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**Access Now Submission to the United Nations Office of the High Commissioner for The Working Group on Business and Human Rights: Call for Inputs for a report on Investors, ESG and Human Rights**

27 September, 2023

**Introduction**

Access Now welcomes this opportunity to provide relevant information to the United Nations (UN) Office of the High Commissioner for the Working Group on Human Rights and Business. Access Now, a UN Economic and Social Council (ECOSOC) accredited organization, routinely engages with the UN in support of our mission to extend and defend digital rights of people and communities at risk around the world.[[1]](#footnote-0) Since its founding in 2009, Access Now monitors the abuse and misuse of new and emerging technologies that threaten fundamental human rights, including freedoms of expression, association, and peaceful assembly, as well as the rights to privacy and non-discrimination. We promote corporate respect for human rights in the digital age, and also closely monitor internet shutdowns and coordinate the global #KeepItOn coalition and campaign against internet shutdowns.[[2]](#footnote-1)

This submission provides pragmatic recommendations on how States, businesses — especially financial institutions of all types — civil society and other stakeholders can ensure their Environmental, Social, and Governance (ESG) approaches align better with the UN Guiding Principles on Business and Human Rights (UNGPs) in the context of financial products and services, especially when focusing on digital technologies. While this submission draws upon examples, these examples are non-exhaustive, and do not represent the lived experiences of all persons at risk. More information is required to take into full account the intersecting forms of oppression of those who are directly targeted.

**General Questions**

1. **What do you understand Environmental, Social, and Governance (ESG) in finance to mean? How are human rights standards and frameworks considered by investors, if at all, in ESG?**
2. We define ESG in finance as the ratings investors use to evaluate the risks related to the environmental and social sustainability of their investments and of their portfolio companies. ESG ratings on the different sectors and on the individual companies’ performance are typically provided by external third parties as commercially available solutions to investors.
3. In terms of how or whether human rights standards and norms are considered by investors in ESG, a main concern is that for many ESG funds, it appears that investors are more likely to consider the impact of environmental and human rights risks to the funds’ profitability, rather than the human rights impact of the companies included in the funds. In the European Union (EU), this matter is hopefully resolved to a certain extent by the introduction and further development of the principle of “double materiality” disclosure requirements for the financial sector through the [Sustainable Finance Disclosure Regulation](https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector_en).

**II. To what extent do ESG approaches present constraints or opportunities for investors and businesses overall?**

1. We feel that the technology sector tends to be [overrepresented in ESG funds](https://news.mongabay.com/2021/04/behind-the-buzz-of-esg-investing-a-focus-on-tech-giants-and-no-regulation/) due to the industry’s relatively low carbon footprint and high returns for shareholders. Similarly, many funds appear to tend to brand themselves as ESG funds or socially responsible funds when they are, for the most part, only [carbon-free funds.](https://news.mongabay.com/2021/04/behind-the-buzz-of-esg-investing-a-focus-on-tech-giants-and-no-regulation/) This overrepresentation of an individual sector in ESG funds ignores the fact that many ICT companies have poor governance practices and fall short on digital rights, labor rights, and other human rights issues. A critical factor is that the “S” criteria used by mainstream ESG ratings providers is generally limited to supply chain risks or worker’s rights issues and fails to capture the human rights and broader social risks unique to the ICT sector. In other words, in most cases, it appears that the “E” in the ESG criteria/score for an ICT company is weighted higher than the equally relevant “S” and the “G,” and the “S” often fails to capture the relevant risks. It is therefore a real concern that shareholders may be misled into thinking they are investing in a responsible manner by choosing to invest in funds titled “ESG”.

**III. What responsibilities and capacity do ESG index and data providers have regarding the assessment of adverse human rights and environmental impacts, and how can ESG indexes and research products be improved to align with the UNGPs approach?**

1. As the first step, ESG index and data providers should be more transparent with their rating methodologies to allow investors and other stakeholders to scrutinize the way the relevant company data is collected, and equally importantly, how it is weighed within the rating. As indicated in the previous chapter, when it comes to addressing human rights risks and their mitigations, ESG index and data providers typically focus on supply chain issues instead of taking time to carefully assess the actual salient human rights issues. For example, in the technology sector, the general consensus is that the most salient human rights issues usually stem from product end-use, and not the supply chain. Given the fact that most of the commercial ESG rating providers do not publish their methodologies or the questionnaires they require companies to fill in for their ratings assessments and data collection, investors should not rely on these ESG indices alone to determine the risk levels for their investments in the technology sector. Evaluating compliance to such standards as the UNGPs, which require companies to include all their business operations onto their human rights risk assessments and the related mitigation, may be underrepresented or missing altogether. To ensure these indices and data providers’ ratings for the corporate sector are valid and truly comply with the basic assumptions of “sustainable investment”, their methodologies should be open for public scrutiny.

**State duty to protect human rights**

1. **How can States better advance human rights-compatible regulation and policies concerning investors and financial institutions generally in a manner that fulfills their international legal obligation to protect human rights?**
2. When drafting relevant regulations on the State or regional (for example, the EU) level on the corporate duty to respect human rights, States and regional institutions must [ensure the inclusion of the financial sector](https://www.euractiv.com/section/economy-jobs/news/negotiations-on-eu-due-diligence-rules-expected-to-pick-up-speed-in-september/) in the scope of the regulation. We note with concern that some States appear to actively work towards [excluding the financial sector from further accountability](https://www.reuters.com/business/finance-should-be-excluded-sustainability-law-says-some-eu-states-2022-11-10/). It is critical to recognise that publicly listed companies typically take guidance on direction from their shareholders, and if these shareholders are not required to uphold the same standards and norms which apply to the corporate sector, it is likely to not only lead to confusion, but also to conflict in the corporate duty to respect human rights in situations where the desired direction from the shareholders could potentially result in adverse human rights impacts by the company.
3. States should also ensure that any reporting or disclosure requirements towards investors and financial institutions include in them the notion of [“double materiality”](https://www.nortonrosefulbright.com/en/knowledge/publications/bc2d7d3f/double-materiality-what-does-it-mean-for-non-financial-reporting#:~:text=The%20concept%20of%20%E2%80%9Cdouble%20materiality%E2%80%9D%20refers%20to%20how%20information%20disclosed,on%20the%20world%20at%20large.).

**Corporate responsibility to respect human rights**

1. **To what extent are investors aware of their responsibility to respect human rights? Are some types of investors more likely than others to align their practices with the UNGPs? Does it depend on the type of investor?**
2. Based on our understanding as a stakeholder, there exists a lot of variation in terms of how and whether investors are aware of or acknowledge their responsibility to respect human rights. The current regulatory planning in the EU, for example, [is potentially increasing such confusion](https://www.euractiv.com/section/economy-jobs/news/negotiations-on-eu-due-diligence-rules-expected-to-pick-up-speed-in-september/), making it easier for the financial institutions to ignore or to deny their role in the overall value chain on responsible corporate behavior. Furthermore, the current anti-ESG rhetoric taking root in the US is clearly already [impacting shareholder voting](https://www.openmic.org/news/big-tech-shareholder-proposals-annual-meeting-results-offer-lessons-for-the-future) on US-based companies in their ESG-related performance, which includes most of the Big Tech companies. Therefore, from our perspective, the differences in investor behavior and the likelihood in adopting the UNGPs in their decision making is perhaps not related to different investor types, but are more based on regional differences. Finally, it is worth noting that the responsible investor community is also [advocating for human rights standards](https://www.eurosif.org/news/joint-statement-of-support-by-responsible-investors-organisations-for-the-corporate-sustainability-due-diligence-directive-csddd/) to be adopted across the whole value chain, including the financial sector.

**II. What does appropriate investor action entail in the event that a client or portfolio company causes or contributes to a potential or actual adverse human rights impact?**

1. As the first step, investors typically try to investigate further and to engage with the company in question. For example, stakeholders have raised significant concerns about the [Google](https://cloud.google.com/blog/products/infrastructure/google-cloud-announces-new-regions) and [Microsoft](https://news.microsoft.com/en-xm/features/microsoft-announces-intent-to-expand-cloud-regions-through-saudi-arabia-datacenter/) announcements to establish cloud data centers in countries with extremely poor human rights records. Shareholders have, together with civil society, called for more transparency from these companies on how they plan to navigate and to mitigate the obvious human rights risks resulting from such plans, but so far, these companies have not engaged with investors on this. The next step, already seen in 2022 and 2023 with, for example, [the Google Annual General Meeting](https://www.accessnow.org/press-release/google-cloud-saudi-arabia-letter-alphabet-shareholders/), is to file shareholder proposals to request further information and further transparency on these plans. The final and the most impactful investor action is to exclude the company from their investment portfolio. [Some investors](https://www.nbim.no/en/responsible-investment/ethical-exclusions/exclusion-of-companies/) are already committed to doing so in cases of human rights violations, but generally speaking, investors should take more efficient charge of their investment decisions in a rights respecting manner when the portfolio companies fail to comply with respecting human rights in their operations - or even from engaging with their own shareholders on the issue.

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

1. Conditional provisions are already a standard in, for example, software licensing to ensure the correct end-use of the software to comply with export licensing obligations. Investors should consider including similar human rights-related provisions to their investment decisions where possible and applicable to also enable them to withdraw from the investment in a more efficient manner should human rights violations occur. While it may be worth investigating whether technological solutions such as Blockchain could be of benefit here, such technology solutions may introduce a new range of [legal and other risks.](https://rm.coe.int/report-on-blockchains-en/1680a8ffc0)

**IV. In what circumstances should investors refrain from making ESG-related investments in view of potential risks of adverse human rights impacts?**

1. Investors should refrain from making any types of investments in companies which are not able or willing to sufficiently explain to their stakeholders, including investors, how they plan to mitigate the potential adverse human rights impacts in cases where the likelihood and the severity of such impacts remains a concern.

**V. How can investors best provide transparency in their disclosures about their practices which are, or are not, in alignment with the UNGPs?**

1. Conducting exercises on gap analysis and risk identification and management is a standard part of corporate governance and risk management in any business enterprise in the modern world, including in the financial sector. Investors should include relevant sections of the UNGPs (Pillar Two) as standard requirements in their relevant processes and assessments, and be prepared to publish the results, together with plans for further improvement, in connection with their standard disclosures.

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

1. In terms of consultation with stakeholders on *human rights-related issues* and on access to remedy, the ESG-related approach should not deviate from the standard set by the UNGPs. In terms of expectations and challenges faced by investors in undertaking meaningful stakeholder consultation, based on feedback from the investor community as a stakeholder, we understand that the information received from the different stakeholder groups may sometimes vary, especially in cases where the stakeholders providing such information include both the corporate sector and the affected groups. In such cases, investors should continue to seek further consultation from relevant stakeholders in order to determine what constitutes a *meaningful and objective* contribution from the stakeholders. Investors should also not accept that conducting *any* engagement will satisfy the requirement for meaningful engagement, that is, investors should avoid the so-called “tick the box” exercises to comply with this requirement.

**VII. How should investors take a heightened human rights due diligence approach in conflict affected areas?**

1. There are [numerous guidelines](https://www.ecchr.eu/fileadmin/user_upload/PAX_ECCHR_Rapport_Lafarge_2023.pdf) from [authoritative sources](https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide) which are publicly available on [how to conduct heightened due diligence](https://www.bsr.org/en/reports/conflict-sensitive-human-rights-due-diligence-for-ict-companies-guidelines-and-toolkit-for-corporate-human-rights-practitioners) in conflict affected areas. Investors should take a two-fold approach; in addition to conducting their own heightened due diligence on their own operations, they should also ensure their portfolio companies are able to provide evidence of having completed the same procedure, and to demonstrate sufficient action taken as a result.

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

1. Stock exchanges can play an important role in ensuring the continued respect for human rights. They can do so by, for example, enforcing rules on disclosure and transparency for publicly listed companies. The same requirements on transparency should also apply to ESG funds to demonstrate that the funds not only measure human rights related risks in terms of profitability, but also risks based on the likelihood and the potential impact on human rights. Also, as noted above, [stock exchanges](https://www.accessnow.org/press-release/sec-proposed-rule-esg-ratings/) could also help ensure additional transparency from the ESG funds on how the “E”, the “S” and the “G” are defined and weighted within the fund[.](https://www.accessnow.org/press-release/sec-proposed-rule-esg-ratings/)

**Good practices**

1. **Please provide examples of any good practices, tools, guidance, policies, etc., regarding the integration of the responsibility to respect human rights by investors, including examples of investors actively preventing or mitigating (including by using leverage or undertaking a responsible exit) any adverse human rights and environment impacts of the businesses in which they invest.**
2. The Norwegian Investment Bank, [Norges Bank Investment Management](https://www.nbim.no/en/) has taken an exemplary approach on transparency on their [decisions to exclude companies](https://www.nbim.no/en/responsible-investment/ethical-exclusions/exclusion-of-companies/) from their portfolio based on human rights violations and also [publicly providing rationale for such decisions](https://etikkradet.no/recommendations/serious-violations-of-human-rights/) through their Council of Ethics. Other investors should follow a similar approach to inform their stakeholders and to demonstrate that investors are committed to and invested in respecting human rights.
3. Collective action platforms such as the [Investor Alliance for Human Rights](https://investorsforhumanrights.org/) provide an excellent opportunity for investors to learn more about human rights and how they apply to investors’ work. Such platforms also provide the potentially required leverage for the investors to push for further progress in the corporate duty to respect human rights.

##### **Access Now (**[**https://www.accessnow.org**](https://www.accessnow.org)**)** defends and extends the digital rights of individuals and communities around the world. As a grassroots-to-global organization, we partner with local actors to bring a human rights agenda to the use, development, and governance of digital technologies, and to intervene where technologies adversely impact our human rights. By combining direct technical support, strategic advocacy, grassroots grantmaking, and convenings such as RightsCon, we fight for human rights in the digital age.

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1. Access Now, About Us, 2021, available at <https://www.accessnow.org/>. As a grassroots-to-global organization, we partner with local actors to bring a human rights agenda to the use, development, and governance of digital technologies, and to intervene where technologies adversely impact our human rights. By combining direct technical support, strategic advocacy, grassroots grantmaking, and convenings such as RightsCon, we fight for human rights in the digital age. [↑](#footnote-ref-0)
2. Access Now, #KeepItOn, 2023, available at: <https://www.accessnow.org/keepiton/>. [↑](#footnote-ref-1)