e.g., the demands posed by plaintiffs in *Sherpa et al v. Casino* (22/04723) and *NAAT and CPT v. BNP Paribas* (23/03469), both pending in 2023 before the Paris Judicial Tribunal.

<sup>480</sup> Onil Banerjee et al., *Can we avert an Amazon tipping point? The economic and environmental costs*, Environ. Res. Lett. 17 (2022), p.2.

<sup>481</sup> See generally Kathryn Baragwanath et al., *Collective property rights lead to secondary forest growth in the Brazilian Amazon*, Proc Natl Acad Sci U S A 120 (2023).

<sup>482</sup> Marcelo C.C. Stabile et al., *Slowing Deforestation in the Brazilian Amazon: Avoiding Legal Deforestation by Compensating Farmers and Ranchers*, Front. For. Glob. Change 4 (2022), p. 1.

<sup>483</sup> *Id.*

<sup>484</sup> ClientEarth, *Communities & forests, Benefit sharing and community contracting: from legal design to full operation*, 2021, p.1.

<sup>485</sup> Soliev, I., Theesfeld, I., Abert, E., Schramm, W., *Benefit sharing and conflict transformation: Insights for and from REDD+ forest governance in sub-Saharan Africa*, Forest Policy and Economics v. 133 (2021), available at <https://doi.org/10.1016/j.forpol.2021.102623>; <https://www.cifor.org/knowledge/publication/4258/>, p. 1; Center for International Forestry Research, *REDD+ Benefit Sharing* (2013), <https://www.cifor.org/knowledge/publication/4258/#>.

degradation, whether it is legal or illegal.<sup>486</sup> As a result, companies that place products identified as main drivers of deforestation (such as palm oil, cattle, soy, coffee cocoa, timber, rubber and derived products) in the market will have to conduct strict due diligence.<sup>487</sup> Operators and traders will have to prove that products are legal and deforestation-free, and will have to collect precise geographical information on the farmland on which the commodities have been grown.<sup>488</sup>

### ***3.3.2. States must not rely on speculative technologies or future action in lieu of immediate, proven mitigation measures***

132. **States must not delay immediate or near-term emissions reduction measures in favor of speculative future action or in reliance on unproven measures. Delaying immediate, proven emissions reduction measures, through a lack of ambition or in favor of speculative technologies, violates the precautionary principle and the principle of intergenerational equity.** Given the foreseeable future violations climate change presents, continuing current levels of GHG emissions constitutes an injustice to future generations. The principle of intergenerational equity demands that States carry out maximally ambitious and scientifically reliable climate mitigation measures in the near term. According to the IPCC, delay in climate action “obstruct[s] near-term emission reduction efforts” and “overburden[s] future generations,”<sup>489</sup> as it significantly increases the risk of overshooting 1.5°C and the dangerous and irreparable environmental harm that would ensue. Indeed, consistent with the IPCC’s observations, national courts have found delaying immediate or near-term emissions reduction measures to be inconsistent with the principle of intergenerational equity.<sup>490</sup> Pursuant to the precautionary principle, States must thus act with urgency in implementing climate mitigation measures within the scope of their powers, including accelerating a transition to fossil-free energy sources such as solar and wind and increasing energy efficiency. Thus, delaying regulatory measures aimed at preventing and mitigating fossil fuel and agroindustrial activity that would significantly elevate atmospheric GHG levels—including via foreseeable downstream and Scope 3 emissions—would be inconsistent with States’ duties to respect and protect human rights.

133. **States cannot justify postponing emissions reductions by relying on non-existent or unproven technologies.** Just as States cannot rely on future emissions reductions to justify inaction or low-ambition pathways in the near-term, they cannot fail to take climate measures now in reliance on the deployment of carbon dioxide removal or other technologies not yet existent or unproven at scale (*see* Section 2.2.2b). As recognized by the German Constitutional Court, delaying emissions reductions in favor of such technologies imposes a disproportionate mitigation burden onto future generations and thereby would impede their enjoyment of fundamental rights.<sup>491</sup> In regulating industry conduct, States must ensure that claims around these technologies and their future deployment do not relieve high-

<sup>486</sup> European Commission, *Green Deal: EU agrees law to fight global deforestation and forest degradation driven by EU production and consumption*, Press Release (Dec. 6, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_7444](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7444).

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> IPCC AR6 WGIII, Ch. 12, p. 1263.

<sup>490</sup> *See, e.g.*, Neubauer Federal Constitutional Court Case, para. 192; Urgenda Supreme Court case, para. 4.76.

<sup>491</sup> Neubauer Federal Constitutional Court Case, para. 182 *et seq.*

emitting industries of the responsibility to take near-term measures to increase the energy efficiency and decrease the GHG footprint of their operations, across their entire value chains.

134. **States may not forgo demonstrably safe and reliable measures to rapidly reduce GHG emissions in reliance on measures that may pose new and independent risks to the environment and human rights.** Available measures to rapidly reduce GHG emissions—like increasing energy efficiency, phasing out fossil fuels, and curbing large-scale deforestation—must take priority over technologies that are unproven at scale, not currently deployable, and that pose new and independent risks to the environment and human rights.<sup>492</sup> This means that States should significantly restrict the implementation of such technologies—including CCS and large-scale CDR—particularly if their development and deployment diverts resources and investments from safer, reliable means of achieving urgently needed GHG emissions cuts.

**3.3.3. States must require business enterprises to assess all foreseeable climate impacts and emissions across their value chains, regardless of where they occur**

135. **States must ensure that their decisions on whether to advance proposed activity within their territories or control are based on climate analyses that factor in all foreseeable emissions in their supply or value chain, regardless of where they occur.**<sup>493</sup> The duty to protect requires the State to regulate fossil fuel and agroindustrial activity “in a way that reduces” the threat they pose to the right to life and other human rights.<sup>494</sup> Under human rights law and the longstanding transboundary harm principle, States must consider, prevent, or minimize extraterritorial GHG emissions that are the foreseeable precursor to or consequence of an activity within a State’s jurisdiction or control. The territorial accounting approach reflected in climate agreements,<sup>495</sup> by which countries are responsible for tracking and mitigating those emissions released within their borders, does not displace or limit this duty. States have an obligation, for instance, to consider the global ramifications of taking fossil fuels out of the ground or expanding cattle ranches, including the foreseeable impact of doing so on the ability to keep temperature below 1.5°C. And they must take measures to avert associated human rights violations, regardless of where the fossil fuels are combusted or where the forests are converted to feed crops.

<sup>492</sup> See IPCC AR6 WGIII, C.4.6 (“Implementation of CCS currently faces technological, economic, institutional, ecological-environmental and socio-cultural barriers. Currently, global rates of CCS deployment are far below those in modeled pathways limiting global warming to 1.5°C or 2°C.”); *id.*, p. 324, 3.3.2.2 (discussing concerns with reliance on CDR); *id.*, p. 1263, 12.3 (discussing potential adverse impacts of large-scale CDR technologies).

<sup>493</sup> National courts in numerous jurisdictions have recognized the imperative to consider both the direct and indirect GHG emissions of a proposed activity during the decision-making process. *See, e.g.,* *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41 (D.D.C. 2019) (U.S.A.) (consideration of downstream GHG emissions stemming from authorization of oil and gas leases), *Gray v. Minister for Planning*, 152 LGERA 258 (2006) (Australia) (consideration of burning coal as indirect impact of extraction, citing intergenerational equity concerns); *Gloucester Resources Limited v. Minister for Planning*, NSWLEC 7 (2019) (Australia), para. 490 (discussing the requirement to consider indirect (Scope 3) GHG emissions in assessing the impacts of a fossil fuel project).

<sup>494</sup> IACtHR OC-23/2017, para 149.

<sup>495</sup> UNFCCC at art. 4.1(f); Paris Agreement at art. 4; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162, arts. 3, 5.

136. **States must require that the environmental impact assessments (EIAs) conducted by business enterprises consider impacts on greenhouse gas emissions across the entire supply or value chain, regardless of where they occur.** Requiring corporations to assess both direct and Scope 3 (upstream and downstream) GHG emissions of their activities, as described in Section 2.1.1, allows a full picture of risks posed to the global climate and consequently to human rights, both within and beyond a State's borders. In the context of the fossil fuel industry, these include, for example, the inevitable downstream emissions from processing and burning oil, gas, or coal extracted from a State's territorial reserves for export. In the context of the beef industry, these include the upstream emissions produced in deforesting or clearing land for feed crops or cattle ranching, depleting soil quality in monocropping feed for cattle raised within a State's territory, as well as methane emissions.<sup>496</sup> Also included are the downstream emissions associated with storing and transporting the produced meat for the global market.<sup>497</sup> These climate analyses must be cumulative in scope,<sup>498</sup> accounting for both the direct and indirect climate impacts of the proposed activity as well as the ways in which those impacts will aggravate and interact with the climate footprints of existing and future activity.<sup>499</sup>

### 3.3.4. States must regulate industry conduct that impedes climate action

137. **Effective protection of human rights requires States not only to regulate industrial activities that generate emissions and erode resilience, but also industry conduct that insulates those harmful activities from scrutiny and regulation.** States cannot ensure regulation adequate to protect human rights from climate-destroying industry activity so long as these industries are able to shield their conduct from oversight and accountability through the misinformation and bad faith tactics described in Section 2.2. According to the Working Group on the issue of human rights and transnational corporations and other business enterprises, the obligation of States under the Guiding Principles to protect against foreseeable impacts related to climate change, entails, *inter alia*, adopting "a range of regulations to discourage greenwashing and undue corporate influence in the political and regulatory sphere in this area."<sup>500</sup> Such measures, include, at a minimum, and across the fossil fuel and

<sup>496</sup> Methane is the second largest contributor to warming and is responsible for about 0.5°C of current global warming. Human activities are responsible for about 60% of global methane emissions. Animal emissions account for 32% of all anthropogenic emissions. Within livestock farming, cattle farming is by far the largest contributor. See, IPCC AR6 WGI SPM, Figure SPM.2; Environment Programme & Climate & Clean Air Coalition, Global Methane Assessment: Benefits and Costs of Mitigating Methane Emissions (2021), pp. 25, 30, available at <https://www.ccacoalition.org/en/resources/global-methane-assessment-full-report>.

<sup>497</sup> Junren Wang et al, *The carbon footprint of cold chain food flows in the United States*, Environ. Res.: Infrastruct. Sustain. v. 2 (2022) (finding that the transport of meat results in higher CO<sub>2</sub> emissions per kg than processed foodstuffs because it has a longer average refrigerated distance).

<sup>498</sup> See IACtHR OC-23/2017, para. 165. See also *Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary objections, merits, reparations and costs), Inter-Am. Ct. H.R. (ser. C) No. 174, para. 41; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012 (Merits and Reparations) Inter-Am. Ct. H.R. (ser. C) No. 245, para. 206.

<sup>499</sup> *Saramaka People v. Suriname*, para. 41; IACtHR OC-23/2017, para. 165.

<sup>500</sup> UN Working Group on Business and Human Rights, Information Note on Climate Change and the UNGPs, paras. 7-8. Also of relevance is that the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities has urgently called for drawing a red line around greenwashing emphasizing *inter-alia* that non-state actors cannot claim to be net zero while continuing to build or invest in new fossil fuel supply, and cannot lobby to undermine ambitious government climate policies either directly or through trade

agro-industry sectors, regulating and addressing<sup>501</sup> various types of corporate misinformation and misrepresentation,<sup>502</sup> false claims about product attributes,<sup>503</sup> and failure to disclose climate risks.<sup>504</sup> States must also require fossil fuel companies and the agro-industry to make relevant information across their supply chains public.<sup>505</sup> Moreover, States must take measures which prohibit conflict of interest in climate policymaking.<sup>506</sup>

138. Given the threat that ISDS poses to States taking effective climate action, particularly action to regulate and accelerate the phaseout of fossil fuels (*see* Section 2.2.4), States should refrain from entering into agreements with ISDS provisions, amend or terminate existing such agreements, and/or withdraw consent to ISDS.<sup>507</sup> Consistent with their obligations to abstain from preventing or hindering other States Parties from complying with their Convention obligations,<sup>508</sup> States should adopt measures to prevent their corporate nationals from using ISDS provisions to challenge other States' climate action. States should also address the challenges posed by strategic lawsuits against public participation (*see* Section 2.2.4) by enacting comprehensive anti-SLAPP legislation and creating effective

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associations or other bodies. The Group recommended States adopt clear, enforceable regulations to limit the potential for corporate greenwashing. *See* United Nations' High-Level Expert Group On The Net Zero Emissions Commitments Of Non-State Entities, *Integrity Matters: Net Zero Commitments By Businesses, Financial Institutions, Cities And Regions* (2022).

<sup>501</sup> For overarching information in this context, see, Lisa Benjamin et al., *Climate-Washing Litigation: Legal Liability for Misleading Climate Communications*, Policy Briefing, The Climate Social Science Network (January 2022); Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (2023), p.6.

<sup>502</sup> *See, e.g.*, European Commission, [Draft EU directive on] Empowering Consumers for the Green Transition, 2022/0092(COD); *Municipalities of Bayamon v. Exxon Mobil Corp.*, 3:22-cv-01550 (D.P.R. 2022) (USA).

<sup>503</sup> *See, e.g.*, Lawyers for Climate Action Complaint to the Advertising Standards Board, Advertising Standards Authority Complaints Board, No. 21/194, 6 July 2021 (New Zealand); ASA Ruling on Shell UK Ltd.'s Shell Go+ Campaign, Advertising Standards Authority, 8 July 2020 (United Kingdom of Great Britain and Northern Ireland); Complaint by Transport and Environment against ENI, Competition and Market Authority of Italy (2019).

<sup>504</sup> *See, e.g.*, ClientEarth, Intervention Update, *UK financial regulators are missing in action on company failures to disclose material climate-related information* (2019); Press Release, Client Earth, *ClientEarth files complaints against Just Eat and Carnival over climate failings* (Aug. 18, 2021), <https://www.clientearth.org/latest/press-office/press/clientearth-files-complaints-against-just-eat-and-carnival-over-climate-failings/#:~:text=ClientEarth%20has%20reported%20two%20UK,breach%20of%20their%20legal%20requirements>

<sup>505</sup> A relevant complaint in this context was filed with the US Securities and Exchange Commission, calling for a full investigation into alleged misleading and fraudulent 'green bonds' issued by the Brazilian meat giant JBS for excluding Scope 3 supply chain emissions that comprise 97% of its climate footprint. Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (2023), p. 44.

<sup>506</sup> There is precedent in legal frameworks regarding prohibition of conflict of interest. *See, e.g.*, World Health Organisation, Framework Convention on Tobacco Control, art. 5.3, May 21, 2003-June 29, 2004, WHA56.1, 2302 U.N.T.S. 166, 42 I.L.M. 518 ("In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."). *See also* OECD Council, The Recommendation on OECD Guidelines for Managing Conflict of Interest in the Public Service (adopted May, 28 2003).

<sup>507</sup> *See generally* UN Human Rights Council, Report of the UN Special Rapporteur on Human Rights and the Environment, *Paying Polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*, UN Doc. A/78/168 (July 13, 2023).

<sup>508</sup> IACtHR OC-23/2017, para. 101.

enforcement mechanisms. Drawing inspiration from the EU anti-SLAPP directive proposal,<sup>509</sup> States should establish procedural safeguards to equip their judicial systems to handle such litigations effectively. These safeguards may include provisions for the early dismissal of unfounded claims, remedies against abusive court proceedings, and safeguards against the enforcement of judgments from third countries. By doing so, States can foster an environment that not only safeguards freedom of expression and public participation but also discourages corporate actors from misusing judicial systems to suppress civic engagement.

139. To be effective, regulatory measures must carry consequences for non-compliance. In many jurisdictions, a business enterprise's misrepresentation of its climate impacts or omissions in disclosures about its supply chain may amount to fraud, deception or unfair commercial practice under existing law.<sup>510</sup> Emerging laws and standards such as the now-updated OECD Guidelines,<sup>511</sup> the proposed EU Directive on Green Claims,<sup>512</sup> and initiatives by regulatory bodies, could more specifically outlaw and penalize climate-washing behavior<sup>513</sup> and regulatory capture,<sup>514</sup> and provide a basis for similar initiatives across jurisdictions. Enforcement consequences should include the denial of financial services to corporations that do not maintain a fully traced supply chain or present any signs of human rights, environmental or climate violations.<sup>515</sup> This Court should clarify that ACHR obligates States to

<sup>509</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") ((2022) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0177>.

<sup>510</sup> Lisa Benjamin et al., *Climate-Washing Litigation: Legal Liability for Misleading Climate Communications*, Policy Briefing, The Climate Social Science Network (January 2022), pp. 7-10; 12-13; *See also*, European Commission, [Draft EU directive on] Empowering Consumers for the Green Transition, 2022/0092(COD); *Municipalities of Bayamon v. Exxon Mobil Corp.*, 3:22-cv-01550 (D.P.R. 2022) (USA); ClientEarth, Intervention Update, *UK financial regulators are missing in action on company failures to disclose material climate-related information* (2019); Press Release, Client Earth, *ClientEarth files complaints against Just Eat and Carnival over climate failings* (Aug. 18, 2021), <https://www.clientearth.org/latest/press-office/press/clientearth-files-complaints-against-just-eat-and-carnival-over-climate-failings/#:~:text=ClientEarth%20has%20reported%20two%20UK,breach%20of%20their%20legal%20requirements>

<sup>511</sup> Organization for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises on responsible conduct*, 27 June 2000 [hereinafter OECD Guidelines], available at: [https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct\\_81f92357-en](https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en) [accessed 8 September 2023].

<sup>512</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on Substantiation and Communication of Explicit Environmental Claims* (Green Claims Directive), 166 Final 2023/0085 (COD), 2023.

<sup>513</sup> Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (2023), p.6.

<sup>514</sup> UN Working Group (WG) on the issue of Human Rights and Transnational Corporations and other Business Enterprises, Information Note on Climate Change and the Guiding Principles on Business and Human Rights, June 2023 [hereinafter UNWG Information note on Climate Change and UNGPs 2023], p. 4 [Part III, 8 (h) (the obligations of States under the Guiding Principles to protect against human rights impacts arising from business activities includes the duty to protect against foreseeable impacts related to climate change, as interpreted by the UN Working Group on Business and Human Rights)]. *See also* OECD 2023 Guidelines for Multinational Enterprises on Responsible Business Conduct, pp. 39-42.

<sup>515</sup> *See, e.g.*, the demands posed by plaintiffs in *Sherpa et al v. Casino* (22/04723) and *NAAT and CPT v. BNP Paribas* (23/03469), both pending in 2023 before the Paris Judicial Tribunal.

regulate industry greenwashing that perpetuates climate-destructive activity, and hold companies accountable for their campaigns of deception and misinformation.

140. States should put in place due diligence regulations that include both administrative sanctions and civil liability provisions that make it easier for parent or lead companies to be held liable for violations committed throughout their supply chain. Such provisions have been increasingly adopted in due diligence legislation around the world in recent years. In France, a company can be liable for its failure to exercise vigilance throughout its supply chain if damages are caused by one of the entities within the company's vigilance perimeter.<sup>516</sup> The French Due Diligence Law makes it possible to seek reparations in case of damage that resulted from a breach of its obligations.<sup>517</sup> In Germany, certain companies that fail to comply with the new national due diligence legislation—which obligates them to ensure that human rights and environmental requirements are met in their supply chain—can face hefty fines of up to 2% of the average annual turnover and can be excluded from public contracts for up to three years.<sup>518</sup> The EU's proposed Directive on Corporate Sustainability Due Diligence (CSDDDD) covers operations across companies' value chains and also establishes administrative sanctions and corporate civil liability for failure to carry out due diligence.<sup>519</sup> The amendments adopted by the European Parliament to the proposed directive also include the possibility of filing injunctive measures against companies that do not comply with the Directive.<sup>520</sup>

### ***3.3.5 States must require business enterprises to respect rights to information, public participation, and Free Prior Informed Consent***

141. **States have a duty to ensure meaningful participation without discrimination, including the right to prior consultation seeking free, prior, and informed consent, in shaping climate change action plans, policies, norms, and projects.**<sup>521</sup> Consistent with that duty, States must not only adhere to such principles in deciding and implementing measures to regulate corporate conduct, but also require business enterprises to respect the rights of Indigenous Peoples to FPIC and enable informed participation in their own operations, including in assessment of their impacts on human rights and the environment, including climate change. Consent and consultation processes should incorporate an intercultural perspective and respect traditional knowledge regarding climate change mitigation and

<sup>516</sup> Cannelle Lavite, *The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence*, Verfassungsblog (June 16, 2020).

<sup>517</sup> *Id.*; LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law no. 2017-399 of March 27, 2017 relating to the duty of vigilance of parent companies and ordering companies] art. 2, JORF n0074 (2017) (France) [hereinafter France LOI n° 2017-399 relative au devoir de vigilance].

<sup>518</sup> Gesetz Ober die unternehmerischen Sorgfaltspflichten in Lieferketten [Act on Corporate Due Diligence in Supply Chains], Jul. 16, 2021, BGBl I Nr. 46 at 2959 (Ger.); Maihold, G., Müller, M., Saulich, C., Schöneich, S. *Responsibility in Supply Chains: Germany's Due Diligence Act Is a Good Start*, SPW Berlin (2021).

<sup>519</sup> Amendments adopted by the European Parliament on June 1, 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD))1, art. 22, 2a.

<sup>520</sup> *Id.*

<sup>521</sup> IACHR & REDESCA *Climate Emergency* report, C, IV., 24.

adaptation, with a commitment to accommodating diverse perspectives in final decisions.<sup>522</sup> Addressing climate change effects must be an inclusive and empowering process for everyone, in particular marginalized individuals and communities that are particularly vulnerable to climate change impacts and responses, which include those living in low-lying coastal areas and delicate ecosystems who depend on these environments for housing and subsistence.<sup>523</sup>

### ***3.3.6 States must eliminate obstacles to justice particularly for those most affected by climate change and investigate human rights abuses linked to corporate climate damage***

142. **Pursuant to their duty to provide effective remedy, States must remove regulatory, social, or economic barriers that prevent or hinder access to justice for victims of corporate-driven, climate-related rights violations.** This obligation applies with particular force to “persons belonging to groups in situations of vulnerability,”<sup>524</sup> who are hardest hit by climate change. The climate crisis exacerbates structural inequalities and vulnerabilities, disproportionately impacting marginalized individuals and communities, including among others, Indigenous Peoples, the future generations, children and youth.<sup>525</sup> The Working Group on the issue of human rights and transnational corporations and other business enterprises has clarified that to fulfill their obligations and responsibilities under the right to remedy in relation to climate change, States and business enterprises should ensure that all forms of access to remedies are responsive to multiple vulnerabilities, intersectional discriminations and marginalization experienced by individuals and communities such as children, women, Indigenous Peoples, and persons with disabilities.<sup>526</sup> The IACHR has explained that this means “States should adopt immediate measures to guarantee access to justice in environmental and climate matters of a judicial or administrative nature in accordance with the guarantees of due process, eliminate all barriers to its exercise and ensure free technical and legal assistance.”<sup>527</sup>

143. **Given the disproportionate effects of the climate emergency on youth and children, States must remove procedural barriers limiting their access to justice and effective remedies, including remedy from corporate actors that have caused or contributed to such rights violations.** As has been affirmed by the Committee on the Rights of the Child, States must eliminate all obstacles that prevent children from initiating proceedings on their own for violations of their rights,<sup>528</sup> including

<sup>522</sup> IACHR & REDESCA *Climate Emergency* report, para. 24.

<sup>523</sup> OHCHR, *Frequently Asked Questions on Human Rights and Climate Change*, p. 19.

<sup>524</sup> IACtHR, *Miskito Divers* Judgment, para. 50.

<sup>525</sup> Anna Kaijser & Annica Kronsell, *Climate change through the lens of intersectionality*, *Environmental Politics*, 23:3, 2014, 417-433, p. 418.

<sup>526</sup> UNWG Information Note on Climate Change and UNGPs 2023, para 24. For example, in regards to Indigenous and tribal peoples, States have the obligation to establish and offer appropriate proceedings that provide a real possibility for the indigenous and tribal communities to be able to defend their rights and exercise effective control over their territory. See also IACtHR, *Kaliña and Lokono Peoples v. Suriname*, para. 240.

<sup>527</sup> IACHR & REDESCA *Climate Emergency* report, para. 36.

<sup>528</sup> UN Committee on the Rights of the Child (CRC), General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, UN Doc. CRC/C/GC/16, 17 April 2013 [hereinafter Committee on the Rights of the Child, General Comment No. 16], para. 66-72; and Committee on the Rights of the Child, General Comment No. 25 (2021) on children’s rights in relation to the digital environment, UN Doc. CRC/C/GC/25, 02 March 2021 [hereinafter Committee on the Rights of the Child, General Comment No. 25], para.

those relating to climate change.<sup>529</sup> Given the complexities of cases involving climate-induced violations—transboundary effects, causation, and cumulative impacts—children and youth must have access to free legal aid and effective legal representation and should be benefited from additional measures to lower the costs when using judicial, quasi-judicial, and non-judicial mechanisms.<sup>530</sup> Also, the IACHR has stated that attention should be paid not only to the individual dimension of rights, “but also to the need to make the right’s collective component effective, in view of its universal and intergenerational scope.”<sup>531</sup> For example, in regard to *standing*,<sup>532</sup> as per Maastricht principles, States must prioritize ensuring victims and their representatives have standing before courts and human rights bodies, so they can enforce future generations’ human rights through the judicial system.<sup>533</sup>

144. ***Standing rules must be interpreted and applied in a manner that permits access to justice in the context of the climate emergency.*** It cannot be that because everyone is a victim of climate change no one can seek remedy and because multiple actors are responsible for climate change no one can be held accountable.

- a. **Individuals should not be denied standing based on the diffuse effects of climate change.** Although the climate emergency imposes a “widespread grievance” on all members of the public, it does not thereby make the harm too abstract, indefinite, or *de minimis* to be cognizable by a court or to other public authorities responsible for protecting human rights.<sup>534</sup> Allowing for collective complaints, such as class action lawsuits and public interest litigation, can enhance access to justice and the right to effective remedy. This is in line with the recommendation of the Committee on the Rights of the Child that States provide for collective complaints, such as class action suits and public interest litigation,<sup>535</sup> to increase accessibility to the courts for children and future generations affected by climate change.<sup>536</sup>

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43-49. Also, *see generally* Committee on the Rights of the Child, General Comment No. 26 (2023) on children’s rights and the environment with a special focus on climate change, UN Doc. CRC/C/GC/26, 22 August 2023 [hereinafter Committee on the Rights of the Child, General Comment No. 26].

<sup>529</sup> Committee on the Rights of the Child, General Comment No. 26, para. 82-90.

<sup>530</sup> For example, the Committee has enumerated measures such as protection from adverse cost orders or limitation of the financial risk to children who bring cases in the public interest regarding environmental matters. *See Id.* CRC General Comment No. 26., para. 86.

<sup>531</sup> IACHR Inter-American Standards, p. 43, para. 46,

[http://www.oas.org/en/iachr/reports/pdfs/Business\\_Human\\_Rights\\_Inte\\_American\\_Standards.pdf](http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf)

<sup>532</sup> In a recent precedent of standing in cases filed by youth on behalf of future generations, a Montana Trial Court ruled that State law’s restriction on consideration of climate change impacts had violated youth plaintiffs’ constitutional rights. The Court recognized plaintiffs’ standing due to the disproportionate harms they suffer as children and youth now, and likelihood that they “will continue to suffer injuries...” into the future. *See* Rikki Held, et al., v State of Montana, et al., Cause No. CDV-2020-307, Montana First Judicial District Court, Lewis and Clark County, August 14, 2023, paras 8; 10, [https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814\\_docket-CDV-2020-307\\_order.pdf](https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf)

<sup>533</sup> *See* Maastricht Principles at Principle 30(c).

<sup>534</sup> *See generally*, Mina Juhn, *Taking a stand: Climate Change Litigants and the viability of constitutional claims*, 89 Fordham L. Rev. 2731 (2021).

<sup>535</sup> CRC General Comment No. 16, para. 68, and CRC General Comment No. 25, para. 44.

<sup>536</sup> *Id.*; CRC General Comment No. 16, para. 68.

- b. **The “collective causation of climate change” or the concurrent responsibilities of multiple contributors must not be a barrier to holding specific actors to account, including business enterprises that have contributed to climate change-related human rights violations.** Notwithstanding State arguments to deflect responsibility on the premise that climate change “is a global phenomenon attributable to the actions of many States,”<sup>537</sup> the Human Rights Committee awarded compensation in a case concerning the insufficiency of a State’s action to protect rights in the context of climate change.<sup>538</sup> The Committee on the Rights of the Child has affirmed that “the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the violations that the emissions originating within its territory may cause.”<sup>539</sup> These decisions reflect the approach of the Dutch Supreme Court in *Urgenda* which held that “each country can be effectively called to account for its share of emissions.”<sup>540</sup> Emissions should be understood to “originate within” a State’s territory not only when they are released there, but when activities within the territory will foreseeably—and in some cases inevitably—lead to emissions outside of the territory, as is the case, for example, with the export of fossil fuels. The production and sale of fossil fuels within a State’s territory, or the decision by a corporation within a State to produce and sell such fossil fuels abroad, ineluctably leads to emissions when the products (oil, gas, and coal or their derivatives) are used as intended.

145. **Standards of evidence need to be interpreted and applied in a manner that does not preclude access to justice in the context of the climate emergency.** This may require a shifting of the burden of proof to require the State to prove a lack of causation, for which there is precedent in environmental matters.<sup>541</sup> Some domestic courts also have cited the precautionary principle in requiring the defending party to prove that their activity was not causing environmental damage.<sup>542</sup> As articulated in the Maastricht Principles on Human Rights of Future Generations, where there are reasonable grounds for concern that the impacts of conduct may result in the violation of rights, triggering the State duty to protect, “the burden of proof in all circumstances must lie with those who would undertake or persist

<sup>537</sup> Human Rights Committee, *Billy et al. v. Australia*, para 6.3.

<sup>538</sup> *Id.*

<sup>539</sup> See *Sacchi et al v. Argentina*.

<sup>540</sup> See *Urgenda* Supreme Court Case.

<sup>541</sup> See *Tătar v. Romania*, para. 87, 107 (In this case, the ECtHR exempted the applicants from proving the certainty of environmental risk because the State was in a better position to prove a lack of causation and show that it had fulfilled its obligations). See also Wu, Chuan-Feng. “Challenges to Protecting the Right to Health under the Climate Change Regime.” *Health and human rights* vol. 23,2 (2021): 121-138, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8694293/>

<sup>542</sup> See, e.g., ICJ, *New Zealand v. France*, 1995 (using the precautionary principle as a basis to shift to France the burden of proving that their nuclear tests would not cause environmental damage); *Case Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others*, Case No. 3491/2021, Judgment of Dec. 28, 2021 (South Africa), para 109 (establishing that that when faced with a “dispute between the experts as to the adequacy of the mitigation measures minimizing the known effects of seismic surveys, it would have been incumbent on the decision-maker to invoke the precautionary principle” and added that the party refuting the applicability of the precautionary principle has the onus to establish that the principle is of no application).

in the conduct involved, not with those who might be harmed as a result. This burden grows proportionately greater as the scale, scope, and irremediability of threats to rights of future generations increases.”<sup>543</sup> Shifting the burden of proof is a human rights-consistent measure for addressing evidentiary challenges related to environmental harm and, ultimately, guaranteeing access to justice.

146. **States must ensure prompt, thorough, independent, and impartial investigation of corporate human rights violations linked to climate damage.** As the IACHR has clarified, a State’s duties to guarantee effective remedy of climate-related human rights violations require it to pursue efforts to strengthen the capacities of all judicial operators and control bodies to prevent, investigate, and punish such violations.<sup>544</sup> In an example of forms that investigation can take in the context of corporate contributions to climate-induced human rights violations, the Commission on Human Rights of the Philippines, relying on its mandate to investigate human rights violations, gathered in a landmark inquiry report, the largest, most comprehensive body of official, sworn eyewitness and expert testimonies, documentary evidence, and legal analysis publicly available anywhere in the world with respect to the climate responsibilities of Carbon Majors companies. The Commission’s analysis and the evidence it marshaled to inform and support that analysis, provides a foundational basis and roadmap to pursue remedy for climate-induced violations.<sup>545</sup>

***3.3.7. States must provide and cooperate in the provision of reparations for climate-induced human rights violations and ensure corporate polluters pay their share of remediation costs***

147. **States must ensure victims of climate-related human rights violations effectively and meaningfully participate in defining reparations based on their needs and priorities, including when those harms result from destructive corporate conduct.** For remedy to be adequate and effective, those directly harmed must participate in the design, implementation, and monitoring of reparation measures or remedial action plans. Each affected community’s experience of harm is different, and therefore, their identified needs and priorities for remedy vary.<sup>546</sup> When relevant, although free, prior and informed consent is one of the instruments to guarantee the right to participation of Indigenous communities,<sup>547</sup> it is not the only mechanism or vehicle to safeguard this right against measures that may affect their territories<sup>548</sup> or rights.
148. **When full *restitution* is not achievable given irreversible climate-induced damage, States must ensure *compensation* is accessible as a critical component of effective remedy.** In the context of

<sup>543</sup> See Maastricht Principles at Principle 9 (“Prevention & Precaution”).

<sup>544</sup> See IACHR & REDESCA *Climate Emergency* report.

<sup>545</sup> CIEL, *Roadmap and Initial Reflections on CHR’s Final Report in the Philippines National Inquiry on Climate Change*, prepared by Carroll Muffett, May 6, 2022, pp. 4-7, available at [https://www.ciel.org/wp-content/uploads/2022/05/CIEL-Philippines-CHR-Roadmap-and-Initial-Reflections\\_May-2022.pdf](https://www.ciel.org/wp-content/uploads/2022/05/CIEL-Philippines-CHR-Roadmap-and-Initial-Reflections_May-2022.pdf).

<sup>546</sup> CIEL, “*Remedying Harm: Lessons from International Law for Development Finance*”, March 10, 2022, p. 7. [https://www.ciel.org/wp-content/uploads/2022/03/Remedying-Harm\\_Lessons-from-International-Law-for-Development-Finance.pdf](https://www.ciel.org/wp-content/uploads/2022/03/Remedying-Harm_Lessons-from-International-Law-for-Development-Finance.pdf)

<sup>547</sup> *Saramaka People v. Suriname*, para. 133-137

<sup>548</sup> UN Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, Addendum: Mission to Argentina, 4 July 2012, A/HRC/21/47/Add.2, para. 52.

environmental harm, it may not be possible to restore victims to their original situation, such as through return to their place of residence or return of their property.<sup>549</sup> Other measures, however, can restore key environmental functions on which victims depend, such as the guarantees of water protection and access to water and food ordered by the Court in its landmark *Lhaka Honhat Association v. Argentina* decision.<sup>550</sup> When restitution is impossible, as is often the case with irreversible climate-induced damage, compensation for both pecuniary harm<sup>551</sup> (such as damages to goods and trade, including homes destroyed or damaged as a result of an extreme weather or the capacity to earn a living) and non-pecuniary harm<sup>552</sup> (including physical and psychological injuries, as well as moral damage such as individual pain or suffering) can be a critical component of remedy.

149. **Consistent with human rights law, States should ensure that business enterprises that have caused or contributed to climate change-related human rights violations bear the costs of its remediation.** In light of the general obligation of States to protect human rights and the “polluter pays principle” discussed above,<sup>553</sup> States should adopt measures that seek to ensure fossil fuel and agroindustrial business enterprises cover costs of emissions reduction, adaptation costs, and remediation of climate change-related violations. States should cooperate on the establishment of international financing mechanisms, such as a fossil fuel levy, or global climate pollution tax, that can secure contributions from polluters to cover human rights violations.<sup>554</sup>
150. **Given the broad scope of climate change-related human rights violations, States must ensure reparations to which individuals and communities have access include functional, psychological, social, and vocational *rehabilitation* as a means of reparation, which could involve holistic medical care as well as legal and social services.** A holistic conception of rehabilitative remedies should be employed in the context of climate emergency, in order to encompass “all sets of processes and services ... to allow a victim of serious human rights violations to reconstruct his/her life plan or to reduce, as far as possible, the violation that has been suffered.”<sup>555</sup> The process of being uprooted due to climate change can cause severe psychological harm to the people who are displaced. For instance, the Guna Yala Indigenous People in Panama will be relocated to the mainland as their island has become

<sup>549</sup> See Frank Haldemann, Thomas Unger, and Valentina Cadelo, eds., *The United Nations Principles to Combat Impunity: A Commentary*, First edition, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2018), at Principle 34, [Hereinafter UN Principles to Combat Impunity: A Commentary].

<sup>550</sup> IACtHR, Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina, Judgment of February 6, 2020, (Merits, reparations and costs), paras 332-333. Also, See Gino J. Naldi, ‘Reparations in the Practice of the African Commission on Human and Peoples’ Rights’, 14 Leiden Journal of International Law 682 (2001), p. 685.

<sup>551</sup> ILC, ARSIWA, p.99, art. 36 cmt. paras.3- 5.

<sup>552</sup> See Douglass Cassel, “*The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*,” in *Out of the Ashes: Reparations for Gross Violations of Human Rights*, ed., M. Bossuyt et al. (Intersentia, 2006).

<sup>553</sup> See Section 3.2.7.

<sup>554</sup> See Boyd and Keene, Policy Brief #5 2023 (recommending adoption of a global pollution tax, debt cancellation, global wealth tax, and redirection of fossil fuel subsidies, consistent with the polluter pays principle and a human rights-based approach).

<sup>555</sup> Clara Sandoval, *Rehabilitation as a Form of Reparation under International Law*, London, UK: Redress Trust, 2009), at page 10, available at: <https://www.refworld.org/pdfid/4c46c5972.pdf>.

unlivable due to the rising sea levels. They have recently expressed their feelings of nostalgia and sadness about leaving their home, as they had learned to live on the island and had many dreams and memories associated with it.<sup>556</sup> As recognized by the Working Group on Business and Human Rights, if people are displaced from their land due to environmental-related harm, holistic rehabilitation measures should also encompass “...a provision for a suitable alternative piece of land...because land can support livelihood for generations.”<sup>557</sup> The situation of the Uru Eu Wau Wau Indigenous People in the Brazilian Amazon is also illustrative. A recent study highlighted that the invasions of their land by the beef industry have led to a constant fear in the community to walk freely around their own lands.<sup>558</sup>

151. **States must guarantee non-compensatory forms of reparation, including measures of satisfaction, which are particularly important to restore the dignity and rights of victims of climate change.**<sup>559</sup> For those who experience trauma from climate-induced losses of their cultural heritage and traditions,<sup>560</sup> measures of satisfaction—which aim to recognize wrong, acknowledge suffering, and respect the dignity of victims<sup>561</sup>—can partly restore what cannot be compensated by money.<sup>562</sup> Just as fact-finding inquiries into perpetrators of human rights abuses may contribute to healing,<sup>563</sup> measures related to “the disclosure of the truth and punishment of wrongdoers serve to address the structural causes of climate change and resulting human rights violations.”<sup>564</sup>
152. **In the context of an escalating climate emergency, States’ guarantees of non-repetition—measures that aim to prevent the recurrence of similar violations in the future—are among the most important forms of relief for corporate-induced climate change.** “[W]here the violation results from a state’s failure to prevent the negative human rights impacts of climate change, the duty to offer appropriate assurances and guarantees of non-repetition could entail an obligation to adopt and implement enforceable legislation to protect human rights from future climate impacts.”<sup>565</sup> Other

<sup>556</sup> 'Una comunidad indígena se despidió de su isla en el Caribe que será devorada por el mar debido al cambio climático', *Infobae*, September 5, 2023. Available at: <https://www.infobae.com/america/mundo/2023/09/05/una-comunidad-indigena-se-despidio-de-su-isla-en-el-caribe-que-sera-devorada-por-el-mar-debido-al-cambio-climatico/>

<sup>557</sup> UNGA Report on Human Rights and Transnational Corporations, p. 15.

<sup>558</sup> Center for Climate Crime Analysis, *The Casino Case*, 2022, p. 16-17, [https://climatecrimeanalysis.org/wp-content/uploads/2022/06/casino\\_case\\_-\\_english.pdf](https://climatecrimeanalysis.org/wp-content/uploads/2022/06/casino_case_-_english.pdf)

<sup>559</sup> See Margaretha Wewerinke-Singh, “Remedies for Human Rights Violations Caused by Climate Change”, *Climate Law* 9: 3 (2019), pp. 224-243.

<sup>560</sup> Chie Sakakibara, ‘Our Home is Drowning: Inupiat Storytelling and Climate Change in Point Hope, Alaska’, 98(4) *Geographical Review* 456 (2008), p. 471.

<sup>561</sup> In a more detailed way, these measures might include: a) the cessation of continuing violations, b) disclosure of truth, c) recovery of bodies, d) an official declaration to restore dignity, e) a public apology and acknowledgment of wrongdoing, e) sanctions of perpetrators, f) commemorations, or g) the inclusion of an account of the violations in educational material. See UN Principles to Combat Impunity: A Commentary, Principle 34.

<sup>562</sup> UNGA Report on Human Rights and Transnational Corporations, at page 15.

<sup>563</sup> *Id.*

<sup>564</sup> Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, *Climate Law* 9(3) (2019), p. 242. The author points out that “While these forms of satisfaction have so far not been awarded in rights-based climate cases, the Inuit petition did invite the IACHR to hold a hearing to investigate the plaintiff’s claims and prepare a report declaring the United States responsible for violation of its rights. The IACHR agreed to hold a hearing on the impacts of climate change on the enjoyment of human rights despite rejecting the petition.”

<sup>565</sup> *Id.* “In cases brought by victims of human rights violations resulting from climate change, victims’ testimonies about their lived experiences with climate risk and harm could also inform the court’s reasoning on the content of a

examples of guarantees of non-repetition include: a) institutional reforms, b) raising awareness about integrating human rights norms into business operations, or c) introducing compliance programs.<sup>566</sup> In order to guarantee non-repetition of corporate-induced climate change-related human rights violations, States must refrain from engaging in, approving, or supporting any new fossil fuel projects and large-scale land clearing for agroindustrial development, or infrastructure that facilitates such expansion.

#### 4. BUSINESS ENTERPRISES HAVE AN INDEPENDENT OBLIGATION TO RESPECT HUMAN RIGHTS

153. **Climate harm cannot be fully prevented or redressed through State action alone but must involve business enterprises fulfilling their duties as well.** The globalization of the world's economy has increased the power and influence of business enterprises and decreased their accountability. The fact that business enterprises' "parent companies are often separated from day-to-day operations by a slew of subsidiary companies,"<sup>567</sup> has heightened their "limited accountability in law for human rights abuses."<sup>568</sup> This accountability is further challenged by the fact corporations, rather than governments, make up the majority of the top 100 economic entities in the world<sup>569</sup> and "generate immense revenues,"<sup>570</sup> which in turn puts business enterprises in positions of power where they can influence regulatory processes in their favor,<sup>571</sup> including environmental and climate policies<sup>572</sup> (See Section 2.2.3).

154. **Human rights violations resulting from business enterprises' conduct (i.e. acts and omissions) contributing to climate change cannot be sufficiently addressed or prevented through an**

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state's prevention obligations. Guarantees of non-repetition would need to be tailored towards preventing the continuation or reoccurrence of the specific acts and omissions that were found to violate the state's obligations to protect human rights against the impacts of climate change."

<sup>566</sup> See generally Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, Climate Law 9(3) (2019), pp. 224-243.

<sup>567</sup> Jaya Élise Bordeleau-Cass, *The 'Accountability Gap': Holding Corporations Liable for International Crimes*, (2019) 3 PKI Global Justice Journal 65 [hereinafter: Bordeleau-Cass, *The 'Accountability Gap'*]. Available at: <https://globaljustice.queenslaw.ca/news/the-accountability-gap-holding-corporations-liable-for-international-crimes>

<sup>568</sup> Andrew Clapham, *Non-State Actors*, p 559, in D. Moeckli, S. Shah, S. Sivakumaran, eds., *International Human rights Law* (Oxford University Press, 3rd. 2018), p. 559. See also, Business and Human Rights Resource Center, *Corporate Impunity is Common and Remedy for Victims is Rare- Annual Briefing on Corporate Legal*, April 2017, [online] available at: [https://media.business-humanrights.org/media/documents/files/documents/CLA\\_AB\\_Final\\_Apr\\_2017.pdf](https://media.business-humanrights.org/media/documents/files/documents/CLA_AB_Final_Apr_2017.pdf), last visited 8 September 2023.

<sup>569</sup> In 2017, "69 of the top 100 economic entities" were "corporations rather than governments". Source: Global Justice Now, *69 of the richest 100 entities on the planet are corporations, not governments, figures show*, 17 October 2018, [online], available at: <https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/>

<sup>570</sup> Bordeleau-Cass, *The 'Accountability Gap'*.

<sup>571</sup> Bordeleau-Cass, *The 'Accountability Gap'*.

<sup>572</sup> See Union of Concerned Scientists, *A Climate of Corporate Control: How Corporations Have Influenced the U.S. Dialogue on Climate Science and Policy*, 2012; Global Witness, *How do corporations influence decisions on climate action?*, 2021, available at: <https://www.globalwitness.org/en/blog/how-do-corporations-influence-decisions-climate-action/>

**exclusively state-centered application of international law.**<sup>573</sup> In light of the above, it is respectfully submitted that in order for this Court to answer the questions before it in the Advisory Opinion Request, it is imperative to also reaffirm the independent obligation of business enterprises in respecting human rights in the context of climate change.

**4.1. Business enterprises have the independent obligation to respect human rights wherever they operate, regardless of the ability or willingness of States to comply with their own human rights obligations**

155. **There is a universal recognition that business enterprises have an independent responsibility to respect human rights wherever they operate.**<sup>574</sup> The UNGPs establish that business enterprises’ responsibility to respect human rights “exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”<sup>575</sup> Moreover, the Inter-American Standards for Business and Human Rights establish that “it is widely accepted that the respect of human rights is a global norm of conduct applicable to all businesses in all situations, regardless of the existence of national laws that formalize it and of States’ international obligations on the subject.”<sup>576</sup>

156. **The Inter-American Court of Human Rights has already endorsed and strengthened this view in its jurisprudence.** In the *Miskito Divers (Lemoth Morris Et Al.) v. Honduras* case,<sup>577</sup> the Court held that, based on the UNGPs provisions, “businesses *must ensure* that their activities do not cause or contribute to human rights violations, and *must adopt measures* to redress [them].”<sup>578</sup> The IACtHR indicated that business enterprises must behave “responsibly in the activities they carry out, since their active participation is fundamental for the respect and enforcement of human rights.”<sup>579</sup> According to the Court, this entails adopting “at their own expense, preventive measures to protect the human rights of their workers, as well as measures aimed at preventing their activities from having a negative impact on the communities in which they operate or on the environment.”<sup>580</sup> Having mechanisms in place to

<sup>573</sup> Andrés Felipe López Latorre, *In Defence of Direct Obligations for Businesses Under International Human Rights Law*, Business and Human Rights Journal, 5(1), 56-83. doi:10.1017/bhj.2019.27, p 70 [hereinafter: López Latorre, *In Defence of Direct Obligations for Businesses Under International Human Rights Law*].

<sup>574</sup> See, UNGPs, principles 11,12, 23; OECD Guidelines, Section IV, para 41-44; United Nations Global Compact, *The Ten Principles / UN Global Compact*, 2015 [hereinafter UN Global Compact Principles], [online] available at: <https://unglobalcompact.org/what-is-gc/mission/principles>; CESCR General Comment No. 24, para. 5; Expert Group on Global Climate Obligations, *Oslo Principles on Global Climate Obligations*, 2015 [hereinafter Oslo Principles], Eleven International Publishing, ISBN 978-94-6274-319-9; Maastricht Principles; IACHR Inter-American Standards, para. 178. See also, López Latorre, *In Defence of Direct Obligations for Businesses Under International Human Rights Law*.

<sup>575</sup> UNGPs, principle 11.

<sup>576</sup> IACHR, Inter-American Standards, para 177. See also, UN OHCHR, *The Corporate Responsibility to respect Human Rights: An interpretive Guide*, 2012 [hereinafter OHCHR Interpretive Guide on Corporate Responsibility and Human Rights].

<sup>577</sup> *Miskito Divers* Judgment.

<sup>578</sup> *Miskito Divers* Judgment, p. 48 (emphasis added).

<sup>579</sup> *Miskito Divers* Judgment, p. 51.

<sup>580</sup> *Id.*

prevent and mitigate risks and remedy any damage caused is an obligation that “must be assumed by companies and regulated by the State.”<sup>581</sup> In *Kaliña and Lokono Peoples v. Suriname*, the IACtHR further confirmed that “businesses *must respect and protect* human rights as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities.”<sup>582</sup>

157. **The standard of conduct for business enterprises articulated in the UNGPs to respect human rights has also been recognized by several domestic courts in the Americas region and around the world.** Affirming the responsibilities of business enterprises, the Peruvian Constitutional Court has recently stated that the human rights due diligence standard is binding on business enterprises: “*el estándar de la debida diligencia en derechos humanos es vinculante para las empresas privadas y la administración estatal, por cuanto complementa el principio de buena fe que caracteriza el cumplimiento del derecho fundamental de consulta previa.*”<sup>583</sup> Furthermore, the Constitutional Court of Colombia has indicated that the UNGPs systematize existing obligations under the international law regime, including the obligation of non-state actors to respect human rights: “[e]stos principios, no constituyen un nuevo tratado de derechos humanos, no crean nuevos derechos o nuevas obligaciones en cabeza de los Estados, sino que sistematizan las obligaciones que ya existen en el derecho internacional para comprender mejor los problemas frecuentes que, en virtud del tipo de actuaciones que asumen las empresas dentro de un territorio. En específico, concretan en qué se traduce la obligación de protección del Estado y la obligación de respeto de los derechos que recae sobre todos los particulares.”<sup>584</sup> According to the Constitutional Court, the UNGPs are guidelines for States and business enterprises, that as specialized bodies must respect human rights, to prevent human rights violations and ensure their reparation if such violations occur: “[s]e trata de lineamientos para que los Estados [...], y las empresas, como órganos especializados que deben respetar los derechos humanos, aseguren que no se cometan violaciones a los derechos y, en caso de que ocurran, se asegure su reparación.”<sup>585</sup>

158. The Constitutional Court of Colombia noted that business enterprises activities cannot be disconnected from the effective protection of human rights and that business enterprises have a duty to respect human rights and repair any damage they cause: “*las actividades empresariales no pueden estar desconectadas de la eficiente protección de derechos humanos. Si bien los particulares no tienen funciones propias de las autoridades estatales, si tienen el deber de respetar los derechos y no causar daños y, en caso de que lo hagan, deben repararlos. La actividad empresarial no está aislada de la primacía de los derechos.*”<sup>586</sup> In a similar ruling, the Canadian Supreme Court held that “it is not ‘plain and obvious’ that corporations today enjoy a blanket exclusion under customary international law from

<sup>581</sup> *Id.*

<sup>582</sup> *Kaliña and Lokono Peoples v. Suriname*, p. 224 (emphasis added).

<sup>583</sup> Constitutional Tribunal of Peru, Plena Sentencia 310/2023, 26 June 2023, para 53-54, available at: <https://tc.gob.pe/jurisprudencia/2023/03326-2017-AA.pdf>

<sup>584</sup> Colombian Constitutional Court, *Sentence T-732 of 2016*, available at: <https://www.corteconstitucional.gov.co/relatoria/2016/t-732-16.htm>, para. 52.

<sup>585</sup> Colombian Constitutional Court, *Sentence T-732 of 2016*, para. 38.

<sup>586</sup> Colombian Constitutional Court, *Sentence T-732 of 2016*, para. 62.

direct liability for violations of ‘obligatory, definable, and universal norms of international law;’<sup>587</sup> human rights “are to be respected by anyone.”<sup>588</sup>

159. The Hague District Court in the Netherlands, when assessing the obligations of Shell under Dutch domestic law, held that the UN Guiding Principles “are suitable as a guideline in the interpretation of the unwritten standard of care,”<sup>589</sup> and that “due to the universally endorsed content of the [UNGPs]” they apply to all business enterprises, whether or not the business enterprise has committed itself to them.<sup>590</sup> Similarly, the Colombian Constitutional Court has used the UNGPs in several opportunities as a hermeneutic tool to establish the standard of due diligence of business enterprises with respect to human rights,<sup>591</sup> especially the right to prior consultation.<sup>592</sup> According to the Constitutional Court, business enterprises have the obligation to act with due diligence in order to identify, prevent, mitigate and respond to the negative impacts of their activities.<sup>593</sup>
160. **The obligation to adopt due diligence plans has also been codified in different legislation around the world.** For example, in France, the Duty of Vigilance Law,<sup>594</sup> adopted in 2018, established the obligation for French business enterprises to adopt effective due diligence plans that include their direct and indirect supply chains within France and in foreign territories. These (extraterritorial) obligations encompass human rights, environmental and climate violations, and oblige business enterprises to assess and report their risks, implement mitigation and preventive measures, and to compensate affected individuals and groups. Similar business enterprises’ obligations have been recognized by British, German, Norwegian and French laws, among others.<sup>595</sup>

<sup>587</sup> Supreme Court of Canada, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (CanLII), [2020] 1 SCR 166, para 113, available at: <https://canlii.ca/t/j5k5j> [hereinafter Nevsun Judgment].

<sup>588</sup> Nevsun Judgment, para. 110.

<sup>589</sup> District Court of The Hague (NL), *Milieudefensie et al. v. Royal Dutch Shell plc.*, 26 May 2021 [hereinafter Shell Judgment 2021-NL], [online] available at: [https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true&keyword=shell#\\_dd69bcea-b686-4197-9d71-c429f2e238a7](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true&keyword=shell#_dd69bcea-b686-4197-9d71-c429f2e238a7), para. 4.4.11.

<sup>590</sup> Shell Judgment 2021-NL, para. 4.4.11.

<sup>591</sup> Colombian Constitutional Court, *Sentence T-072 of 2023*, para. 35, available at: <https://www.corteconstitucional.gov.co/Relatoria/2023/T-072-23.htm>. See also Colombian Constitutional Court, *Sentence T-614 of 2019*, at 9.10, available at: <https://www.corteconstitucional.gov.co/relatoria/2019/T-614-19.htm>; *Sentence SU-123 of 2018*, available at: <https://www.corteconstitucional.gov.co/relatoria/2018/SU123-18.htm>; *Sentence T-732 of 2016*.

<sup>592</sup> Colombian Constitutional Court, *Sentence SU-123 of 2018*, para. 13.2. See also Colombian Constitutional Court, *Sentence T-072 of 2023*; *Sentence T-732 of 2016*.

<sup>593</sup> Colombian Constitutional Court, *Sentence T-072 of 2023*, para. 35, citing *Sentence T-614 of 2019* at 8.1 “las empresas, y no solo los Estados, tienen la obligación de actuar con una debida diligencia a fin de identificar, prevenir, mitigar y responder a las consecuencias negativas de sus actividades.”; Constitutional Tribunal of Peru, *Plena Sentencia 310/2023*, 26 June 2023, para 53-54, “el estándar de la debida diligencia en derechos humanos es vinculante para las empresas privadas”

<sup>594</sup> France LOI n° 2017-399 relative au devoir de vigilance.

<sup>595</sup> See UK, Environmental Act 2021 at <https://www.legislation.gov.uk/ukpga/2021/30/contents/enacted>; German Act on Corporate Due Diligence Obligations in Supply Chains (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten) 2023 at <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html>; Norwegian Transparency Act 2022 at <https://www.regjeringen.no/contentassets/c33c3faf340441faa7388331a735f9d9/transparency-act-english-translation.pdf>; Corporate Duty of Vigilance law (Loi de Vigilance) at

161. **The growing number of international standards, guidelines, domestic and regional judicial and quasi-judicial decisions and legislations that reaffirm and strengthen business enterprises' independent responsibility to respect human rights make evident an evolutive trend:** business enterprises' responsibility to respect human rights must be concretized through binding due diligence and redress measures. Otherwise, this responsibility becomes illusory. This evolutive trend is reflected in the above cited *Miskito Divers* case, where the Court considered that carrying out continuous human rights risk assessments, mitigating any human rights risks, and providing remedy for any damage caused is an **"obligation [that] must be assumed by companies and regulated by the State."**<sup>596</sup> More than a simple change in language, this Court recognized the positions of power that business enterprises have, and therefore, their positions as guarantors in respecting human rights.
162. Harmonizing the interpretation that domestic courts in the region have given to human rights obligations and duties in a manner that does not diminish the protection afforded and in light of the *pro personae* principle, enshrined in the ACHR, is essential. **Therefore, it is respectfully requested that this Court reaffirms in this Advisory Opinion what has been already enshrined in previous rulings: that business enterprises are duty bearers of the obligation to respect human rights.**<sup>597</sup>

#### 4.2. Duties of business enterprises derived from the obligation to respect human rights

##### 4.2.1. At minimum, business enterprises have the duty to respect internationally recognized human rights and respect the rights of children and future generations

163. As addressed in Section 1, the human rights at stake in this climate emergency are broad in scope. When it comes to business enterprises activities, "[t]here are few if any internationally recognized rights businesses cannot impact—or be perceived to impact—in some manner."<sup>598</sup> Business enterprises in GHG-intensive industries, including their financial backers (financial institutions, banks and/or investors) and other facilitators need to take concrete actions<sup>599</sup> to fulfill their legal responsibilities in relation to present and future generations.<sup>600</sup> They need to respect at minimum,<sup>601</sup> the rights expressed

<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>; and forthcoming EU Directive on corporate sustainability due diligence (CSDDD), at <https://www.dlapiper.com/en/insights/publications/global-esg-alert/2023/eus-proposed-directive-on-corporate-sustainability-due-diligence-what-us-companies-need-to-know>

<sup>596</sup> *Miskito Divers* Judgment, p. 51(emphasis added).

<sup>597</sup> López Latorre, *In Defence of Direct Obligations for Businesses Under International Human Rights Law*, p. 70; IACHR, Inter-American Standards, 178.

<sup>598</sup> John Ruggie, [former] Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, Doc. No. A/HRC/8/5, 7 April 2008, para. 52.

<sup>599</sup> The responsibility to respect human rights is not passive; "it requires action on the part of the business." Shell Judgment 2021-NL, para. 4.4.15, citing the UNGP commentary to Principle 14.

<sup>600</sup> Non-state actors can be held accountable under international law for breaches of these duties. See Maastricht Principles, para. 25 (c).

<sup>601</sup> UNGPs, principle 12.

in the Universal Declaration on human rights, in the nine core international human rights instruments,<sup>602</sup> in the eleven fundamental instruments of the ILO<sup>603</sup> in the Durban Declaration and Programme of Action,<sup>604</sup> in the Declaration on the Right to Development,<sup>605</sup> in the Vienna Declaration and Programme of Action,<sup>606</sup> and in the UN Declaration on the Rights of Indigenous Peoples.<sup>607</sup>

164. **Business enterprises should have particular consideration of children's rights<sup>608</sup> (see Section 1) in the face of the climate emergency,<sup>609</sup> taking full responsibility when failing to do so.<sup>610</sup>** As stated by the CRC, "business activity is a source of significant environmental damage, contributing to child rights abuses. Such damage results, for example, from the (...) the extraction and burning of fossil fuels, industrial air and water pollution and unsustainable agriculture (...) practices."<sup>611</sup> Therefore, the Committee recommends the development "of due diligence procedures that integrate children's rights

<sup>602</sup> UN OHCHR, *The Core International Human Rights Instruments and their monitoring bodies*, available at: <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>. The nine core human rights instruments are defined as the following: International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), International Convention for the Protection of All Persons from Enforced Disappearance (CPED), Convention on the Rights of Persons with Disabilities (CRPD).

<sup>603</sup> UNGPs, principle 12; ILO, *Conventions and Recommendations*, available at: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm#:~:text=The%20ILO%20Governing%20Body%20had,of%20forced%20or%20compulsory%20labour.>

<sup>604</sup> UNGPs, principle 12. See also, UN, *Declaration and Programme of Action - World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 2002, available at: [https://www.ohchr.org/sites/default/files/Documents/Publications/Durban\\_text\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf)

<sup>605</sup> UNGA, *Declaration on the Right to Development resolution 41/128*, 4 December 1986, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-development>

<sup>606</sup> UN World Conference on Human Rights in Vienna, *Vienna Declaration and Programme of Action*, 25 June 1993, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>

<sup>607</sup> UNGPs, principle 12. See also UN General Assembly, *Declaration on the Rights of Indigenous Peoples, Resolution adopted*, 13 September 2007, available at: [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)

<sup>608</sup> The Committee on the Rights of the Child, General Comment No. 16 (2013), para. 8, stated that "all business enterprises should fulfill their responsibilities in relation to children's rights and States should ensure that they do so. Furthermore, business enterprises must not undermine the ability of the State to fulfill its obligations to children under the Convention and the Optional Protocols." See also para 1.

<sup>609</sup> IACHR Inter-American Standards, para. 241, referencing the Expert Group on Global Climate Obligations, *Principles on Climate Obligations of Enterprises*, 2018 [hereinafter *Principles on Climate Obligations of enterprises*], Eleven International Publishing, ISBN 978-94-6274-796-8, [online] available at: <https://climateprinciplesforenterprises.files.wordpress.com/2017/12/enterprisesprincipleswebpdf.pdf>, p. 28-29; and the Oslo Principles.

<sup>610</sup> *Kaliña and Lokono Peoples v. Suriname*, p. 224; UNGP, principle 11; and IACHR Inter-American Standards, para 197.

<sup>611</sup> Committee on the Rights of the Child, General Comment No. 26 (2023), para. 79.

impact assessments into their operations,”<sup>612</sup> and the establishment of “effective grievance mechanisms for children who have been victims of such abuses of their rights.”<sup>613</sup>

#### **4.2.2 Business enterprises have the duty to address the adverse human rights impacts of their conduct and as a result of their relationship with business partners, entities in their value chain and other actors**

165. **To comply with their responsibility to address human rights violations, business enterprises have a duty to “avoid causing or contributing to adverse human rights impacts”<sup>614</sup> through their own acts and omissions<sup>615</sup> or as a result of their business relationships with other parties.**<sup>616</sup> This requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation, assuming the corresponding consequences in law.<sup>617</sup>

166. **Business enterprises should prevent human rights violations and mitigate the adverse impacts of their activities and business relationships.** To prevent and mitigate negative impacts on the human rights of present and future generations,<sup>618</sup> particularly the most severe and potentially irreversible,<sup>619</sup> business enterprises are responsible for exercising human rights due diligence and “being accountable, and assuming the corresponding consequences, whether in criminal, civil, or administrative law.”<sup>620</sup> Considering that the adverse effects of climate change negatively impact the real enjoyment of all human rights,<sup>621</sup> adequate due diligence entails an assessment and evaluation of the ongoing and potential (future)<sup>622</sup> contribution to climate change as a result of their conduct.<sup>623</sup> Such assessment must consider all stages of business enterprises’ operation and throughout their entire value chain,<sup>624</sup> even if

<sup>612</sup> Committee on the Rights of the Child, General Comment No. 26 (2023), para. 81.

<sup>613</sup> Committee on the Rights of the Child, General Comment No. 26 (2023), para. 88.

<sup>614</sup> UNGPs, Principle 13; OECD Guidelines, at section IV.1, IV.2.

<sup>615</sup> The definition of “activities” includes both actions and omissions of business enterprises.

<sup>616</sup> UNGPs, principle 13; OECD Guidelines, at section IV.1, IV.2.: “[B]usiness relationships” include relationships with business partners, value chain entities, and any other non-State or State entity that is directly linked to its business operations, products or services, p. 33.

<sup>617</sup> UNGPs, principles 11, 15 (b); IACHR Inter-American Standards, para 197.

<sup>618</sup> IACtHR OC-23/2017, para. 155. See Maastricht Principles, 25 (a-c).

<sup>619</sup> UNGPs, principle 24.

<sup>620</sup> IACHR Inter-American Standards, para 197. See also the UNGPs, principle 15 (b); UNWG Information note on Climate Change and UNGPs 2023, para. 10, 17.

<sup>621</sup> IACtHR OC-23/2017, para 47.

<sup>622</sup> Allegations posed to Saudi Aramco from the ClientEarth Complaint by the UN Special Procedures mechanism. WG on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur (SR) on the promotion and protection of human rights in the context of climate change; the SR on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the SR on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the SR on the human rights to safe drinking water and sanitation, *Communication to Saudi Aramco*, 26 June 2023 [hereinafter UNWG and UNSR Communication to Saudi Aramco], Ref.: AL OTH 53/2023, available at:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28094>, p. 3.

<sup>623</sup> CHRP Climate Change Report, p. 82. Maastricht Principles, para. 6 (a), 25 (a-c).

<sup>624</sup> CHRP Climate Change Report, p. 82;

not required by government regulations in the jurisdiction in which they operate.<sup>625</sup> In addition, business enterprises must assess their corporate policies to identify if any of them may lead to possible human rights violations.<sup>626</sup> These findings must be integrated into their decision-making processes and actions.<sup>627</sup> Conducting a due diligence assessment alone is insufficient; the results must be publicly disclosed and disseminated (*see* Section 4.3.3).<sup>628</sup>

167. **Business enterprises should cease or change the activity that is negatively impacting human rights.** When a business enterprise contributes to or is at risk of causing or contributing to climate change through its direct or indirect activities, it should take the necessary steps to cease or change the activity in question, in order to prevent or mitigate the chance of violations of human rights occurring or recurring.<sup>629</sup> Business enterprises should also, to the greatest extent possible, use their leverage to influence change through their entire value chain and business partnerships to mitigate any remaining climate change impact on human rights linked to their operations, products or services.<sup>630</sup>

168. **Business enterprises should remediate adverse human rights impacts of their activities and business relationships.** Business enterprises should put in place “processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute,”<sup>631</sup> as established in several international, regional and national instruments.<sup>632</sup> The UNGPs and the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”) assert that business enterprises should establish appropriate policies and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. Furthermore, they should provide for or cooperate in their remediation through internal mechanisms and other legitimate processes.<sup>633</sup>

169. **Providing full and effective reparation include “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”<sup>634</sup>** (*see* Section 3.1). In the Inter-American system, the

<sup>625</sup> CHRP Climate Change Report, p. 119.

<sup>626</sup> CHRP Climate Change Report, p. 82.

<sup>627</sup> *Id.*.. *See also* UNGPs, principle 19.

<sup>628</sup> CHRP Climate Change Report, p. 81-82.

<sup>629</sup> UNGP, principle 19; OECD Guidelines, at section IV.2.

<sup>630</sup> OECD Guidelines, at section IV.2; UNGPs, principle 13; OHCHR Interpretive Guide on Corporate Responsibility and Human Rights, p. 18. According to the OECD Guidelines, “leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.” OECD Guidelines, at Part IV, para. 47.

<sup>631</sup> CHRP Climate Change Report, p. 66

<sup>632</sup> *See the* UNGPs, principles 11, 14, 15 (c); OECD Guidelines at section IV, para. 41, 46, 51. At a regional level *see e.g.*, European Parliament, *Amendments adopted on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* Document No. P9\_TA(2023)0209; and the IACHR, *Inter-American Standards*, para 194-197. At a national level *see i.e.* CHRP Climate Change Report, pg. 81-82.

<sup>633</sup> UNGPs, principles 11, 14, 15 (c), 22; OECD Guidelines, at section IV, para. 41, 46, 51; CHRP Climate Change Report, pg. 85. *See also*, UNGPs, Commentary on principle 22- “Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors.”

<sup>634</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para. 19. *See also*, Committee on the Rights of the Child, General Comment No. 26 (2023), para. 89.

responsibility of business enterprises to remediate is a “correlative legal effect” of the primary duty of States to provide an effective remedy.<sup>635</sup> Consequently, those who are negatively affected by environmental damage and climate change resulting from business enterprises conduct can be entitled to reparations, especially given that the right to a healthy environment is an integral component of human rights within the Inter-American system as well.<sup>636</sup>

170. Furthermore, as the Committee on the Rights of the Child acknowledged, “[r]emedial mechanisms should consider the specific vulnerabilities of children to the effects of environmental degradation, including the possible irreversibility and lifelong nature of the harm. Reparation should be swift, to limit ongoing and future violations.”<sup>637</sup> These obligations extend to future generations.<sup>638</sup>

#### **4.3. Measures that business enterprises must fulfill to respect human rights in the context of climate change**

##### **4.3.1. To address their climate change-related human rights impacts, business enterprises must commit to deep, rapid, and sustained GHG emissions reduction throughout their entire business operation and value chain**

171. **Business enterprises in GHG-intensive industries should take the necessary steps to cease or change the activity contributing to the harm or risk of harm,<sup>639</sup> especially in the case of severe and irreversible impacts,<sup>640</sup> and in doing so, apply the precautionary approach.<sup>641</sup>** Widespread adverse climate change-related impacts, losses, and damages to people and nature have already occurred (*see* Section 1).<sup>642</sup> Some are already irreversible (e.g. the loss of life, family life, culture, property, and species extinctions) or are approaching irreversibility with every additional increment of global warming.<sup>643</sup> To prevent or mitigate the foreseeable risk of increased warming, best scientific evidence indicates that GHG intensive business enterprises must commit to deep, rapid and sustained GHG emissions reduction throughout their entire business operation and value chain.<sup>644</sup>

<sup>635</sup> IACHR Inter-American Standards, para 176-179; 194-196. *See also*, OHCHR Interpretive Guide on Corporate Responsibility and Human Rights, p. 64.

<sup>636</sup> IACHR, Inter-American Standards, para 46. *See also*, IACtHR OC-23/2017, para. 62; IACHR, *Situation of Human Rights of Indigenous and Tribal Peoples of the Pan-Amazon Region*, 29 September 2019, OAS/Ser.L/V/II. Doc. 176, para. 272-279; IACHR, Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA, by its initials in Spanish), *SRESCER Welcomes Decisions Taken in the Region to Face Climate Change*, 17 April 2018. Available at: <https://www.oas.org/es/cidh/prensa/comunicados/2018/083.asp>.

<sup>637</sup> Committee on the Rights of the Child, General Comment No. 26 (2023), para. 89. *See also* UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para. 15-23.

<sup>638</sup> *See* Maastricht Principles, para. 25 (b).

<sup>639</sup> UNGPs, principle 19; OECD Guidelines, at section IV.2

<sup>640</sup> UNGPs, principle 24.

<sup>641</sup> UN Global Compact Principles, principle 7.

<sup>642</sup> IPCC AR6 SYR SPM, at A.2.

<sup>643</sup> IPCC AR6 SYR SPM, at A.2 and B.3.2; IPCC WGII SPM, at B1.2.

<sup>644</sup> IPCC AR6 SYR SPM at AR6, B.6.

172. **In spite of the clear scientific warnings and knowledge of the contribution of GHG-intensive business enterprises to climate change, the majority of the world’s GHG-intensive business enterprises are failing to take action to reduce GHG emissions.** As stated in section 2.2.2a, only 4% of the 2000 biggest listed business enterprises have committed to quality net zero pledge.<sup>645</sup> Major business enterprises, like Shell, claim to be in line with the Paris Agreement, but are only in fact committed to a reduction of 5% emissions by 2030, relative to 2019 emissions.<sup>646</sup> Indeed, a report found that in 2021, the climate policies of ten of the largest oil and gas companies in the world were not aligned with the Paris Agreement temperature limits, and that the “net zero” goals of eight of these companies had significant shortcomings.<sup>647</sup> It is the pathway that matters,<sup>648</sup> and while the majority of business enterprises seem to “have set commitments to achieve net zero emissions by 2050 or sooner,” overall “the majority of companies have not set medium-term emissions reduction targets aligned with 1.5°C or fully aligned their future capital expenditures with the goals of the Paris Agreement.”<sup>649</sup>
173. **If business enterprises continue to operate “business-as-usual,” the violation of fundamental rights will become the norm in many nations,<sup>650</sup> including the Americas region.<sup>651</sup>** The science is clear. Only deep, rapid, and sustained reductions of GHG can limit the global temperature to a maximum of 1.5°C with little to non-overshoot, leading to the slowdown of global warming in the next decades,<sup>652</sup> and eventually enabling the stabilization of atmospheric concentrations of GHG to safe levels (*See* Section 1). To fulfill their obligation to respect human rights, GHG-intensive business enterprises must (*inter alia*):
- a. **Conduct a climate and human rights due diligence assessment** that “identif[ies] all their Scope 1, 2, 3 greenhouse gas emissions throughout their operations with such identification being science-based, verifiable and informed by input from experts,”<sup>653</sup> including and “based on meaningful consultation with all relevant stakeholders.”<sup>654</sup> The right to free, prior and informed consultation

<sup>645</sup> Net Zero Tracker analysis.

<sup>646</sup> Thomas Day et al., *Corporate Climate Responsibility Monitor 2023*.

<sup>647</sup> Climate Action 100+ Net Zero Company Benchmark Shows Continued Progress on Net Zero Commitments Is Not Matched by Development and Implementation of Credible Decarbonisation Strategies (Oct. 13, 2022), available at: [www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-continued-progress-on-net-zero-commitments-is-not-matched-by-development-and-implementation-of-credible-decarbonisation-strategies/](http://www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-continued-progress-on-net-zero-commitments-is-not-matched-by-development-and-implementation-of-credible-decarbonisation-strategies/); MSCI, ESG Ratings & Climate Search Tool, available at [www.msci.com/our-solutions/esg-investing/esg-ratings-climate-search-tool/issuer/bp-plc/IID000000002140371](http://www.msci.com/our-solutions/esg-investing/esg-ratings-climate-search-tool/issuer/bp-plc/IID000000002140371) (accessed Nov. 29, 2022); Carbon Tracker, Oil Majors’ Net Zero Plans Still Far from Paris Targets (May 27, 2021), available at: <https://carbontracker.org/oil-majors-net-zero-plans-still-far-from-paris-targets/>.

<sup>648</sup> Mike Coffin, Carbon Tracker senior analyst and report author: <https://carbontracker.org/oil-majors-net-zero-plans-still-far-from-paris-targets/>

<sup>649</sup> Climate Action available online at: <http://www.climateaction100.org/news/climate-action-100-net-zero-company-benchmark-shows-an-increase-in-company-net-zero-commitments-but-much-more-urgent-action-is-needed-to-align-with-a-1-5c-future/>

<sup>650</sup> CHRP Climate Change Report, 105.

<sup>651</sup> IPCC AR6 SYR SPM, at B.1

<sup>652</sup> IPCC AR6 SYR SPM, at B.1, B.3, B.5.1

<sup>653</sup> UNWG Information note on Climate Change and UNGP 2023, para. 17d.

<sup>654</sup> *Communication to Saudi Aramco*, p. 7, para 5; Information Note UNGP-BHR para. 21.

and consent must be respected, particularly in relation to “matters that involve the rights of indigenous peoples and tribal Afro Descendant peoples in the context of business activities.”<sup>655</sup>

- b. **Phase out GHG emissions from their own activities, subsidiaries, products and services, and business relationships.** GHG-intensive business enterprises need to reduce their emissions throughout their value chain (scope I, II and III emissions).<sup>656</sup>
- c. **Halt oil and gas expansion and phase out oil and gas production.** Limiting global warming to a maximum of 1.5°C with limited to no overshoot requires rapid, deep and in most cases immediate reductions in oil and gas production and use this decade.<sup>657</sup> However, according to the UNEP, governments’ planned production levels in 2030 correspond to “29% more oil and 82% more gas than global levels consistent with limiting warming to 1.5°C”<sup>658</sup> and States’ plans and projections taken together “would lead to global oil and gas production rising out to 2050.”<sup>659</sup> Furthermore, the IPCC has identified that projected CO<sub>2</sub> emissions from existing fossil fuel infrastructure alone “already exceed the remaining carbon budget for limiting global warming to 1.5°C.”<sup>660</sup> To limit warming to a maximum of 1.5°C and reach net zero global emissions by 2050, no new long-term oil and gas projects can be approved for development and, after 2030, a number of projects need to be closed before they reach the end of their technical lifetime.<sup>661</sup>
- d. **Stop exploitation and development of new oil and gas fields.**<sup>662</sup> In scenarios consistent with limiting global warming to a maximum of 1.5°C and reaching net zero global emissions by 2050, “no fossil fuel exploration is required and no new oil and natural gas fields are required beyond those that have already been approved for development.”<sup>663</sup>
- e. **Halt the construction of new coal plants and manage the phase out in emissions from existing assets.** OECD nations, such as the United States and Canada, have committed to end coal use

<sup>655</sup> Inter-American Standards, para 49.

<sup>656</sup> As defined by the GHG Protocol.

<sup>657</sup> IPCC AR6 SYR SPM, at C.3.

<sup>658</sup> 2023 UNEP Production Gap Report Key Messages, p. 16.

<sup>659</sup> SEI, Climate Analytics, E3G, IISD, and UNEP, (2023), The Production Gap: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises. Stockholm Environment Institute, Climate Analytics, E3G, International Institute for Sustainable Development and United Nations Environment Programme. <https://doi.org/10.51414/sei2023.050> [Hereinafter, 2023 UNEP Production Gap Report] at Section 2.3, p.24

<sup>660</sup> IPCC AR6 SYR SPM, at B.5.3; *see also* IPCC AR6 WGIII, Mitigation of Climate Change, at TS.3, p. 68.

<sup>661</sup> International Energy Agency, Special Report on the Oil and Gas Industry in Net Zero Transitions, 2023, pp. 14, 19; *see also* IPCC AR6 WGIII, Box TS.8, at p. 90 (“Without early retirements, or reductions in utilisation, the current fossil infrastructure will emit more GHGs than is compatible with limiting warming to 1.5°C”).

<sup>662</sup> International Energy Agency. *Net Zero by 2050 A roadmap for the global energy sector*. [online] Available at: [https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroBy2050-ARoadmapfortheGlobalEnergySector\\_CORR.pdf](https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroBy2050-ARoadmapfortheGlobalEnergySector_CORR.pdf), p. 21.

<sup>663</sup> International Energy Agency, *World Energy Outlook 2021* (2021), p. 100, available at <https://iea.blob.core.windows.net/assets/4ed140c1-c3f3-4fd9-acae-789a4e14a23c/WorldEnergyOutlook2021.pdf>; *see also* IEA, *Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach - 2023 Update* (2023), p. 16 (“No new long-lead time upstream oil and gas projects are needed in the NZE Scenario.”).

entirely by 2030 and to shut down coal-fired power stations by 2040 at the latest.<sup>664</sup> Scientists estimate that Latin American countries should reach a phase-out by 2032. However, Latin America is still seeing an expansion of the current coal infrastructure. Scientists have called for the “cancelling the planned coal power plant units”<sup>665</sup> as a “very important step,”<sup>666</sup> and highlighted “the need for countries to retire all coal power plants older than 40 years as soon as possible, and create a clear plan to retire the remaining plants in the next one to two decades, and introduce measures to reduce their capacity factor significantly.”<sup>667</sup> According to the IEA most recent report, “early retirement or repurposing of coal-fired power plants, are key to facilitate declines in fossil fuel demand and create additional room for clean energy to expand.”<sup>668</sup>

#### 4.3.2. Business enterprises must develop a corporate just transition plan for emission reductions

174. **In addition to decarbonization policies, business enterprises must develop a corporate transition plan for emission reduction targets and the phasing out of hydrocarbons that prevents a disproportionate impact on employment or in communities that rely on this employment.** A rights-based approach to the decarbonization of our societies is necessary to avoid a “disproportionate impact on those who are already disadvantaged.”<sup>669</sup> Efforts towards a system-change that protects human rights “need to address existing injustices while being cognizant of complexity, feedback and trade-offs across social-ecological systems.”<sup>670</sup> Just transition plans of business enterprises should respect labor rights<sup>671</sup> and recognize existing inequities and injustices in order to avoid perpetuating them while identifying ways to address sustainability challenges, ensuring meaningful engagement and consultation with impacted communities and overall be aligned, at a minimum, with the International Labor Organization Guidelines for a just transition.<sup>672</sup> As established by the OECD, “it is important for enterprises to assess and address social impacts in the context of their environmental management and due diligence activities and to take action to prevent and mitigate such adverse impacts both in their transition away from environmentally harmful practices, as well as towards greener industries or practices, such as the use of renewable energy.”<sup>673</sup>

<sup>664</sup> Climate Analytics, *Global and regional coal phase-out requirements of the Paris Agreement: Insights from the IPCC Special Report on 1.5°C*, September 2019, Key Messages.

<sup>665</sup> *Id.* p. 21

<sup>666</sup> *Id.*

<sup>667</sup> *Id.*

<sup>668</sup> IEA, *Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach* (2023), available at [https://iea.blob.core.windows.net/assets/4ad26550-05c4-4495-9891-98e588cd0be8/NetZeroRoadmap\\_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf](https://iea.blob.core.windows.net/assets/4ad26550-05c4-4495-9891-98e588cd0be8/NetZeroRoadmap_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf).

<sup>669</sup> Ciple, David and Harrison, Jill. *Transition tensions: mapping conflicts in movements for a just and sustainable transition*. 2020. Environmental Politics, 29. 435–56. Kashwan et al., *Planetary justice: Prioritizing the poor in earth system governance*. 2020. Earth system governance, vol. 6.

<sup>670</sup> Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and IPCC, *IPBES-IPCC Co-Sponsored Workshop Report on Biodiversity and Climate Change*, 2021 [hereinafter IPBES-IPCC Report on Biodiversity and Climate Change], p. 33.

<sup>671</sup> OECD, 2023 Guidelines for Multinational Enterprises on Responsible Business Conduct, para 70.

<sup>672</sup> IPBES-IPCC Report on Biodiversity and Climate Change, p. 172; International Labor Organization Guidelines for a just transition towards environmentally sustainable economies and societies for all [hereinafter ILO Just Transition Guidelines].

<sup>673</sup> OECD 2023 Guidelines for Multinational Enterprises on Responsible Business Conduct, para. 70.

#### 4.3.3. Business enterprises must provide accurate information on their business activities

175. Businesses enterprises must provide in an accurate, effective,<sup>674</sup> “timely, accessible and complete”<sup>675</sup> manner, information they possess (often exclusively) on the human rights impacts of their business activities that may contribute to causing or exacerbating climate change. They must also refrain from any efforts to mislead, undermine and deny climate science.

176. **Business enterprises must disclose in a timely manner to the public, investors, stockholders and government agencies<sup>676</sup> the findings from their climate and human rights due diligence assessments.** The information includes “climate and human rights impact assessment results [,] the corresponding measures taken in relation thereto[,]”<sup>677</sup> “policies and action plans in relation to all their actual and potential climate change-related impacts on human rights and the environment.”<sup>678</sup> More specifically, business enterprises must disclose (*inter alia*):

- a. **Information on GHG emissions and other conduct which may destroy natural carbon sinks and report how they are aligned with the international effort to limit global warming to below 1.5°C.** From the environmental due diligence assessment, business enterprises must disclose the GHG emissions resulting from the totality of their operations, including those of their subsidiaries across multiple jurisdictions, and foreseeable downstream emissions from the use of their products.<sup>679</sup> Business enterprises should “commit to transparency in the communication of scientific findings.”<sup>680</sup>
- b. **Information on the direct, indirect and cumulative impacts.** Information about GHG emissions resulting from the exploration, extraction, production, marketing, sale and consumption of fossil fuel should be provided ahead of any contemplated new activities in strict compliance with the right to access to information<sup>681</sup> and the right to free prior and informed “effective and meaningful”<sup>682</sup> consultation and consent.<sup>683</sup> The disclosure should also include in an “accessible way measures to reduce such emissions and to address their contribution to climate and climate mitigation targets, throughout their operations.”<sup>684</sup> These plans must contain “key performance indicators, which may be reviewed and evaluated to determine whether published goals and plans are achieved over a specific period.”<sup>685</sup>

<sup>674</sup> IACHR Inter-American Standards, para. 48.

<sup>675</sup> IACHR Inter-American Standards, para. 48.

<sup>676</sup> CHRP Climate Change Report, p. 82, 119.

<sup>677</sup> CHRP Climate Change Report, p. 119.

<sup>678</sup> UNWG Information note on Climate Change and UNGPs 2023, para. 17 (b).

<sup>679</sup> CHRP Climate Change Report, p. 119.

<sup>680</sup> UNWG Information note on Climate Change and UNGPs 2023, para. 21.

<sup>681</sup> Escazú Agreement, Article 5.

<sup>682</sup> UNWG Information note on Climate Change and UNGPs 2023, para. 6.

<sup>683</sup> Inter-American Standards, para. 49.

<sup>684</sup> UNWG Information note on Climate Change and UNGPs 2023, para. 8a; UNGPs, principle 21; IACHR Inter-American Standards, para. 250.

<sup>685</sup> CHRP Climate Change Report, p. 119. IACHR Inter-American Standards, para 48.

- c. **Business enterprises must provide information on their corporate lobbying activities and “revolving doors”<sup>686</sup> at the domestic, regional and international level.<sup>687</sup>** These disclosures are particularly important with respect to funding for legal entities that participate in fora that discusses climate science and climate policy (*See* Section 2.2.3).
- d. **Business enterprises must not engage in greenwashing and must disclose information about their actual impact.** As shown in Section 2, greenwashing has contributed and continues to contribute to climate change and human rights violations as it hinders climate action and promotes demand and dependence on fossil fuels.<sup>688</sup> The information business enterprises provide must be done in a good faith and legally-compliant manner that does not violate laws on fraud or misleading advertisement, among others.<sup>689</sup> Business enterprises must not engage in the misrepresentation or withholding of environmental information. In addition, business enterprises “should refrain from supporting and/or engaging in public information campaigns based on inaccurate, misleading, and unfounded assertions that harm the ability of States and the public to make informed decisions pertaining to climate change.”<sup>690</sup>
- e. **Moreover, businesses enterprises must not undermine, conceal, downplay or obfuscate climate science.** Business enterprises “should denounce all forms of climate denial propaganda and cease funding lobbies, politicians, pseudo-scientists, trade associations and other organizations that disseminate false information about climate change and climate science.”<sup>691</sup> Furthermore, businesses should not engage “agents of misinformation” to deny the gravity or downplay and deny the causal relationship between GHG emissions and extreme weather events.<sup>692</sup>

<sup>686</sup> "The term “revolving door”, refers to the movement of individuals from positions in public office to jobs in the same sector in private organizations, and vice-versa. Lines are blurred between political and economic power when the same people that one day are regulators become high-paid employees of major corporations the next." The Greens, European Free Alliance in the European Parliament, *Revolving Doors and The Fossil Fuel Industry Time To Tackle Conflicts Of Interest In Climate Policy-Making*, May 2018, available at [https://www.greens-efa.eu/files/assets/docs/report\\_of\\_revolving\\_doors\\_digital\\_min.pdf](https://www.greens-efa.eu/files/assets/docs/report_of_revolving_doors_digital_min.pdf) at p.9

<sup>687</sup> "Business enterprises should ensure transparency and integrity in lobbying activities." OECD Guidelines, at General Policies A5.

<sup>688</sup> UNWG and UNSR Communication to Saudi Aramco, p. 6.

<sup>689</sup> "In all contexts, business enterprises should comply with all applicable laws." UNGPs, Principle 23. *See, e.g.* complaints in: *The Municipalities of Puerto Rico v. Exxon Mobil Corp, et. al.* 3:22-cv-01550. 22 Nov 22. US Dist. Court Puerto Rico; *County of Maui v. Sunoco L.P. et. al.* 2CCV-20-0000283 12 Oct 2020 Circuit Court Second Circuit State of Hawai'i; *County of Multnomah v. Exxon Mobil Corp, et. al.* 23CV25164. 22 June 2023. Circuit Court of the State of Oregon; *State of California v. Exxon Mobil Corp, et. al.* 16 September 2023. Superior Court of the State of California, County of San Francisco.

<sup>690</sup> UNWG and UNSR Communication to Saudi Aramco, p. 6. *See also*, UNWG Information note on Climate Change and UNGP 2023, para. 18, "Business enterprises should act responsibly and not promote unsustainable consumption, undertake greenwashing or seek to have undue corporate influence in this area."

<sup>691</sup> CHRP Climate Change Report, p. 119; *see also* Report From The United Nations' High-Level Expert Group On The Net Zero Emissions Commitments of Non-State Entities, Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions, 2022, p. 15

<sup>692</sup> UNWG and UNSR Communication to Saudi Aramco, p. 7, para 6.

#### 4.3.3. Business enterprises must not undermine States' abilities to fulfill their own human rights obligations and must refrain from exerting undue influence on legislative or political processes and institutions

177. Business enterprises should not undermine the ability of State parties to fulfill their duties including in relation to reducing GHG emissions and other carbon-intensive industries,<sup>693</sup> transitioning to renewable energy, protecting, conserving and restoring forests and other natural carbon sinks<sup>694</sup> and ensuring "the sustainable use of ecosystems and biodiversity."<sup>695</sup> To fulfill this duty, business enterprises must (*inter alia*):

- a. **Business enterprises must not hinder or block States' efforts to protect human rights by taking appropriate action on climate change.** Business enterprises should refrain from promoting, facilitating or encouraging States to continue or increase the use of fossil fuels.<sup>696</sup> Business enterprises must not undermine the ability of States to fulfill their own obligations under the Convention on the Rights of the Child,<sup>697</sup> among other legal instruments.
- b. **Business enterprises must refrain from directly or indirectly exerting undue influence on legislative or political processes that seek to regulate the industries in which they operate.**<sup>698</sup> The "capture" of State institutions and the "undue influence over public decision-makers" can violate human rights<sup>699</sup> (*see* section 2.2.3). In addition, business enterprises "should work against corruption in all its forms."<sup>700</sup> The UN Special Rapporteur on Human Rights and the Environment

<sup>693</sup> "Businesses should support, rather than oppose, public policies intended to effectively address climate change." OHCHR SR on Human Rights and the Environment, *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment*, 2019 [UN Safe Climate Report]. A/74/161, [online] available at: <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf>. See also UNGPs, commentary to principle 13.

<sup>694</sup> Boyd, David. *A Healthy Biosphere*. Report from the Special Rapporteur of Human Rights and the Environment, 2020 [hereinafter Boyd, *A healthy Biosphere*], Doc. A/75/161 [online] available at: [https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/Healthy\\_Biosphere\\_A75161.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/Healthy_Biosphere_A75161.pdf), para 77.

<sup>695</sup> Boyd, *A Healthy Biosphere*, para 77.

<sup>696</sup> UNWG Information note on Climate Change and UNGPs 2023, para.18: "Business enterprises should act responsibly and not promote unsustainable consumption."

<sup>697</sup> Committee on the Rights of the Child, General comment No. 16 (2013), in para. 8, stated that "all business enterprises should fulfill their responsibilities in relation to children's rights and States should ensure that they do so. Furthermore, business enterprises must not undermine the ability of the State to fulfill its obligations to children under the Convention and the Optional Protocols."

<sup>698</sup> See, UNWG Information note on Climate Change and UNGPs 2023, para. 18, ""Business enterprises should act responsibly and not ... seek to have undue corporate influence in this area."

<sup>699</sup> IACHR Inter-American Standards, para. 52: "States should be free from undue influence from corporations or those working to further their interests that seek to privilege corporate economic interests over, or otherwise disrupt, the realization of human rights." *See also*, Human Rights Council, A/HRC/40/57: *Guiding principles on human rights impact assessments of economic reforms - Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights*, 19 December 2018, UN Doc. A/HRC/40/57, at 14.3.

<sup>700</sup> UN Global Compact Principles, principle 10; IACHR, *Resolution No. 1/18: Corruption and Human Rights*, 2 March 2018.

recommended to “[l]imit fossil fuel businesses and their industry associations from influencing climate, energy and environmental policies, in light of their responsibility for the majority of emissions and their well-known efforts to subvert and deny scientific evidence of climate change.”<sup>701</sup>

- c. **Business enterprises must participate in good faith in legal and quasi-legal proceedings.** They should not undermine the proceedings “that promote accountability for climate change-related impacts on human rights and the environment.”<sup>702</sup> Business enterprises must not engage in anti-climate litigation designed to “delay or dismantle existing or emerging regulations that promote climate action.”<sup>703</sup> In addition, in accessing the courts themselves, business enterprises must not engage in litigation designed to “harass or intimidate” or stifle civil society through “strategic lawsuits against public participation”<sup>704</sup> (SLAPP).<sup>705</sup> Moreover, in accordance with their duties to respect human rights, business enterprises should refrain from using ISDS to challenge State measures that aim to curb the climate impacts of fossil fuel pollution or agroindustrial land conversion (*see* Section 2.2.4).

#### **4.3.4. Business must avoid contributing to deforestation and destruction of natural carbon sinks and commit to ambitious and near-term emissions reduction rather than rely on future, risky technologies, unproven at scale**

178. Biodiversity loss, climate change and human rights are closely interconnected.<sup>706</sup> To fulfill their obligation to respect human rights, business enterprises must not contribute to deforestation and must commit to ambitious and near-term emissions reduction measures to keep global warming below 1.5°C.<sup>707</sup>

179. Effective and reliable measures need to primarily be a result of the phase out of hydrocarbons and a halt to the destruction of carbon sinks.<sup>708</sup> Business enterprises must cease deforestation of the Amazon

<sup>701</sup> UN Safe Climate Report, para 77: “This is a key element of the WHO Framework Convention on Tobacco Control, which limits the involvement of tobacco companies in health policy.”

<sup>702</sup> UNWG Information note on Climate Change and UNGPs 2023, para. 29.

<sup>703</sup> UNEP Global Climate Litigation Report 2023, p. 14

<sup>704</sup> UN Human Rights Council, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 4 February 2016, UN Doc. A/HRC/31/66, para. 84, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/13/PDF/G1601813.pdf?OpenElement>.

<sup>705</sup> Business enterprises must not engage in other forms of weaponizing the judicial processes, which can fundamental rights of freedom of expression, peaceful assembly and association.” Enshrined in Articles 19 and 20 of the Universal Declaration of Human Rights (UDHR) and guaranteed under Articles 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR). UN SR Info Note on SLAPPs, para. 3.

<sup>706</sup> IPBES-IPCC, Scientific outcome of the IPBES-IPCC co-sponsored workshop on biodiversity and climate change, Section 1.1; Boyd, A healthy Biosphere, para 3.

<sup>707</sup> See IPCC, AR6 WGIII, at Ch. 3, 3.2, and *The Production Gap Report 2021*, pp. 4, 12, 14-15: relying on the 1.5SR report and concluding that a 1.5°C consistent pathway requires an immediate and steep decline in fossil fuel production.

<sup>708</sup> IPCC AR6 WGIII, Fig. 3.7.

and other natural carbon sinks;<sup>709</sup> reduce adverse impacts on ecosystems and biodiversity from their own activities, their subsidiaries and supply chain; and reduce impacts on nature from the use of their products and services.<sup>710</sup>

#### 4.3.5 Business enterprises must remediate and compensate for past and ongoing climate change-related harm (loss and damage) and adaptation costs

180. The responsibility of business enterprises to remediate the human rights violations caused through their business activities in the context of climate change include:

- a. **Measures of restitution:** Businesses enterprises are obligated, to the fullest extent feasible, to reinstate the affected party to their former state prior to the human rights violations.<sup>711</sup> Carbon-intensive business enterprises are required to participate in initiatives aimed at rectifying historical and continuous harm inflicted upon the global climate, for instance by providing the necessary funds to compensate the victims of climate change impacts through courts or quasi-judicial bodies.<sup>712</sup> Business enterprises should also restitute grabbed lands to traditional Indigenous populations and provide the necessary funds required by the communities to reforest destroyed areas, recognizing and respecting the rights of Indigenous peoples to lead the biodiversity restoration of the area whether they are located within the country where the business has its domicile or in foreign territory.<sup>713</sup>
- b. **Measures of compensation:** In light of the polluter pays principle (*see* section 3.2.7), individuals and the State (society at large) should not pay the cost of climate change, largely caused by carbon-intensive business enterprises' activities.<sup>714</sup> As repeatedly affirmed by the Superior Court of Justice of Brazil regarding causation and attribution of liability, "those who act; who do not act when they should have; who allow the action to take place; who do not care that an action is being undertaken; who finance others to act; and who benefit when others act should be regarded as co-polluters, and are thus jointly and severally liable."<sup>715</sup> Alongside the overarching duty to provide financial compensation commensurate with the gravity of the human rights violations to victims,<sup>716</sup> businesses enterprises are compelled to endorse and collaborate in the transition to sustainable energy practices. Moreover, "achieving climate resilience and adaptation is a critical component of

<sup>709</sup> UN Department of Economic and Social Affairs - Sustainable Development, *Goal 15 / Department of Economic and Social Affairs*, Target 15.2, available at <https://sdgs.un.org/goals/goal15>; *see also* Global Forest Goals and Targets of The UN Strategic Plan for Forests 2030, Target 1.3, available at <https://www.un.org/esa/forests/wp-content/uploads/2019/04/Global-Forest-Goals-booklet-Apr-2019.pdf>; Kunming-Montreal Global Biodiversity Framework (CBD/COP/15/L.25), Section F. 2050 Vision and 2030 mission, available at <https://www.cbd.int/doc/c/e6d3/cd1d/daf663719a03902a9b116c34/cop-15-l-25-en.pdf>.

<sup>710</sup> Boyd, A Healthy Biosphere, para. 77.

<sup>711</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para 19.

<sup>712</sup> CHRP Climate Change Report, p. 110.

<sup>713</sup> *See, e.g.* France LOI n° 2017-399 relative au devoir de vigilance.

<sup>714</sup> OECD, *Background note: The implementation of the Polluter Pays Principle* (March 2022).

<sup>715</sup> Daniela Arantes Prata and Danilo B Garrido Alves, *Brazil: A Progressive Framework on Civil Liability and Human Rights Protection?* 2023 citing Superior Tribunal of Justice of Brazil, REsp 650.728/SC, 23 October 2007.

<sup>716</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para 20.

the long-term global response to climate change to protect people and ecosystems”<sup>717</sup> to which business enterprises are required to contribute. Carbon intensive business enterprises must contribute to the adaptation expenses borne by the communities disproportionately impacted by climate change,<sup>718</sup> and financial institutions must “enhance finance mobilization in order to deliver the scale of resources needed to achieve climate plans, particularly for adaptation.”<sup>719</sup> Moreover, business enterprises “should avoid activities, which undermine climate adaptation for, and resilience of, communities, workers and ecosystems.”<sup>720</sup> They should also compensate not only for violations committed by their main branch, but also for violations committed by direct and indirect suppliers, whether in national territory or abroad (see for instance the French Duty of Vigilance Law).

- c. **Rehabilitation measures:** Measures of rehabilitation “should include medical and psychological care as well as legal and social services.”<sup>721</sup> While business enterprises are not obligated to directly furnish rehabilitation measures, their duty to provide compensation must include contributions to address the human rights harms they have caused as significant polluters, as outlined in paragraph 149.<sup>722</sup> This includes covering “costs required for legal or expert assistance, medicine and medical services, and psychological and social services”<sup>723</sup> of affected communities.
- d. **Measures of satisfaction:** Effective measures of satisfaction encompass, among others, all measures of mitigation and remediation mentioned in Section 3.<sup>724</sup> Measures of satisfaction should include, where applicable, factual verification and comprehensive public disclosure regarding the violations,<sup>725</sup> as well as a “[p]ublic apology, including acknowledgement of the facts and acceptance of responsibility”<sup>726</sup> by business enterprises for their contribution to climate change and resulting human rights adverse impacts.
- e. **Guarantees of non-repetition [non-recurrence]:** Business enterprises should guarantee non-repetition measures, that may include, in addition to the measures detailed above in section 4.3.1, the incorporation of educational programs on corporate responsibility for human rights and climate change.<sup>727</sup>

#### 4.4. Responsibilities for business enterprises that facilitate and finance GHG-intensive business activities and strategies, including the financial sector and business consulting sector

<sup>717</sup> OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, 2023 [hereinafter OECD 2023 Guidelines for Multinational Enterprises on Responsible Business Conduct], available at <https://doi.org/10.1787/81f92357-en>, p. 79.

<sup>718</sup> CHRP Climate Change Report, p. 120.

<sup>719</sup> Glasgow Climate Pact, para. 19.

<sup>720</sup> OECD 2023 Guidelines for Multinational Enterprises on Responsible Business Conduct, p. 79.

<sup>721</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para 21.

<sup>722</sup> See CHRP Climate Change Report, pg. 101-102.

<sup>723</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para 20 (e). See also, Dinah Shelton, *Remedies and Reparation*, in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, Cambridge: Cambridge University Press (2012), pp. 377-379.

<sup>724</sup> Principles on Climate Obligations of enterprises 2018, principles 9 (1), 10 (1).

<sup>725</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para 22 (b).

<sup>726</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para 22 (e), (h).

<sup>727</sup> UNGA Principles and Guidelines on the Rights to a Remedy and Reparation, para 23.

181. As found by the District Court in The Hague, “not only are CO<sub>2</sub> emitters held personally responsible for environmental damage in legal proceedings all over the world, but also other parties that could influence CO<sub>2</sub> emissions.”<sup>728</sup> For example, over the course of 2019, the world’s largest banks provided loans worth more than USD 2.6 trillion (equivalent to Canada’s GDP) to, among others, the forestry, mining, fossil fuels sectors.<sup>729</sup> There are several sectors that facilitate carbon-intensive business activities and strategies such as the financial sector and the business consulting sector and in doing so they are *directly linked or contribute* to climate change-related human rights violations.<sup>730</sup>

182. **Business enterprises that facilitate and finance GHG-intensive business activities have individual responsibilities under the UNGPs to respect human rights and conduct due diligence.**<sup>731</sup> These business enterprises can be directly linked to adverse human rights impacts through their own operations and actions or through their business relationships.<sup>732</sup> When financing and facilitating GHG-intensive industries, the business enterprises in these sectors have direct links with climate change and the resulting human rights violations. The degree to which these sectors’ services and products increase the likelihood of the adverse impact determines whether they are in a position of contribution.<sup>733</sup> If business enterprises’ products or services enable, encourage, or motivate the further expansion of fossil fuel production and consumption and destruction of natural carbon sinks, they will

<sup>728</sup> Shell Judgment 2021-NL, para. 4.3.5.

<sup>729</sup> Bankrolling extinction Report, Portfolio Earth, p. 6; Brendan Montague, Bankrolling extinction, the Ecologist, 2020.

<sup>730</sup> Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. John G. Ruggie, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context*, Harvard Kennedy School of Government, 21 February 2017 [hereinafter cited as Ruggie Comments on Banks and UNGP], available at: [https://media.business-humanrights.org/media/documents/files/documents/Thun\\_Final.pdf](https://media.business-humanrights.org/media/documents/files/documents/Thun_Final.pdf), p. 1-2.

<sup>731</sup> Communication to Sumitomo Mitsui Banking Corporation on the matter of ClientEarth's complaint to Saudi Aramco and Others by the UN Special Procedures mechanism. WG on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur (SR) on the promotion and protection of human rights in the context of climate change; the SR on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the SR on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the SR on the human rights to safe drinking water and sanitation, *Communication to Sumitomo Mitsui Banking Corporation*, 27 June 2023 [hereinafter UNWG and UNSR Communication to Sumitomo Mitsui Banking], Ref.: AL OTH 89/2023 [online] available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28204>; See other related communications against Public Investment Fund, Morgan Stanley & Co. LLC, Mizuho Financial Group, Inc., JP Morgan Chase & Co., HSBC Holdings PLC, Goldman Sachs Group, Inc., Credit Agricole S.A., Citigroup, BNP Paribas [online] <https://spcommreports.ohchr.org/TmSearch/RelCom?code=SAU%203/2023>.

<sup>732</sup> UNWG and UNSR Communication to Sumitomo Mitsui Banking; See other related communications against Public Investment Fund, Morgan Stanley & Co. LLC, Mizuho Financial Group, Inc., JP Morgan Chase & Co., HSBC Holdings PLC, Goldman Sachs Group, Inc., Credit Agricole S.A., Citigroup, BNP Paribas [online] <https://spcommreports.ohchr.org/TmSearch/RelCom?code=SAU%203/2023>.

<sup>733</sup> See: OHCHR, Advice on the application of the UNGPs on Business and Human Rights in the context of the banking sector, p 8, available at: <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf> [hereinafter cited as OHCHR Advice in the context of the banking sector]. For the responsibility of banks specifically, see: Macchi, C.; Bernaz, N. Business, *Human Rights and Climate Due Diligence: Understanding the Responsibility of Banks*, Sustainability 2021 [hereinafter Macchi et. al, Human Rights and Climate Due Diligence], 13, 8391, available at: <https://doi.org/10.3390/su13158391>.

be contributing to human rights violations.<sup>734</sup> For instance, “[i]f a bank identifies or is made aware of an ongoing human rights issue that is directly linked to its operations, products or services through a client relationship, yet over time fails to take reasonable steps to seek to prevent or mitigate the impact, it can be viewed as enabling the situation.”<sup>735</sup>

183. **Business enterprises that facilitate and finance GHG-intensive business activities have the same duties to address (prevent, mitigate and remediate) human rights adverse impacts of their climate-driving activities** (see Section 3.2.2 and 3.3.1). “Where a bank is directly linked to an adverse human rights impact through a client, it still has a responsibility to prevent or mitigate the impact, and that “[w]here the adverse impacts are directly linked to a bank’s lending or securities underwriting through a client, it should also use its leverage to seek to prevent and mitigate those impacts.”<sup>736</sup> More specifically, business enterprises operating in these sectors must, among others and in addition to the measures outlined above:

- a. Refrain from financing or advising on new fossil fuel related projects and instead direct capital and strategy towards green projects.<sup>737</sup> Particularly financial institutions have “a unique position to influence and direct the actions and policies of companies and industries to transition to a low-carbon economy.”<sup>738</sup>
- b. Promote “informed and more efficient capital allocation and help facilitate the transition to a more sustainable lower carbon economy.”<sup>739</sup>
- c. Clearly communicate their expectations to clients to meet their human rights obligations.<sup>740</sup>

<sup>734</sup> Whether a business enterprise has contributed to human right harms depends on factors which “include the extent to which a business *enabled, encouraged, or motivated* human rights harm by another; the extent to which it *could or should have known about such harm*; and the *quality of any mitigating steps* it has taken to address it.” Ruggie Comments on Banks and UNGP, p. 2 (emphasis added). See also, OHCHR, Response to request from BankTrack for advice regarding the application of the UNGPs on Business and Human Rights in the context of the banking sector (12 June 2017), available at:

<https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>, p. 6-7.

<sup>735</sup> UNWG Communication to Sumitomo Mitsui Banking, p. 6.

<sup>736</sup> UNWG Communication to Sumitomo Mitsui Banking, p. 6, *citing* the OECD Guidance on Due Diligence for Responsible Corporate Lending and Securities Underwriting.

<sup>737</sup> Refrain from “injecting capital into activities related to fossil fuel extraction and conventional fossil fuel-based power generation.” Instead, they “should redirect capital to activities that promote GHG emissions reduction and build infrastructure necessary to address and respond to the physical impacts of climate change.” CHRP Climate Change Report, p. 121. The Paris Agreement established that it was critical to “make finance flows compatible with a pathway toward low greenhouse gas emissions and climate-resilient development.” Paris Agreement. 2016, art. 2.1 (c).

<sup>738</sup> “The sector can steer companies and industries towards a sustainable path by aligning lending and investment portfolios with targets set by science.” CHRP Climate Change Report, p. 121. International financial institutions “must refrain from designing, adopting, financing, and implementing policies or measures that, directly or indirectly, impair the enjoyment of human rights by future generations.” Maastricht Principles, p. 26.

<sup>739</sup> CHRP Climate Change Report, p. 85, 86.

<sup>740</sup> For instance, “In order to satisfy itself that its financial products and services are not being used in ways that cause adverse human rights impacts, a bank should clearly communicate its expectations to its clients and undertake human rights due diligence appropriate to the proposed transaction, which may include seeking assurances from the client that it has in place adequate policies and processes to itself identify, prevent and mitigate risks associated with its activities.” OHCHR Advice in the context of the banking sector, p. 6.

- d. Cut “commercial ties with business partners who, unresponsive to climate due diligence efforts, continue to contribute to climate change”<sup>741</sup> and related human rights violations.
- e. Enhance “finance mobilization in order to deliver the scale of resources needed to achieve climate plans, particularly for adaptation” and additional support for climate change-related loss and damage.<sup>742</sup>

#### 4.5. Responsibility of State-Owned Enterprises (SOE)<sup>743</sup>

184. State-owned enterprises (SOE) are significant actors<sup>744</sup> within the global economy, capable of substantial human rights impacts. National oil and gas SOE are “responsible for more than 50% of global oil and gas production, and national coal companies control around 55% of global coal production. [These SOEs] account for 40% of total investment in oil and gas worldwide.”<sup>745</sup>

185. Due to the proximity to the State, reliance on statutory authority or taxpayer support,<sup>746</sup> SOEs have an increased responsibility to act fully in line with international standards, especially the UN Guiding Principles, and best practices to prevent and mitigate against human rights impacts of climate change.<sup>747</sup> In addition to the business enterprise duties described above, SOEs must lead by example<sup>748</sup> and take “additional” steps to protect against human rights abuses by business enterprises that they own or control.<sup>749</sup> They must establish clear expectations regarding SOEs’ respect for human rights and fulfill their obligations through a range of regulatory and policy measures.<sup>750</sup> Failure to take all reasonable steps to prevent, mitigate and remediate abuses of human rights by an SOE may entail a violation of

<sup>741</sup> As argued by Macchi et. al, Human Rights and Climate Due Diligence, p. 12.

<sup>742</sup> CHRP Climate Change Report, p. 121.

<sup>743</sup> Following the OECD Guidelines on Corporate Governance of State-Owned Enterprises, for the purposes of this document, State owned enterprises (SOE) are defined as “[a]ny corporate entity recognized by national law as an enterprise, and in which the State exercises ownership [...]. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as State-owned enterprises if their purpose and activities, or parts of their activities, are of a largely economic nature. **Ownership and control.** [...] [E]nterprises that are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control [effective control].” OECD, OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, [hereinafter OECD SOE Guidelines], Paris, available at <http://dx.doi.org/10.1787/9789264244160-en>, p.14. Such a definition was reiterated by the UNHRC WG Report on HR and Transnational Corporations 2016, para 9-11.

<sup>744</sup> In sectors like energy, infrastructure, public utilities, and finance. UN Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 4 May 2016 [hereinafter UNHRC WG Report on Human Rights and Transnational Corporations 2016], Doc No. A/HRC/32/45, para. 13, 26-28. In its Report, the Working Group notes that there are compelling ethical and policy reasons for States to take additional actions to ensure that State-owned enterprises respect human rights.

<sup>745</sup> The Production Gap Report 2021, p. 29 (internal citations omitted).

<sup>746</sup> UNGP, principle 4

<sup>747</sup> UNWG Information note on Climate Change and UNGPs 2023, p. 4. See also, UNWG and UNSR Communication to Saudi Aramco, p. 6.

<sup>748</sup> UNHRC WG Report on Human Rights and Transnational Corporations 2016, para. 52.

<sup>749</sup> UNGP, principle 4; UNHRC WG Report on Human Rights and Transnational Corporations 2016, para. 88-89. See also, OECD Guidelines, p. 22; OECD SOE Guidelines, p. 24.

<sup>750</sup> UNHRC WG Report on Human Rights and Transnational Corporations 2016, para. 23, 25.

the State's own international law obligation to protect and respect for which they can be held accountable.<sup>751</sup>

## Conclusion

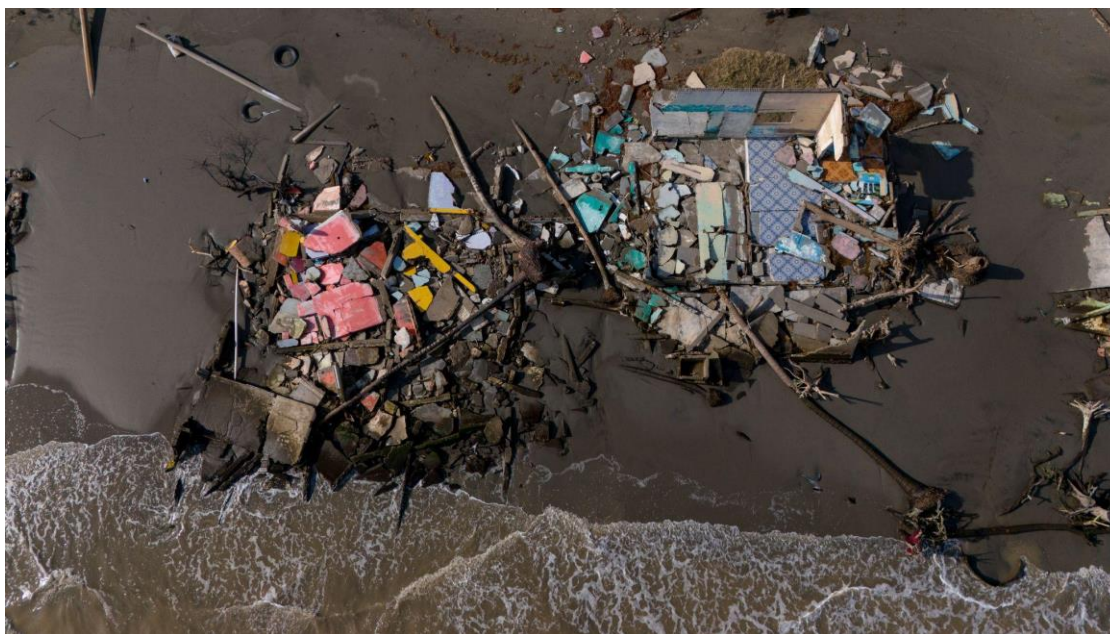
186. The submitting organizations respectfully request that the Court, in its Advisory Opinion, clarify that it is not possible to uphold human rights in the face of the climate emergency without adequately regulating and holding accountable those business enterprises in the fossil fuel and agroindustrial sectors overwhelmingly responsible for driving climate change through their physical activities and their deceptive and obstructive conduct.
187. To fulfill their human rights obligations under the ACHR, States must take all measures within their power to prevent, mitigate, and remediate the conduct of the fossil fuel industry and agro-industrial enterprises that causes foreseeable violations of human rights through the generation of GHG emissions, destruction of carbon sinks, and derailment of effective climate action. Furthermore, it is respectfully submitted that the Court should reaffirm in this Advisory Opinion that business enterprises must uphold their duties to refrain from, prevent, and remediate conduct that drives foreseeable climate change-related harm to human rights. In light of best available science regarding the causes and consequences of extreme and slow onset climate events, the ACHR and other applicable human rights law require States and business enterprises to halt fossil fuel expansion and agroindustrial deforestation, rapidly and equitably phase out the production and use of fossil fuels, and reduce industrial agriculture. Only such measures are reasonably capable of achieving the steep reductions in GHG emissions and protection and restoration of natural ecosystems required to limit warming to 1.5°C and avoid further foreseeable catastrophic impacts on people and the planet.
188. This Court's Advisory Opinion can help ensure that measures taken to prevent and remediate climate change-related human rights violations are consistent with the principles of prevention, precaution, intergenerational equity, public participation, polluter pays, and non-retrogression, and reflective of States' common but differentiated responsibilities and respective capabilities. Like the Court's 2017 Advisory Opinion on the Environment and Human Rights, this Advisory Opinion on the climate emergency and human rights could provide foundational guidance on what is required to ensure the right to a clean, healthy and sustainable environment and all the human rights that depend on it in the face of corporate-driven climate change.

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<sup>751</sup> UNHRC WG Report on Human Rights and Transnational Corporations 2016, para. 29-34, 89. The Working Group stated that according to UN human rights treaty bodies "States may breach the duty to respect or to protect under international human rights law owing to human rights abuses by State-owned enterprises," para 30.

## Annex

Tabasco State, in Mexico, is one of the most vulnerable to the impacts of the climate crisis. El Bosque community is located in the peninsula between the Grijalva River and the Gulf of Mexico. For approximately five years, the El Bosque community has been experiencing first-hand the disproportionate impacts of climate change. Accelerated sea level rise, coastal erosion and floods caused by heavy rains and other extreme weather events have devastated the community, displacing over 30 families and leaving 20 others in immediate danger.



El Bosque, Tabasco México, November 2023.

*"Twenty years ago, the coast was far away, you had to walk 20 minutes to get to the sea. In the last few years, the waves came closer, the northeasters and hurricanes took our coast. Four years ago, we lost our first houses and we watched as our neighbors lost everything from one moment to the next. In a short time, the sea has taken more than 20 houses and two entire streets have been lost and are now buried under the sea."*<sup>752</sup>

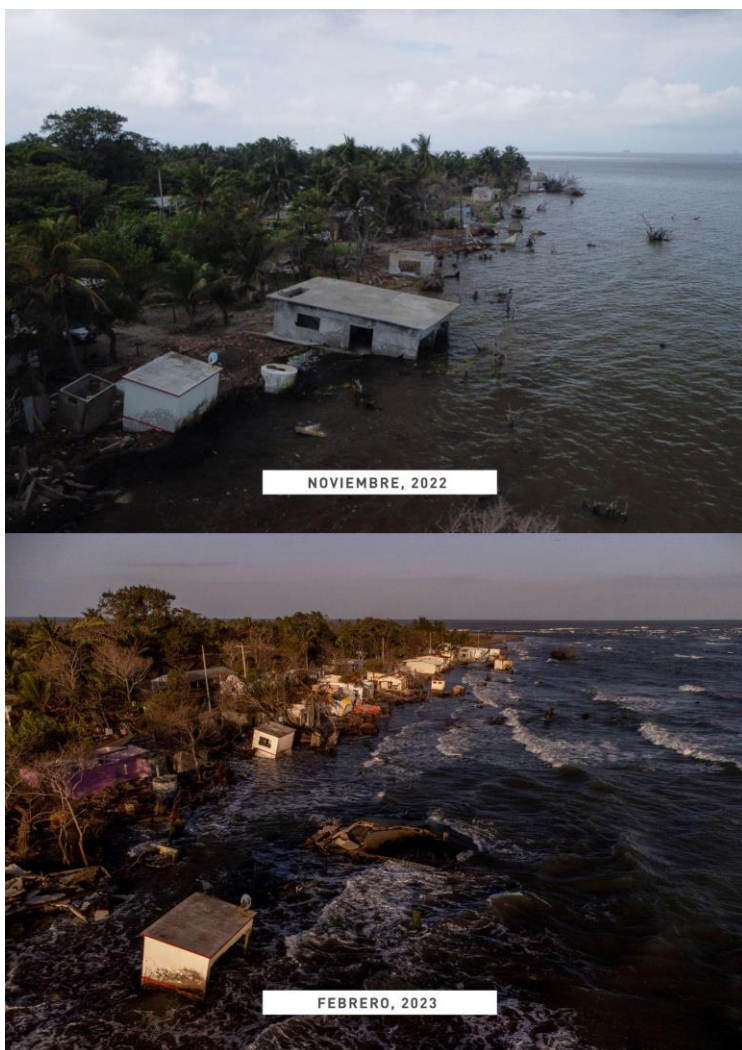
As expressed by the community, they are "one of the first towns in Mexico to lose everything to climate change",<sup>753</sup> and one of the first ones to be displaced by climate change impacts in the Americas region.

<sup>752</sup> Original Spanish: "Hace 20 años, la costa quedaba lejos, había que caminar 20 minutos para llegar al mar. En los últimos años, las olas se acercaron, los nortes y los huracanes se llevaron nuestra costa. Hace cuatro años perdimos las primeras casas y miramos cómo nuestras vecinas y vecinos lo perdían todo de un momento a otro. En poco tiempo el mar se ha llevado más de 20 casas y se han perdido dos calles enteras que hoy están sepultadas bajo el mar"

<sup>753</sup> Comunicado El Bosque, Tabasco, 7 de noviembre del 2022. Original Spanish: "somos uno de los primeros pueblos en México en perderlo todo ante el cambio climático"

In the past, the community was composed of approximately 300 inhabitants, 83 houses, a school with a dining room, a community center, some paved streets, drainage, potable water and electricity services. Today, 60 homes have been lost due to sea level rise and many others are next in line to disappear. Dozens of families are living now in highly precarious conditions, in tin sheet houses, without a firm floor, without bathrooms and with intermittent electricity supply.

Many members of the community have been forced to migrate to other municipalities in search of security and stability. However, not every family or person in the community can afford this. Most people in El Bosque rely on the natural resources provided by the river and the sea for their food and income. Moving from el Bosque would entail the loss of livelihood and an increase in expenses.





The community also lost the primary school and Kindergarten to sea level rise, leaving children without access to education. The families that can afford it, are sending their children to the school in Frontera, a city nearby, but as expressed by el Bosque resident Aurea Sanchez, "it is very expensive to send them to schools outside of the Bosque and this represents many expenses for the family that they often cannot cover."<sup>754</sup> Ever since they lost the school to sea level rise, 26 children in El Bosque are only receiving a couple of hours of school per week outside on the street. This situation is impacting the mental health of children, who are showing signs of distress and anxiety.



<sup>754</sup> Origina Spanish, Aurea Sanchez testimony “es muy caro mandarlos a colegios por fuera del Bosque y esto representa muchos gastos para la familia que muchas veces no pueden cubrir.”

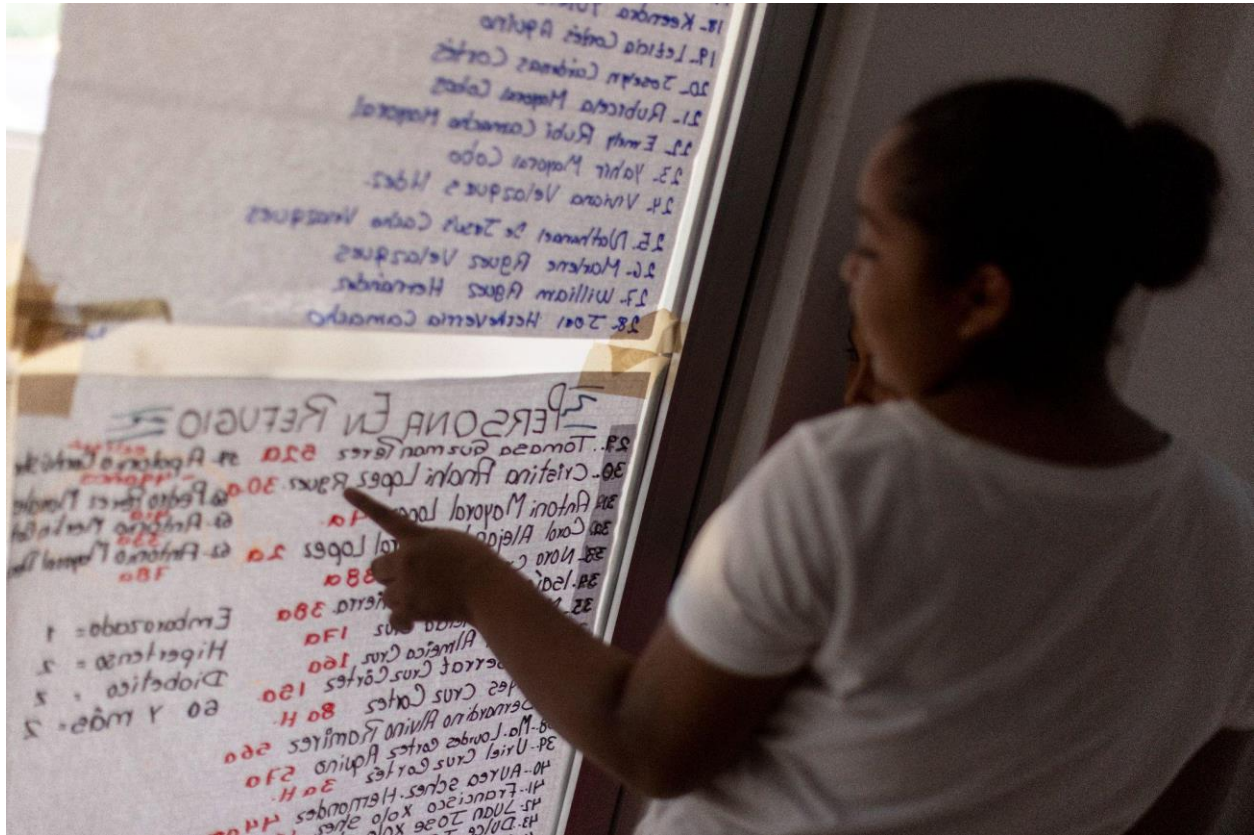
For years, El Bosque community has demanded the Mexican government to relocate them to another place where the community can maintain their productive activities. However, their petition has been ignored. The community is asking that the government (*inter alia*):

- Ensures that planned relocation sites do not expose them to increased disaster risk and provide for disaster risk management measures in the event of future disasters;
- Consider all relevant social, economic, cultural and demographic factors, especially the specific needs of women, children and people with disabilities;
- Involve the community in the consultation, planning, implementation and evaluation of planned relocation programs and projects;
- Consider community ties, cultural values, traditions, and special emotional ties to the original place of residence;
- Ensure access to livelihood opportunities, basic services and housing at the new site;

The community of El Bosque is demanding that the relocation is fair, dignified, and participative.



El Bosque, Tabasco México, November 2023.



El Bosque, Tabasco México, November 2023