ClientEarth

04 December 2023

34 Drayton Park
London
N5 1PB

[Name], Chief Executive Officer

[Bank]

[Address]

By post and by email

Cc: [ ], Chief Legal Officer; [ ], Chief Risk and Compliance Officer; [ ], Chief Sustainability Officer

Re: [BANK]'s human rights responsibilities and legal duties with respect to energy sector clients

Dear **[Name of CEO]**,

ClientEarth is an international non-profit environmental law organisation headquartered in London, with offices in Europe, Asia, and the US. Our Accountable Finance initiative focuses on the legal implications of climate-related financial risks and impacts for a wide spectrum of market participants, including banks and their boards of directors.

We refer to the complaint submitted by ClientEarth to the UN Working Group on Business & Human Rights in September 2021 regarding Saudi Aramco and its financiers (**ClientEarth's Complaint**),[1] the subsequent UN communication regarding your client Saudi Aramco (ref: AL OTH [ ]/2023) sent to **[BANK]** on [ ] June 2023 (the **UN Communication**)[2] and **[BANK's]** response dated [ ].[3]

We write to echo the UN's concerns about **[BANK]**'s contribution to the climate-related human rights impacts of Saudi Aramco. We add that by continuing to support such clients, **[BANK]** risks breaching its responsibility to respect human rights and exposes itself to material legal and reputational risks. This is because energy sector clients that are continuing to pursue fossil fuel expansion cannot be considered Paris-aligned or credibly transitioning towards net zero emissions by 2050, and are therefore a cause of climate-related human rights impacts.

According to the best available science, new fossil fuel exploration and production will push the world over the threshold of 1.5ºC warming, the target enshrined in the Paris Agreement on

[1] ClientEarth, 'Complaint to the Working Group on the Issues of Human Rights and Transnational Corporations and other Business Enterprises' (September 2021), available at: clientearth-complaint-concerning-saudi-arabian-oil-company.pdf
[2] [ ]
[3] [ ]

Climate Change (see the International Energy Agency's Net Zero Roadmap, the **IEA NZE**[4]). This will lead to severe climate-related impacts and could also lead to climate "tipping points" that further accelerate warming and intensify such impacts.[5]

This letter:

1. Explains **[BANK]**'s legal responsibility to respect human rights by preventing, mitigating and remedying climate-related human rights impacts associated with your energy sector clients' activities;
2. Sets out why **[BANK]** is at serious risk of breaching its human rights responsibility through its continued business relationship with Saudi Aramco;
3. Indicates the legal and reputational risks associated with continued financing in breach of **[BANK]**'s human rights responsibilities; and
4. Translates the concerns raised in the UN Communication into actionable red-lines for **[BANK]** to adopt.

1. **[BANK]**'s legal responsibility: human rights & climate

Climate change is not only an issue of material financial and systemic risk for financial institutions and investors. It is also a well-documented human rights issue[6] and engages business enterprises' responsibility to respect human rights.[7]

Banks, like all business enterprises, have a responsibility to respect human rights under international law, specifically as set out in the UN Guiding Principles on Business & Human Rights (**UNGPs**)[8] and incorporated in the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (**OECD Guidelines**).[9]

Although the UNGPs apply regardless, **[BANK]** has proclaimed that it is implementing this responsibility in its operations and business activities and cites this proclamation in its

[4] See IEA, 'Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach' (September 2023 Update), available at: https://iea.blob.core.windows.net/assets/13dab083-08c3-4dfd-a887-42a3ebe533bc/NetZeroRoadmap_AGlobalPathwaytoKeepthe1.5CGoalinReach-2023Update.pdf; IPCC, 'Sixth Assessment Report: Climate Change 2021 – The Physical Science Basis' (2021), available at: Sixth Assessment Report – IPCC.

[5] See Nature, 'Climate tipping points – too risky to bet against' (27 November 2019), available at: https://www.nature.com/articles/d41586-019-03595-0

[6] See, for example, United Nations General Assembly, 'Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Note by the Secretary-General' (15 July 2019), available at: A/74/161

[7] See United Nations Human Rights Special Procedures, 'Information Note on Climate Change and the Guiding Principles on Business & Human Rights' (June 2023), available at: Information Note Climate Change and UNGPs

[8] UN Office of the High Commissioner for Human Rights, 'Guiding Principles for Business and Human Rights' (2011), available at: Introduction to the UN Guiding Principles on Business & Human Rights; see also 'The Corporate Responsibility to Protect Human Rights: An Interpretive Guide' (2012), available at: The Corporate Responsibility to Respect Human Rights: An Interpretive Guide

[9] OECD, 'OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (updated 8 June 2023), available at: MNE Guidelines; see also the OECD's resources for responsible business conduct in the financial sector, available at: Guidelines for MNEs – RBC Financial Sector

response to the UN Communication.[10] **[BANK]**'s responsibility to respect human rights applies wherever it operates, and exists independently of States' ability (or willingness) to fulfil their duty to protect human rights. This responsibility applies equally to both your on- and off-balance sheet activities: lending, underwriting, investments (including when held by a bank as custodian or nominee), insurance, and advisory and other financial services.[11]

Under international human rights standards, banks bear responsibility for the climate-related adverse human rights impacts of all aspects of their business and their entire value chain (i.e. including their financing activities). Where prioritisation is necessary, the severity (scale, scope and irremediable character) of climate change impacts means they should be prioritised. [BANK] should act to identify, prevent, mitigate and remedy the climate impacts associated with your clients' activities.

In practice, a bank's responsibility for climate-related human rights impacts can move along a continuum depending on the extent to which it has enabled, encouraged, or motivated the human rights harm by a borrower or client.[12] A continuing business relationship with a client will mean that a bank is ***'directly linked'*** to any human rights related impacts resulting from that client's activities.[13] As set out in the UN Communication,[14] a bank will move along the continuum towards '***contributing***' to climate-related human rights impacts if it is aware of an ongoing human rights issue to which it is directly linked, yet over time fails to take reasonable steps to seek to prevent or mitigate such impacts through the exercise of leverage.[15] Contribution brings with it a responsibility to provide a remedy to those affected, and certain banks have set up grievance mechanisms to provide such a remedy.[16]

The UN Communication expressed a "*most serious concern regarding the adverse impacts on human rights caused by activities such as the exploitation of fossil fuels which contribute to climate change*".[17] It also stated that the corporate PR activities (so-called 'greenwashing' or disinformation) which harm the ability of governments and the public to make informed decisions regarding urgent climate mitigation harm the enjoyment of human rights by extension.[18]

Where **[BANK]** is **directly linked** through its clients' fossil fuel expansion or greenwashing activities to climate-related impacts on human rights, it should take appropriate action to exercise leverage over clients, in order to prevent and mitigate the human rights impacts of those activities. This means moving them to credible Paris-alignment.[19] If **[BANK]** lacks leverage over its clients, and cannot establish leverage such as by acting together with other

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[10] See n 3
[11] See, generally, OHCHR, 'Advice on the application of the UNGPs on Business and Human Rights in the context of the banking sector', available at: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf
[12] Ibid, pp6-7
[13] See n 8, Principle 13 and commentary at pp15-16 of the UNGPs
[14] See n 2, p7
[15] See n 11, pp6-7
[16] See: BankTrack – ANZ launches human rights grievance mechanism in a first for the global banking sector
[17] See n 2, p6
[18] See n 2, pp5, 8
[19] See n 8, Principle 19 and commentary at pp20-22 of the UNGPs

banks, it should consider ending the relationship, whilst meeting any outstanding legal obligations.[20]

[BANK] will be taken to have long held **knowledge** of the well-recognised climate-related human rights impacts associated with fossil fuel sector clients, including but not limited to Saudi Aramco (see Section 2 below). In such circumstances, **[BANK]**'s failure over time to take action to require, encourage, or support them to prevent these adverse impacts by aligning with the Paris Agreement would mean **[BANK]** is likely **contributing** to these clients' harmful activities.

Accordingly, international human rights standards dictate that **[BANK]** should take the necessary steps to cease or prevent its contribution in the form of its financing (i.e. ceasing future financing and/or terminating the relationship), use any leverage over its clients to mitigate any remaining impact to the greatest extent possible,[21] and actively engage in remediation for any victims of these human rights impacts.[22]

Failure to take the above steps means that **[BANK]** should be prepared to accept the consequences – reputational, financial or legal – of this continued connection to its clients' climate-related impacts on human rights.

2. **[BANK]**'s potential breach of human rights standards: Saudi Aramco relationship

The evidence in ClientEarth's Complaint and the UN Communication suggests that [BANK] is at serious risk of breaching its responsibility to respect human rights through its ongoing business relationship with Saudi Aramco.

Saudi Aramco is the largest greenhouse gas emitter, accounting for 4.33% of global emissions of carbon dioxide and methane from fossil fuels and cement between the period 1965 and 2018.[23] Rather than aligning its business strategy with the Paris Agreement goals by rapidly cutting fossil fuel production, Saudi Aramco remains the world's largest crude oil producer by production volume and in fact plans to significantly increase its oil and gas reserves.[24] Saudi Aramco's announcement of a 'net zero' aim excludes the lion's share of its climate impact in the form of its Scope 3 emissions,[25] rendering it incompatible with the Paris-aligned goal of a reduction of global greenhouse gas emissions by at least 45% by 2030 in order to reach net zero by 2050.[26]

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[20] For a more detailed analysis of **[BANK]**'s human rights responsibilities, see paragraphs 187 to 211 of ClientEarth's Complaint
[21] See, generally, n 8
[22] See n 8, Principle 22 and commentary at pp24-25 of the UNGPs; and n 11, pp10-13
[23] Climate Accountability Institute, 'Update of Carbon Majors 1965 – 2018' (December 2020), available at: CAI PressRelease Dec20 (climateaccountability.org)
[24] https://www.aramco.com/-/media/publications/corporate-reports/saudi-aramco-ara-2022-english.pdf?la=en&hash=6BC0409B50ECFF4A4C743307DF2FF7BDBCEC8B43, pp18, 22, 45
[25] https://www.aramco.com/en/news-media/news/2021/ambition-to-reach-operational-net-zero-emissions-by-2050
[26] IPCC, 'Special Report: Global Warming of 1.5C: Summary for Policymakers' (2018), B.1, available at: Summary for Policymakers — Global Warming of 1.5 ºC (ipcc.ch)

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Saudi Aramco's business strategy disregards its responsibility to address its climate change-related human rights impacts. **[BANK]** continues to provide significant financial support to Saudi Aramco. A snapshot of **[BANK]**'s recent transactions with the Saudi Aramco corporate group is included at **Annex 1**.

The UN Communication recognises that the financing of Saudi Aramco's activities could be in violation of international human rights standards.[27] **[BANK]** will be taken to have knowledge of the well-recognised climate-related human rights impacts associated with Saudi Aramco. On the basis of your continued financing, it appears that **[BANK]** has failed over time to take action or use its leverage to require, encourage or support Saudi Aramco to prevent these risks by aligning with the Paris Agreement, or, in the alternative where such action or engagement is ineffective, to responsibly terminate the business relationship.

Continued disregard for **[BANK]**'s responsibility to respect human rights regarding Saudi Aramco increases the likelihood that **[BANK]** is **contributing** to Saudi Aramco's climate-related human rights impacts, and so has a responsibility to engage in the remediation of those impacts.

A summary of the impacts likely to materialise in Saudi Arabia itself are extracted in the UN Communication, detailing how large parts of the country are forecast to become uninhabitable under a high-emissions scenario, with heat and humidity beyond human tolerances.[28] This year's heatwave in Saudi Arabia saw temperatures in excess of 50ºC, with mass heat stress experienced by Hajj pilgrims.[29] The number of heat-related deaths across the MENA region is estimated to rise from today's average of 2.1 / 100,000 people to more than 100 / 100,000 people by 2100 under high emissions scenarios resembling current emissions trajectories.[30]

Although ClientEarth's Complaint and the UN Communication have focused on Saudi Aramco as the world's most emissions-intensive business, the same considerations apply in respect of your other clients in the energy sector, to the extent such clients are also failing to decarbonise their businesses in accordance with a Paris-aligned transition strategy.[31]

3. **[BANK]**'s potential breach of human rights standards: reputational risks

[BANK]'s relationships with Saudi Aramco and other clients engaged in fossil fuel expansion are sources of material reputational risks.

[27] See n 2, p7
[28] See n 2, pp4-5
[29] See: https://www.theguardian.com/world/2023/jun/30/thousands-suffer-heat-stress-on-hajj-pilgrimage-as-temperatures-reach-48c
[30] The Lancet, 'Current and future trends in heat-related mortality in the MENA region: a health impact assessment with bias-adjusted statistically downscaled CMIP6 (SSP-based) data and Bayesian inference' (April 2023), available at: https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(23)00045-1/fulltext
[31] This is the vast majority. See, for example: https://www.cdp.net/en/articles/media/research-reveals-no-oil-and-gas-companies-have-plans-in-place-to-phase-out-fossil-fuels; and https://carbontracker.org/reports/absolute-impact-2023/

Not only do these relationships undermine the credibility of **[BANK]**'s commitment to respect human rights in accordance with international law, they are also in stark conflict with climate commitments made by **[BANK]**, including through its participation in the Net Zero Banking Alliance (**NZBA**).

[BANK]'s NZBA commitments are explicit – to align portfolios with pathways to reaching net-zero emissions by 2050 or sooner, consistent with a maximum average temperature rise of 1.5ºC, taking into account best available science.[32] The best available science presently indicates that pathways must be consistent with at least 45% emissions reductions by 2030 and that existing fossil fuel infrastructure,[33][34] let alone expansion to exploit upstream reserves,[35] is not compatible with limiting temperature rise to 1.5ºC. **[BANK]**'s continued support for Saudi Aramco, and continued support for other clients pursuing fossil fuel expansion,[36] is not consistent with such a pathway and fundamentally undermines the credibility of **[BANK]**'s NZBA commitment.

In addition, the "climate-related human rights impacts" to which the bank is contributing (see Sections 1 and 2 above) are not abstract or nebulous. Instead, the human suffering resulting from climate change is increasingly evident. For example, Canada's wildfires in May and June 2023, the likelihood of which doubled as a result of climate change, led to at least 17 direct fatalities, the evacuation of more than 150,000 people and damage to at least 200 structures, including homes.[37] Air Quality Index values in the USA reached levels considered hazardous.[38] In Pakistan, floods in 2022, found to have been made up to 50% more severe by global warming,[39] caused the deaths of over 1,700 people whilst at least 12,867 others were injured.[40] In addition, over 1.1 million hectares of farmland were flooded, destroying

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[32] See NZBA, 'Commitment Statement', available at: 10-NZBA-PRB-Commitment-statement-D3.pdf (unepfi.org)

[33] The IPCC estimates that emissions from existing fossil fuel *consuming* infrastructure will cause warming in excess of 1.5ºC. Emissions from existing and *planned* infrastructure are likely to cause warming in excess of 2ºC. See: IPCC Working Group III, Climate Change 2022: Mitigation of Climate Change, Technical Summary, TS.3 at p68, available at: IPCC_AR6_WGIII_TechnicalSummary.pdf

[34] Estimates also suggest that emissions from existing and under-construction fossil fuel *producing* infrastructure will cause warming in excess of 1.5ºC and also nearly exhaust the remaining 2ºC carbon budget (the amount of remaining emissions the world can emit in order to limit the chance of warming in excess of 2ºC). See: Environmental Research Letters, 'Existing fossil fuel extraction would warm the world beyond 1.5ºC (May 2022), available at: Existing fossil fuel extraction would warm the world beyond 1.5 C (iop.org)

[35] See n 4

[36] See Rainforest Action Network and ors, 'Banking on Climate Chaos: Fossil Fuel Finance Report 2023' (April 2023), pp48-49, available at: https://www.bankingonclimatechaos.org/wp-content/uploads/2023/08/BOCC_2023_vF.pdf

[37] https://www.worldweatherattribution.org/climate-change-more-than-doubled-the-likelihood-of-extreme-fire-weather-conditions-in-eastern-canada/

[38] https://www.worldweatherattribution.org/climate-change-more-than-doubled-the-likelihood-of-extreme-fire-weather-conditions-in-eastern-canada/

[39] https://www.theguardian.com/environment/2022/sep/15/pakistan-floods-made-up-to-50-worse-by-global-heating

[40] https://www.redcross.org.uk/stories/disasters-and-emergencies/world/climate-change-and-pakistan-flooding-affecting-millions#:~:text=Millions%20of%20people%20were%20impacted,8%20million%20people%20were%20displaced.

crop production.[41] Total economic losses have been estimated in the region of US$15 billion.[42] In Europe, unprecedented extreme heat killed an estimated 61,000 people in 2022.[43]

Worse is to come. According to the latest report of the UN's IPCC, present transition pathways published by States imply global warming of approximately 2.8°C.[44] This level of warming is forecast to lead to large parts of the tropics becoming uninhabitable, widespread crop failures, sea level rises measured in metres and a high risk of crossing further climate tipping points (e.g. collapses of icesheets and the breakdown of rainforest ecosystems and ocean circulation systems[45]) that could cause further and uncontrollable jumps in temperature rise.[46] The uncertainty of predicted temperatures means that increases of 4°C or more are possible on this emissions pathway. The IPCC concludes that "*there is a rapidly closing window of opportunity to secure a liveable and sustainable future for all.*"[47]

Climate change impacts heighten reputational (and legal, see Section 4 below) risks for **[BANK]**. As such impacts become more severe, calls for remedies to be provided by those most responsible will increase. If **[BANK]** continues to support Saudi Aramco and other major fossil fuel expanders, then the likelihood increases that, consistently with the international human rights standards summarised above, it will be grouped together with those firms when policymakers inevitably seek to fund the costs of climate adaptation and damages. This has been recommended, for example, by the Commission on Human Rights of the Philippines in its National Inquiry on Climate Change.[48]

In addition, financing for fossil fuel expanders such as Saudi Aramco contributes to an increase in the scale of the financial risks associated with the world's transition to net zero.[49] The prospect of the materialisation of such risks, in the form of widespread devaluations and stranding of carbon-intensive assets (in particular, fossil fuel assets[50]), is widely

[41] https://www.nature.com/articles/s41598-023-30347-y#Sec9
[42] https://www.worldbank.org/en/news/press-release/2022/10/28/pakistan-flood-damages-and-economic-losses-over-usd-30-billion-and-reconstruction-needs-over-usd-16-billion-new-assessme
[43] https://www.isglobal.org/en/-/el-calor-record-del-verano-de-2022-causo-mas-de-61-000-muertes-en-europa
[44] See IPCC Synthesis Report of the IPCC Sixth Assessment Report, Summary for Policymakers, A.4.3, p11, https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf
[45] https://www.nature.com/articles/d41586-019-03595-0
[46] See Carbon Tracker, Unburnable Carbon: Ten Years On, June 2022, p18, available at: https://carbontracker.org/reports/unburnable-carbon-ten-years-on/
[47] See IPCC Synthesis Report of the IPCC Sixth Assessment Report, Summary for Policymakers, Headline Statements, available at: AR6 Synthesis Report: Summary for Policymakers Headline Statements (ipcc.ch)
[48] See Commission on Human Rights of the Philippines, 'National Inquiry on Climate Change Report' (December 2022), available at: https://chr.gov.ph/wp-content/uploads/2022/12/CHRP_National-Inquiry-on-Climate-Change-Report.pdf, pp101-102
[49] Transition risks resulting, for example, from policy responses to climate change, technological innovations or a changed business environment resulting from evolving stakeholder perceptions and expectations.
[50] The research referenced in footnotes 33 and 34 concludes that decommissioning and premature closure of fossil fuel infrastructure will be necessary, with resultant stranded assets. See also: Reclaim Finance, 'Fossil assets: the new subprimes?' (June 2021), available at: https://reclaimfinance.org/site/wp-content/uploads/2021/06/Report-Fossil-Assets-the-new-subprimes.pdf

acknowledged to have the potential to wipe out trillions of dollars from asset values,[51] and could materially damage financial and price stability.[52] Such impacts have the makings of the next systemic financial crisis.[53]

Not only is such financing to the detriment of **[BANK]**'s own longer-term economic and financial interests, thereby engaging directors' duties (see Section 4 below), the potential materialisation of climate-related systemic risks also raises related reputational risks. Such risks could have knock-on financial consequences if – similarly to their response to the Global Financial Crisis of 2007-2008[54] – policymakers and regulators feel compelled to take action to penalise (directly) or regulate (more vigorously) those banks found retrospectively to be most responsible for any transition-related economic or financial crash or downturn.

4. **[BANK]**'s potential breach of human rights standards: legal risks

[BANK]'s relationships with Saudi Aramco and other clients engaged in fossil fuel expansion are sources of material legal risks.

<u>Human rights standards and laws</u>

While the responsibility to respect human rights originates as a 'soft law' instrument in the UNGPs and OECD Guidelines, it is increasingly being reflected in and enforced through national laws. This includes mandatory laws in France,[55] Germany,[56] and Norway;[57] and future mandatory law at the European Union level[58] (collectively, mandatory human rights and environmental due diligence laws, or **mHREDD laws**). Other jurisdictions, including the Netherlands[59] and South Korea,[60] are currently considering mHREDD laws. In 2022, the Japanese Government also published guidelines on business and human rights.[61] Negotiations are underway, at the UN level, regarding a binding treaty on business and human rights that would require States to implement mHREDD laws, and the draft text brings financial institutions within the treaty's remit.[62]

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[51] See, for example: Bank for International Settlements and Banque de France, 'The green swan: central banking and financial stability in the age of climate change' (January 2020), p19 available at: https://www.bis.org/publ/othp31.pdf
[52] See Mark Carney, 'Resolving the climate paradox' (September 2016), available at: https://www.bis.org/review/r160926h.pdf
[53] See n 51
[54] Banks across the world paid about $321 billion in fines in the decade following the 2007-2008 financial crisis as regulators stepped up scrutiny, according to a report by the Boston Consulting Group. See summary here: https://www.reuters.com/article/us-banks-fines-idUSKBN1692Y2
[55] French Duty of Vigilance Law 2017
[56] German Supply Chain Due Diligence Act 2021
[57] Norwegian Transparency Act 2022
[58] EU Corporate Sustainability Due Diligence Directive (forthcoming)
[59] Dutch Bill on Responsible and Sustainable International Business Conduct
[60] South Korean Bill on Human Rights and Environmental Protection for Sustainable Business Management
[61] Japanese Government Guidelines on Respecting Human Rights in Responsible Supply Chains, 2022, available at https://www.meti.go.jp/english/press/2022/0913_001.html
[62] See: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf

Importantly, these mHREDD laws tend to have far reaching extraterritorial application and effects. This means that they can impose legal obligations on **[BANK]**'s entities that are domiciled elsewhere, whether by virtue of financing activities or having a subsidiary in that jurisdiction, or by being part of the global value chain of companies that are required to comply with the law. Therefore these laws are not only a relevant consideration for banks headquartered in countries with mHREDD laws; they can apply well beyond their borders.

This is likely to lead to litigation against banks based on the accountability mechanisms in these laws, some of which allow for damages claims.[63] New mHREDD laws have recently been identified by the Network for Greening the Financial System (**NGFS**) as a key factor in future climate-related litigation against financial institutions.[64]

There have already been instances of legal action against companies[65] and banks[66] on climate-related aspects of their responsibility to respect human rights in national courts. Complaints on similar grounds made regarding banks before the OECD's National Contact Points[67] and through the use of human rights grievance mechanisms[68] suggest that further litigation against banks is likely to follow.

Indeed, accelerated by a number of trends including the increasing precision and acceptance of climate attribution science,[69] the increasing frequency and severity of major weather events and the advent of for-profit climate litigation funding,[70] actions holding banks accountable for their human rights impacts based on their continued financing of fossil fuel

[63] The first such case under the French Duty of Vigilance law was launched in 2023: *Les Amis de la Terre France & others v BNP Paribas*, filed 23 February 2023, details available at: French NGOs take BNP Paribas to court in world's first climate lawsuit against a commercial bank
[64] See NGFS, 'Climate-related litigation: recent trends and developments' (September 2023), available at: ngfs_report-on-climate-related-litigation-recent-trends-and-developments.pdf
[65] See *Milieudefensie et al. v Royal Dutch Shell plc*, judgment dated 26 May 2021, available at: Milieudefensie et al. v. Royal Dutch Shell plc. - Climate Change Litigation; *Notre Affaire à Tous and Others v. Total*, judgment dated 18 November 2021, available at: Notre Affaire à Tous and Others v. Total - Climate Change Litigation (climatecasechart.com); *Asmania et al. vs Holcim*, available at: Asmania et al. vs Holcim - Climate Change Litigation (climatecasechart.com); *Kaiser, et al. v. Volkswagen AG*, available at: Kaiser, et al. v. Volkswagen AG - Climate Change Litigation (climatecasechart.com); *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG*, available at: Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG - Climate Change Litigation (climatecasechart.com)
[66] See n 63
[67] See *Dutch NGOs v ING Bank*, filed 8 May 2017, summary available at: Dutch NGOs vs. ING Bank - OECD Watch
[68] *Tiwi Islanders v Various banks and export credit agencies*, human rights grievance complaints sent 4 April 2023, available at: Equity Generation Lawyers | Human rights
[69] See NGFS, 'Report on micro-prudential supervision of climate-related litigation risks' (September 2023), available at: ngfs_report-on-microprudential-supervision-of-climate-related-litigation-risks.pdf, p26
[70] https://www.ft.com/content/055ef9f4-5fb7-4746-bebd-7bfa00b20c82

businesses could represent a legal "tipping point"[71] leading to liability for substantial awards of damages.[72] Central bankers, increasingly, are anticipating a rise of such litigation.[73]

Greenwashing

The gap between **[BANK]**'s public statements regarding business and human rights, including commitments to adhere to the UNGPs and the OECD Guidelines, and its fossil fuel financing activities are not only a source of reputational risk.

As regulators and policymakers aim for markets to operate with accurate information, greenwashing is emerging as an increasingly significant legal risk that can arise in many different forms, including, for example:[74]

(1) Brand greenwashing: greenwashing by the organisation in overall terms by claiming to be greener than it actually is;

(2) Product greenwashing: mis-labelling or mis-selling sustainable products;

(3) Greenwashed financing: including providing corporate financing for high emissions companies for their "green energy transition" when that company is still expanding fossil fuel production; and

(4) Financial reporting greenwashing: including false statements or omissions in public disclosures.

These risks are not theoretical. Multiple banks have already been the subject of litigation and/or regulatory investigations regarding the disconnect between their climate-related consumer advertising / public disclosures and their fossil fuel financing activities.[75] The NGFS has recently noted and predicted a strengthening of this trend,[76] particularly as laws governing prospectuses in the US and EU are acknowledged to present a relatively low bar for legal claims.[77] The EU Sustainable Finance taxonomy is being phased in, and will highlight any disjuncts between public statements and underlying investments and/or business activities in Europe.

Regulators are also stepping up levels of scrutiny. The US Securities and Exchange Commission has created a Climate and ESG Task Force to proactively identify ESG-related misconduct, with a particular focus on disclosures. The European Banking Authority has

[71] See n 69
[72] NGFS, 'Climate-related litigation: Raising awareness about a growing source of risk' (November 2021), available at: https://www.ngfs.net/sites/default/files/medias/documents/climate_related_litigation.pdf, p9
[73] See n 69 and Frank Elderson, '"Come hell or high water": addressing the risks of climate and environment-related litigation for the banking sector' (September 2023), available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230904_1~9d14ab8648.en.html#:~:text=The%20phrase%20can%20equally%20be,banks%20need%20to%20be%20prepared.
[74] See ClientEarth and AIGCC, 'Greenwashing and how to avoid it: an introductory guide for Asia's finance industry' (April 2023), available at: https://www.clientearth.org/latest/documents/greenwashing-and-how-to-avoid-it-an-introductory-guide-for-asia-s-finance-industry/
[75] Ibid, pp13-15
[76] See n 64, p13
[77] See n 69, p9

recently completed a survey finding a rise in greenwashing in the banking sector.[78] Recent UK Financial Conduct Authority business plans have committed to identifying greenwashing[79] and pursuing higher quality climate disclosures.[80] Its Director of ESG has spoken of the importance of closing the 'say-do' gap in order to address greenwashing.[81] The Chief Sustainable Finance Officer of the Japanese Financial Services Agency has acknowledged that greenwashing has become a core issue for financial services agencies around the world.[82]

Fiduciary duties

[Note: this subsection on directors' duties was tailored to the local laws applicable in each bank's jurisdiction of headquarters. The example below was included in the letter sent to HSBC on 4 December 2023 and is based on UK company law.]

Finally, in addition to the above and the local laws and regulations applicable to the bank across its jurisdictions of operation, HSBC's directors are bound by fiduciary duties, including:

(1) The duty to act in accordance with the bank's constitution,[83] which includes HSBC's board-proposed resolution[84] passed in May 2021 committing to set, disclose and implement a Paris-aligned strategy;[85]

(2) The duty to exercise reasonable care, skill and diligence;[86] and

(3) The duty to act in a way most likely to promote the success of the bank, having regard to the impact of the bank's operations on the community and the environment.[87]

Having recognised climate change as a material financial risk and publicly committed to align with the Paris Agreement and engage its clients on their net zero transitions, HSBC's directors have indicated that they consider this to be the course of action which would be most likely to promote the success of the bank.

By allowing HSBC's business relationships with non-Paris-aligned clients pursuing fossil fuel expansion to continue, with the consequent reputational and legal risks that result, HSBC's directors are acting in a manner that risks undermining the success of the bank and

[78] European Banking Authority, 'Progress report on greenwashing monitoring and supervision', (May 2023), available at: https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2023/1055934/EBA%20progress%20report%20on%20greewnwashing.pdf, see Executive Summary
[79] https://www.fca.org.uk/publications/business-plans/2022-23,
[80] https://www.fca.org.uk/publications/business-plans/2023-24
[81] https://www.fca.org.uk/news/blogs/finance-positive-sustainable-change#:~:text=Closing%20the%20say%2Ddo%20gap,challenges%20from%20all%20sides%20now.
[82] ClientEarth and AIGCC, 'Greenwashing and how to avoid it: an introductory guide for Asia's finance industry' (November 2023) (Japan Update), available at: https://www.clientearth.asia/latest/documents/japan-edition-of-greenwashing-guide-released/, p1
[83] Section 171 Companies Act 2006
[84] HSBC, 'Notice of AGM' (2021), available at: AGM and shareholder meetings | HSBC Holdings plc, Resolution 15
[85] This resolution forms part of the bank's constitution by virtue of sections 17(b), 29(1) and 171 Companies Act 2006
[86] Section 174 Companies Act 2006
[87] Section 172 Companies Act 2006

consequently are at risk of breaching their fiduciary duties. Putting in place the red-lines set out in Section 5 below can help HSBC mitigate these risks and will position HSBC well for investor expectations and engagement.[88]

5. **[BANK]**'s policies: red-lines to respect human rights

In ClientEarth's view, the most effective way for **[BANK]** to prevent its contribution to climate-related human rights impacts caused by energy sector clients is to ensure it does not continue to provide finance and/or support to such clients if they are not credibly aligning with the goals of the Paris Agreement. Such a course of action can mitigate the legal and reputational risks set out in Sections 3 – 4 above. In specific terms, ClientEarth considers that this requires the measures set out below.[89]

1. **[BANK] should immediately put in place and implement a policy that it will no longer provide on- or off-balance sheet services relating to projects, or to companies involved in projects, that involve new exploration, expansion or development of fossil fuels, in line with the IEA NZE;**

2. **[BANK] should require its fossil fuel-intensive clients to publish:**

    a) **Scope 1, 2 and 3 emissions data by the end of H1 2024; and**

    b) **Paris-aligned transition plans by the end of H1 2024, to include short, medium and long-term targets to transition its business to net zero emissions on a timeline aligned with, at minimum, IPCC SR1.5 pathway 1, and setting out red-lines for clients (which should include that these plans prohibit new exploration, expansion or development of fossil fuels, in line with the IEA NZE).**

    Financing should be withdrawn from companies that refuse to publish the above data by the specified date, or that make inadequate progress against their Paris-aligned transition plan;

3. **[BANK] should make explicit: (a) what it is requiring of its clients, by when, including by way of amendment to its financing policies; and (b) what consequences follow from failing to meet those requirements, including by way of contractual terms that allow for the early withdrawal of financing and/or support; and**

4. **[BANK] should be transparent about the basis for any claims that continued support for such clients accelerates the client's transition towards Paris-alignment. Fundamentally, companies involved in new exploration, expansion or development of fossil fuels cannot be regarded as transitioning toward net zero,**

[88] See, for example, ShareAction, '$4.2tn investors call on leading banks to strengthen climate ambitions before COP26' (7 July 2021), available at: $4.2tn investors call on leading banks to strengthen climate ambitions; Investor Alliance for Human Rights, 'Investor Statement of Support: BankTrack Global Human Rights Benchmark' (2023), available at: Investor Statement Banktrack 2022 Global Human Rights Benchmark
[89] Whilst respecting all applicable laws and existing contractual requirements.

in line with the IEA NZE,[90] and should therefore be excluded from [BANK]'s financing (see point 1 above).

In line with the UNGPs,[91] the above measures should be made 'real' through integration across relevant internal functions and processes: from performance incentives to business development, client relationship management to risk management policies, credit approvals processes to capital requirements calculations. **[BANK]** should also publicly disclose information which is sufficient for stakeholders to evaluate the adequacy of **[BANK]**'s response to its climate impacts through its clients.

ClientEarth calls on **[BANK]** to comply with its responsibility to respect human rights. The United Nations Special Rapporteur on human rights and transnational corporations has stressed the need to apply 'principled pragmatism', taking practical action and taking effective steps to create change and strengthen the bank's promotion and protection of human rights.[92] We emphasise that the UNGPs provide **[BANK]** with a credible and human rights-based framework to guide and benchmark climate risk management, and may assist in areas where the operationalisation of net zero commitments is lagging. The red-lines set out above are an appropriate first step.

6. Conclusion

It is well noted that there is an increasing focus internationally on the deficiencies of financial sector action regarding the energy sector, and in particular the lack of science-based policies being set by banks.[93]

[BANK]'s continuation of its business relationship with Saudi Aramco, and with other clients engaged in fossil fuel expansion, increases the risk of it being found in breach of international human rights standards. A continued failure to exercise leverage or, should that approach prove ineffective, responsibly terminate the business relationship with Saudi Aramco and other such clients, make it likely that **[BANK]** has moved along the continuum towards a position of contributing to adverse climate-related human rights impacts, with a resultant responsibility to engage in the provision of remedy to people affected by climate change. International human rights standards set out the global baseline of expected conduct for all business enterprises wherever they operate, and can be expected to shape regulation and litigation relating to the financial sectors' responsibility regarding climate change.

[BANK]'s involvement with adverse climate-related human rights impacts leaves it exposed to material reputational and legal risks, including litigation risk. Such risks will become more severe over time and could expose the bank to significant financial liabilities, in particular as

[90] See n 4

[91] See n 8, Principles 17 and 19, pp 17-19, 20-22

[92] See United Nations General Assembly, 'Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework' (15 July 2019), available at: A/74/161

[93] See, for example, SBTi, 'Fossil Fuel Finance Position Paper' (consultation draft, 2023) ('*FIs shall establish a policy to immediately cease new financial support to companies and projects that add to the unabated capacity of fossil fuel assets*') and SBTi, 'Financial Institutions Net-Zero (FINZ) Standard Conceptual Framework and Initial Criteria' (consultation draft, 2023), both available at: Public Consultation on SBTi Resources for Financial Institutions - Science Based Targets

climate-induced human suffering increases, systemic climate-related financial risks crystallise, and/or human rights impacts-focused climate litigation proliferates.

In contrast, transparent implementation of the red-lines set out in Section 5 above in a human rights-respecting approach offers the opportunity to mitigate these risks and credibly manage and mitigate the climate impacts of **[BANK]**'s operations. As the UNGPs state: "*Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place*."[94] Conversely, "*[c]onducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse*".[95] As with the management of any material and systemic risk, failing to take reasonable steps and maintaining a 'say-do' gap will increasingly implicate Board-level fiduciary duties.

We would welcome an opportunity to discuss the contents of this letter further with you, the Board, the Chief Legal Officer, the Chief Risk and Compliance Officer and the Chief Sustainability Officer. Please address your response to this letter to Alex Lombos at alombos@clientearth.org.

Yours sincerely,

Laura Clarke

Chief Executive Officer, ClientEarth

[94] See n 8, p16
[95] See n 8, p19

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Annex 1: [BANK]'s continuing support for Saudi Aramco (2022 – 2023)

The table below, showing **[BANK]**'s continued support for the Saudi Aramco corporate group in the period 2022 - 2023, was extracted from Refinitiv's dataset on 13 November 2023.

[Note: table removed due to licensing restrictions.]