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**Joint Submission to the UN Working Group on Business and Human Rights**

**Investors, ESG, and Human Rights**

*Submitted by:*

Minnesota Alliance for Sustainable Pension Investment

Funds Enterprise, Carlson School of Management, University of Minnesota

Human Rights Center, University of Minnesota Law School

(*consultative status with the Economic and Social Council*)

Minneapolis

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**About Us**

We are a cross-disciplinary coalition of organizations based in Minnesota (USA). We have prepared this submission based on our collective experience with human rights and responsible investing through research, local advocacy, and asset management.

* The **Minnesota Alliance for Sustainable Pension Investment** is a citizen-driven initiative advocating for legislation to govern the state pension in coherence with the human rights and environmental commitments of the state.
* The **Funds Enterprise at the Carlson School of Management, University of Minnesota** is an asset management program that allows students to manage Investment Funds for external participant-clients. The Funds are signatories to the Principles for Responsible Investment and integrate ESG considerations into their investment decisions.
* The **Human Rights Center at the University of Minnesota Law School** is dedicated to advancing human rights research, teaching, and advocacy with partners across sectors and at the local, national, and international levels. The Center has a long-standing engagement in the area of business and human rights and consultative status with the UN Economic and Social Council.

**Investors, ESG, and Human Rights**

Financial actors across different sectors and levels of governance are seeking guidance on best practices and standards for ESG and human rights, but finding inconsistent and decentralized answers. In our experience, this confusion and ambiguity contributes to backlash against advocates’ efforts to infuse and translate human rights considerations into investment-related decision-making.

With this report, the UN Working Group is uniquely positioned to clarify the human rights standards relevant to each of the three pillars of ESG and help bridge the divide between human rights processes and the traditional risk and return analysis used by asset managers. We have prepared this submission because we expect that the Working Group’s engagement on these questions will offer critical support for our work in Minnesota to advance human rights-informed ESG investment frameworks and practices.

**First, we describe our assessment of the gap between the human rights framework and the reality of the finance process in practice.** Namely, we note that analysts perceive an insurmountable gap between the data-driven demands of the risk-reward models of the finance sector and the human rights-related assessments they deem to be qualitative and value-based and outside of their reach and expertise. We propose three areas in which the Working Group could have an important impact: clarifying the cross-cutting link of human rights to the ESG pillars; identifying areas to expand human rights metrics visible to analysts; and strengthening the human rights framework of the UN-backed Principles for Responsible Investment (PRI).

**Second, we call on the WG to pay special attention to the important role and responsibility of sub-national public pension funds** in its thematic work on investors and ESG. These key actors have an important influence and protagonism, but we note they are completely overlooked and invisible in the international human rights debates and guidance. We urge the Working Group to name and emphasize the critical role of sub-national public pensions in this report and not stop at mentions of the “global, regional, and national levels.” This is key both because of the heightened duties for states with respect to state actors and funds, as well as the strategic importance for the aim of advancing human rights standards and practice given the massive influence of institutional investors – including sub-national bodies - across the finance sector.

1. **The** **Gap Between Human Rights Assessments and Finance Processes**

The Working Group should aim to clarify the cross-cutting nature of the human rights framework as related to the ESG pillars and assist efforts to expand the bounds of the data-centric processes of the finance sector to support analysts’ review of processes and practices. An especially important area of intervention for doing this would be strengthening the human rights framework of the PRI.

1. **Clarifying the Concept of Human Rights and ESG in Finance**

We see that “sustainable finance” means something different across contexts and sectors. This not only contributes to confusion and tension; in some cases, it creates the illusion of agreement and poses a significant barrier to real progress and open debate.

Often, sustainable finance refers to or focuses on funds directed toward purportedly “green” projects.[[1]](#footnote-1) The focus is on leveraging funding for projects with outcomes deemed positive for sustainability. This limited lens is distinct from processes aimed at identifying responsibilities for the broad array of impacts at each stage of a project and financing arrangement.

For the investor community, finance is itself a system of analysis and allocation meant to enable investors to choose the projects that offer the best risk-adjusted returns. Sustainable finance in this context refers to the practice of incorporating ESG considerations into that system of risk-return analysis. While considering multiple investment opportunities, ESG integration should help investors determine the best choices based on a refined understanding of the risk and return potential of investments.

The UN Working Group should clarify for the investment and finance sector, and public debate that a human rights-based approach to ESG must not be limited to considering possible positive environmental, social, or governance contributions of a particular investment. A human rights-based approach to ESG requires taking measures at every stage to identify, prevent, mitigate, and remedy adverse human rights impacts.

1. **Address the Limitations of the Data-Centric Approach Investors Take to Human Rights Standards and Frameworks in ESG**

Within this risk-return framework, investors rely on data that they can apply to their models. The only way to operationalize a human rights-based approach is to bridge the gap between existing human rights indicators and best practices and the reality of the tools and models used by the finance sectors.

Reflecting the dominance of data-centric decision-making, most asset managers have focused largely on the assessment of environmental metrics in ESG, and specifically on greenhouse gas emissions. Companies and investors are under significant pressure from various constituents to respond to the immediate and burgeoning problem of climate change. But most critically, data on emissions is widely available and maps on neatly to the risk-return frameworks of finance. Asset managers rely on the emissions data to evaluate potential exposure to high carbon-emitting industries and to assess the extent to which emissions might impair shareholder value in the future or imply future costs for adaptation or mitigation. We believe an important dimension explaining this focus is that both companies and investors can identify ways to profit from the transition to a low-carbon economy.

Human rights abuses and impacts are more difficult for investors to connect to the portfolio companies and quantify as negative externalities. Investors are attuned to the history of financial liability for companies for environmental harms caused - information which can be incorporated into the financial metrics of risk and return. However, the risk analysis of financial liability for adverse human rights impacts is less clear. The long-standing impunity and layered obstacles for successfully litigating claims against transnational corporations for human rights harms means that this is generally outside the assessment of risk by analysts without specialized knowledge or training.

By and large, we see that asset management firms have limited or no engagement with existing human rights standards and frameworks. Analysts review the data that is easiest to collect, but the information that would be needed to actually assess how a portfolio company’s policies and practices impact workers along the value chain or in affected communities is not readily visible. Even where human rights issues may be visible, the traditional risk-return models do not surface assessments of links to the company under review.

Assessments pulled under the heading of human rights tend to include review of metrics related to workers - including the diversity of companies’ direct workforce, gender pay gap issues, workplace safety, training, and other issues connected to employee satisfaction. Within these data, even in the face of evidence of bias or unequal treatment of workers, analysts are mostly assessing only for compliance with local laws. The “social” category of ESG metrics reported in the highly influential Bloomberg database is limited to: percentage of women in the workforce; percentage of women in management; percentage of workforce that is unionized; and a series of yes/no questions about a variety of administrative policies, including a human rights policy. Although these metrics are important, they are not sufficient to assess a full picture of human rights concerns.

Therefore, the ESG human rights assessment for a given company is based largely on the reported existence of a policy, without any easily accessible or quantifiable information for analysts about the scope or effectiveness of the policy. Even where the policy or statement is included in a report, clicking on this quite literally sends the analyst out of that data world into what can feel like uncharted territory they are unprepared to navigate. Most analysts are unequipped to make assessments beyond the prepared data realm. In this way the policy review becomes a box-checking exercise that in reality does not contribute to the analysts’ task of accurately assessing risk.

For human rights standards to be operationalized in the predominant finance processes of risk and return, analysts need additional guidance, systems, and training on how to request and analyze the most relevant information, as opposed to relying only on the lowest-hanging, least informative data points. Asset managers need additional tools to carry out process-focused evaluations. The type of information leaders need to successfully and responsibly manage a particular business is different from the information that investors need and can feasibly collect and compare when making decisions about companies in which to invest. For this reason, as the Working Group has recognized,[[2]](#footnote-2) tailored guidance for investors is key.

Externally validated metrics are especially important for investors. Investors rely on recognized and accessible external standards to have a platform and common language with managers and a basis upon which to request and compare information. These enable investors to confidently and consistently ask the right questions of the companies in which they are considering investing.

Industry-specific certification standards can be useful for allowing corporate partners and end-users to level the playing field across jurisdictions, regardless of differences in legal frameworks. Increased links between certification standards and the UNGPs would be a pragmatic way to make the human rights framework a more immediately applicable part of the analyst’s toolkit.

1. **Foster a Greater Connection between the PRI and the UNGPs**

The UN Working Group has highlighted previously how critical support for human rights-based approaches from industry initiatives can be in terms of bolstering investor uptake.[[3]](#footnote-3) Specifically, we encourage the Working Group to support greater integration and connection between the UN-backed Principles for Responsible Investment (the PRI) and the UNGPs as a high-impact area of intervention to help resolve investor confusion on ESG investing and increase the incorporation of rights-based approaches.

The PRI are an important initiative and channel for actors to signal their commitment to responsible investment, for international standard and expectation setting, and for exchanging knowledge and best practices. More than 3,000 investors representing more than US$103 trillion AUM have signed onto the PRI. Governments have also been drawing on the PRI to promote responsible investing. For example, in its National Action Plan on Business and Human Rights in 2008, the Danish Government required state-owned companies to join the UN Global Compact principles and the PRI.[[4]](#footnote-4) Several U.S. states have signed onto the PRI, including Minnesota and Illinois.

The PRI have explicitly recognized the link to the international human rights framework,[[5]](#footnote-5) although the integration is limited in several important respects. First, as the Working Group has observed,[[6]](#footnote-6) the relevance of human rights standards is understood to apply exclusively under the S of the ESG paradigm. Furthermore, the framing presented by PRI guidance sets out decent work and diversity, equity, and inclusion as the predominant social issues facing companies, with international human rights standards coming in under those lenses.

In 2020 the PRI issued a human rights framework, including a “multi-year agenda to work towards respect for human rights across the financial system and a commitment to increase accountability among investors signatories by introducing human rights questions into the PRI Reporting Framework.”[[7]](#footnote-7) In addition to conceptual limitations of siloing the human-rights based assessment only under the social dimension of ESG, the actual uptake of the PRI human rights framework has been minimal. An analysis of signatory reports reveals that just 17% of signatories of the PRI make any mention of specific human rights guidance such as the UNGPs.[[8]](#footnote-8) The PRI announced a five-year plan for its signatories to incorporate human rights into their investment practices in line with the UNGPs.[[9]](#footnote-9)

The PRI must be more than an opportunity for actors to signal alignment with responsible investment ideals. Many actors that make the effort to sign onto the PRI are actively seeking guidance and support for navigating the increasing pressure and interest for integrating ESG into finance in a meaningful way. Given the influence in the investment community, the PRI convening space and reporting requirements are a strategic place for the Working Group to direct efforts to communicate to asset managers that human rights guidance and resources as integral to the ESG paradigm.

1. **Sub-national Public Pensions Investment Funds**

The UNGPs apply to institutional investors, including public pension funds.[[10]](#footnote-10) The public nature of these investment actors means that have heightened duties to both respect and protect human rights.[[11]](#footnote-11) Incorporating the UNGPs and human rights due diligence into public pension funds is a key step for states to improve policy coherence and ensure more effective government action.[[12]](#footnote-12) The Working Group has called on states to “integrate respect for human rights into the mandate, operations and investment activities of institutions involved in the issuance and management of State pension funds” and to “assess whether policies and legislation relating to public pension funds… are aligned with the State’s human rights obligations and address gaps.”[[13]](#footnote-13)

We urge the Working Group to emphasize that the heightened duties associated with the management of public pension funds should be recognized and made explicit, and sub-national pension funds are key actors with analogous human rights considerations.

1. **Reframing Fiduciary Duties for Public Pension Fund Management**

In addition to the human rights argument recognizing heightened duties because of the public nature of institutional investors, emerging economic and financial arguments also articulate extended or reframed conceptions of fiduciaries duties. Because of their size, the portfolio choices of these large “universal owners”[[14]](#footnote-14) can affect an entire ecosystem of actors. Universal owners are those that are large enough that there is public interest in the choices that they make and the repercussions of their investment decisions are felt by society at large. This is another basis for acknowledging an expanded fiduciary duty in the context of large public plans. Fiduciary duties are often defined as an exclusive responsibility to the plan participants – namely to generate the highest possible returns for those participants. Universal owners, on the other hand, owe a duty to the public collectively and to the public interest. “The public – and current and future taxpayers specifically - are the true residual risk bearers for public pension funds.”[[15]](#footnote-15)

There are several initiatives to make these expanded or reframed fiduciary duties explicit through legislative initiatives, including the Minnesota Fiduciary Responsibility Act promoted by the Minnesota Alliance for Sustainable Pension Investment. We urge the Working Group to emphasize the correct conception of fiduciary duties, which is the conceptual battleground on which debates about ESG and human rights in the investment sector are waged.

1. **Sub-national actors are key actors in human rights, ESG, and investment debates and decision-making**

Institutional investors at the sub-national level are a major part of this institutional investment landscape – both for their size and influence as well as the important public debates taking place over their proper management. However, sub-national public pension funds are entirely absent from international human rights guidance and debates to date. A decision by the Working Group to explicitly reference and engage these actors as key sites of intervention would help link the debates and advocacy at the sub-national level with the development and dissemination of global standards, and vice versa.

Sub-national public pension funds are key for the norm cascade necessary to advance a rights-based integration of ESG in finance. These public pension funds exert a disproportionate influence on asset managers. Contracts with the government are coveted, and firms are willing to comply with requirements that allow them to compete for these contracts.

Divestment and proxy votes are among the most important tools at states’ disposal to hold public companies accountable for incorporating human rights into investment decisions. [[16]](#footnote-16) Many public pensions have updated their proxy voting guidelines to acknowledge the growing importance of shareholder proposals.[[17]](#footnote-17) In our review, these strategies are still modest, involving basic review of portfolio company proxies and assessing which shareholder proposals (if any) they might support. There are very few examples of pension funds taking a leading role on any particular issue. Instead, they are opting to vote in favor of shareholder proposals that they deem consistent with new guidelines or joining broad stakeholder groups such as the Climate Action 100.[[18]](#footnote-18)

While each jurisdiction is set up differently, the dynamic of the Minnesota State Board of investment (MSBI) demonstrates the important role of the legislature in establishing sub-national ESG investment policies. The MSBI is responsible for approximately $130 billion in assets under management.[[19]](#footnote-19) Decision-making at the MSBI is highly concentrated. The board itself is comprised of four constitutional officers: the Governor, the Secretary of State, the State Auditor and the Attorney General for the state of Minnesota. Staff is responsible for day-to-day management of the assets, and is led by an Executive Director and a small team of senior investment professionals. In total, there are 33 members of the MSBI staff. The board and staff are supported by an Investment Advisory Council, which is comprised of investment experts from the state of Minnesota.

Divestment or heightened reporting decisions are made by the legislature as opposed to the staff of the public pension fund. For example, the Minnesota legislature has passed statutes that:

* require the State Board of Investment to liquidate its holdings in companies with their principal place of business in Russia or Belarus to the extent it is practicable (MN Statute 11A.245, in 2022);
* require divestment of companies who conduct business in Iran (MN Statute 11A.244, adopted in 2009); and
* require reporting on (but not divesting from) investments in companies that conduct business in Northern Ireland (MN Statute 11A.24, adopted in 1988).

Not all important decisions, however, flow directly from legislative action. The Minnesota SBI voted to divest from thermal coal companies in 2020 with no mandate from the state legislature.[[20]](#footnote-20)

Across the US, there is a patchwork of ESG standards, approaches and practices. In the US, California recently passed a bill requiring companies operating in the state with over $1 billion in annual revenues to disclose their greenhouse gas emissions.[[21]](#footnote-21) Another recent statute requires the boards of the Public Employees’ Retirement System and the State Teachers’ Retirement System to divest from thermal coal companies.[[22]](#footnote-22)

At the same, examples of sub-national actors taking regressive measures and adopting inaccurate stances vis-a-vis the role of ESG in public pension funds further demonstrate the need for clarity and guidance applicable and communicated to the sub-national level. For example, in the U.S. state of Kentucky, public figures, including the state attorney general, have asserted that ESG-based investment strategies do not comply with state law pertaining to fiduciary duties of firms managing public pension funds.[[23]](#footnote-23) Similarly, in 2022 the attorneys general of 19 U.S. states sent a letter to BlackRock asserting that the company was prioritizing its “climate agenda” over the best interests of beneficiaries in connection with ESG investing and retirement funds.”[[24]](#footnote-24) Recent legislation passed in Florida and Texas are examples of how ESG investments can be politicized, restricted, and face discursive challenges.[[25]](#footnote-25)

Outside of the US, an important example comes from Germany. In June 2023, four German states implemented stronger ESG standards for their sustainable investment strategies – resulting in the move of nearly €30 billion worth of assets to public pension funds.[[26]](#footnote-26) The 2015 Paris Climate Agreement will serve as the basis for the states’ investment strategy for public pension funds.[[27]](#footnote-27)

We are eager to bring the Working Group’s report into ongoing debates at the local level and leverage the tailored human rights guidance into our advocacy with diverse actors in the financial and public sectors. We urge the Working Group to emphasize that an important and feasible step for states to advance in existing human rights obligations is to mandate public pension funds to conduct human rights-based assessments to increasingly align investments with state’s obligation to respect and protect human rights.

1. For example, a typical “Green Bond” might raise money to invest in a solar energy array. *See* [Green Bond Principles](https://www.icmagroup.org/assets/documents/Sustainable-finance/2022-updates/Green-Bond-Principles-June-2022-060623.pdf), International Capital Markets Association, 2021. [↑](#footnote-ref-1)
2. [A/HRC/50/40/ADD.3,](https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F50%2F40%2FAdd.3&Language=E&DeviceType=Desktop&LangRequested=False) (para 111). [↑](#footnote-ref-2)
3. [Virtual launch UNGPs 10+ stocktaking report on institutional investment](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/summary-note-investor-report-launch_0909.pdf), OHCHR, 2021. [↑](#footnote-ref-3)
4. [Guiding Principle 4](https://globalnaps.org/ungp/guiding-principle-4/), National Action Plans on Business and Human Rights. [↑](#footnote-ref-4)
5. [Social Issues](https://www.unpri.org/sustainability-issues/environmental-social-and-governance-issues/social-issues), Principles for Responsible Investment. [↑](#footnote-ref-5)
6. https://www.unpri.org/sustainability-issues/environmental-social-and-governance-issues/social-issues/human-rights [↑](#footnote-ref-6)
7. [Why and how investors should act on human rights](https://www.unpri.org/human-rights/why-and-how-investors-should-act-on-human-rights/6636.article), Principles for Responsible Investment, 22 Oct. 2020. [↑](#footnote-ref-7)
8. [Sustainability Outcomes Key Findings](https://www.unpri.org/sustainability-outcomes/sustainability-outcomes-what-does-our-reporting-data-reveal-about-emerging-signatory-practices/10754.article) [↑](#footnote-ref-8)
9. Vibeka Mair, [PRI looks to add human rights to its reporting framework by 2025](https://www.responsible-investor.com/pri-looks-to-add-human-rights-to-its-reporting-framework-by-2025/), Responsible Investor, 19 Aug. 2020. [↑](#footnote-ref-9)
10. [A/HRC/47/39/Add.1](https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False), para 31. *See also* [A/HRC/44/56](https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F44%2F56&Language=E&DeviceType=Desktop&LangRequested=False), para 45: wherein a meeting was held at the Eighth Session of the Forum on Business and Human Rights to discuss the role of public investments, especially public pension funds, can increase respect for human rights. [↑](#footnote-ref-10)
11. [A/HRC/47/39/Add.1](https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False), para 113(3). [↑](#footnote-ref-11)
12. [A/HRC/50/40/Add.3](https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F50%2F40%2FAdd.3&Language=E&DeviceType=Desktop&LangRequested=False), paras 48–51. [↑](#footnote-ref-12)
13. [A/HRC/47/39/Add.1](https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F39%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False), para 113(3). [↑](#footnote-ref-13)
14. Jim Hawley & Andrew Williams, “The Emergence of Universal Owners: Some Implications of Institutional Equity Ownership” <https://www.jstor.org/stable/40722019>. [↑](#footnote-ref-14)
15. Paul Rose, Public Wealth Maximization: A New Framework for Fiduciary Duties in Public Funds, University of Illinois Law Review (2018). [↑](#footnote-ref-15)
16. The investment and divestment of public pension funds have long served as an instrument for public engagement on critical, systemic human rights issues, including apartheid in South Africa, child labor, and tobacco use. David Cifrino, [The Politicization of ESG Investing](https://www.sir.advancedleadership.harvard.edu/articles/politicization-of-esg-investing), Harvard Advanced Leadership Initiative Social Impact Review, 24 Jan 2023. [↑](#footnote-ref-16)
17. According to the Harvard Law School Forum on corporate governance, shareholder proposals in 2023 increased for the third year in a row, to 889. https://corpgov.law.harvard.edu/2023/08/03/shareholder-proposal-developments-during-the-2023-proxy-season/#:~:text=The%20five%20most%20popular%20proposal,and%20(v)%20special%20meetings. [↑](#footnote-ref-17)
18. https://www.climateaction100.org/about/ [↑](#footnote-ref-18)
19. as of June 30, 2023 [↑](#footnote-ref-19)
20. https://msbi.us/sites/default/files/2021-02/msbi\_resolution\_on\_thermal\_coal\_investments\_-\_may\_29\_2020.pdf [↑](#footnote-ref-20)
21. Mark Segal, [California Lawmakers Pass Bill Requiring Companies to Disclose Full Value Chain Emissions](https://www.esgtoday.com/california-lawmakers-pass-bill-requiring-companies-to-disclose-full-value-chain-emissions/#:~:text=The%20legislation%20would%20require%20companies,emissions%2C%20including%20those%20associated%20with), ESG Today, 12 Sept. 2023. [↑](#footnote-ref-21)
22. California S.B. 185 [↑](#footnote-ref-22)
23. David Cifrino, [The Politicization of ESG Investing](https://www.sir.advancedleadership.harvard.edu/articles/politicization-of-esg-investing), Harvard Advanced Leadership Initiative Social Impact Review, 24 Jan 2023. [↑](#footnote-ref-23)
24. David Cifrino, [The Politicization of ESG Investing](https://www.sir.advancedleadership.harvard.edu/articles/politicization-of-esg-investing), Harvard Advanced Leadership Initiative Social Impact Review, 24 Jan 2023. The states include Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah and West Virginia. [↑](#footnote-ref-24)
25. Isla Binnie and Ross Kerber, [DeSantis signs sweeping anti-ESG legislation in Florida](https://www.reuters.com/business/sustainable-business/desantis-signs-sweeping-anti-esg-legislation-florida-2023-05-02/), Reuters, 3 May 2023; Amal Ahmed, [Lawmakers passed a bill to stop insurers from considering ESG criteria in setting rates](https://www.texastribune.org/2023/06/12/texas-legislature-insurance-esg-rates/), The Texas Tribune, 12 June 2023. [↑](#footnote-ref-25)
26. Luigi Serenelli, [Analysis: German states realign €30 bn pension funds assets to stricter ESG standards](https://www.ipe.com/news/analysis-german-states-realign-30bn-pension-fund-assets-to-stricter-esg-standards/10067280.article), IPE, 20 June 2023. [↑](#footnote-ref-26)
27. Dr. Danyal Bayaz, [Beamtenpensionen nachhaltig finanzieren](https://www.dpn-online.com/pension-management/beamtenpensionen-nachhaltig-finanzieren-110229/), DPN, 14 Aug. 2023. [↑](#footnote-ref-27)