

Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment

BENJAMIN J. RICHARDSON *

This article argues that environmental law must target the financial sector, which sponsors and profits from environmental pillage. The rise of a system of finance capitalism has made the financial sector a crucial economic sector. A long-standing movement for socially responsible investment (SRI) has recently begun to advocate environmental standards for financiers. While the SRI movement has gained more influence in recent years, it has come at the price of jettisoning its former emphasis on ethical investment in favour of an instrumental, business case approach. Some modest legal reforms to improve the quality and extent of SRI have yet to make a tangible difference. An alternative legal strategy to promote SRI for environmental sustainability is suggested based on reforming the fiduciary duties of financial institutions. Fiduciary duties tied to concrete performance standards such as sustainability indicators provide a way to restore the ethical imperatives of SRI.

Cet article avance que le droit environnemental doit viser le secteur financier, qui cautionne le pillage de l'environnement et en profite. L'avènement d'un système de capitalisme financier a transformé le secteur financier en un secteur économique capital. Un mouvement en faveur des investissements socialement responsables (ISR), né depuis longtemps, a récemment commencé à préconiser des normes environnementales pour les financiers. Parce que le mouvement ISR a accru son influence ces dernières années, il a dû atténuer l'importance qu'il attachait auparavant aux investissements éthiques, en faveur d'une analyse commerciale instrumentale de cas. On attend toujours de voir si quelques modestes réformes juridiques cherchant à améliorer la qualité et la portée des ISR, opèrent une différence tangible. Une stratégie juridique alternative, permettant d'encourager l'ISR en faveur de la viabilité environnementale est suggérée sur la base de la réforme des devoirs fiduciaires des établissements financiers. Les devoirs fiduciaires liés à des normes concrètes de rendement, telles que des indicateurs de viabilité, représentent une façon de rétablir les impératifs éthiques de l'ISR.

* Associate Professor, Osgoode Hall Law School, York University. This article draws partly on the author's new book, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (New York: Oxford University Press, 2008).

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|------|---|-----|
| I. | RENEWING ENVIRONMENTAL LAW..... | 244 |
| II. | SOCIALLY RESPONSIBLE INVESTMENT (SRI)..... | 249 |
| | A. SRI: Its Business and Ethical Motivations..... | 249 |
| | B. SRI Governance..... | 254 |
| III. | ETHICS FOR ETHICAL INVESTMENT..... | 259 |
| | A. Building an Ethical Consensus..... | 259 |
| | B. Ecological Ethics for SRI..... | 262 |
| IV. | REGULATORY REFORMS FOR ETHICAL INVESTMENT..... | 266 |
| | A. Fiduciary Duties..... | 266 |
| | B. Fiduciary Finance..... | 272 |
| | 1. Accounting for Sustainability..... | 272 |
| | 2. The Spectrum of Fiduciary Duties for SRI..... | 277 |
| | C. Collateral Reforms..... | 285 |
| V. | CONCLUSIONS..... | 288 |

I. RENEWING ENVIRONMENTAL LAW

CONTEMPORARY SYSTEMS OF environmental law worldwide provide little space for ethics. Their stock-in-trade includes bureaucratic licenses, technology prescriptions, market incentives, and informational standards. They treat environmental management as a matter of business acumen, technological innovation, or obedience to regulatory commands. While all of these responses in theory can be considered reflective of some underlying ethical stance, such as utilitarianism, they do not reflect rigorous baseline standards to safeguard ecological systems over the long term. The mechanical, pragmatic outlook of environmental law reflects broader characteristics of modern governance, which tends to eschew morality and virtue.¹ The state's legitimacy and success are measured primarily by its performance as an economic manager. This economic rationality both fuels environmental degradation and constrains policy solutions when financial or other "concrete" grounds to motivate action are seemingly lacking.

A further fundamental weakness of environmental law regimes is their focus on the front-line companies that visibly pollute or exploit natural resources, rather than on their financial sponsors. Several decades of such

1. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981) at 233-36; David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Oxford: Blackwell, 1990) at 220.

regulation have hardly dented environmentally unsustainable trends. Financial institutions, such as banks, pension plans, and mutual funds, have systemically been remote to these environmental and social consequences.² The financial sector leverages economic development by raising capital for corporations and managing financial risks.³ In addition to supplying funds, financiers as shareholders also acquire influence to advocate changes in corporate policy.⁴ Despite such relationships, financial institutions have traditionally not been held legally accountable for the ultimate consequences of the transactions they fund. Causal relationships between finance and environmental impacts are separated widely across time and space, frequently obscuring holistic responsibility for the degradation of the environment. Legitimately, financial institutions may be construed as the unseen polluters, who wittingly or unwittingly contribute to environmental problems they sponsor and profit from.⁵

Both of these deficiencies of modern systems of environmental regulation could be challenged by the long-standing movement for socially responsible investment (SRI). Although what is “socially responsible” can obviously be read in many ways, SRI generally seeks to make financiers more considerate of their social and environmental impacts over the long term. Originally known more commonly as “ethical investment,” the SRI movement began in the anti-slavery campaigns of the Quakers in the 1700s. Today, it calls for investment boycotts or other financial pressures on firms that engage in a host of concerning practices, such as disregarding human rights, selling unethical products such as

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2. Juan Rada & Alex Trisoglio, “Capital Markets and Sustainable Development” (1992) 27:3 Colum. J. World Bus. 42; William Thomas, “The Green Nexus: Financiers and Sustainable Development” (2001) 13 Geo. Int’l Envtl. L. Rev. 899.
 3. For an introduction, see Marc Levinson, *Guide to Financial Markets* (New York: Bloomberg Press, 2006).
 4. Stuart Gillan & Laura Starks, “Relationship Investing and Shareholder Activism by Institutional Investors” (1995) [working paper, University of Texas].
 5. Environmental issues are not the only subject of connection between financial institutions and their culpability for social problems. Take, for example, the litigation ensued by Holocaust survivors against Swiss and German banks for their collusion with the Nazis’ expropriation of Jewish property. Yet another example is the lawsuit launched by Black South Africans brought under the United States (US) *Alien Tort Claims Act* against international financiers for supporting the former apartheid regime: Peter van der Auweraert, “Holocaust Reparation Claims Fifty Years After: The Swiss Banks Litigation” (2002) 71 Nordic J. Int’l L. 557.

tobacco, or failing to seek to reduce their greenhouse gas emissions. Thus, central to the traditional goals of the SRI movement has been the compulsion to choose investments on ethical grounds that promote the public interest rather than invest only to maximize financial returns for private reward.

Until recently, the SRI movement was regarded by mainstream financial institutions as a subversive, fringe sector. That derogatory attitude is starting to change as some financiers recognize that the social or environmental behaviour of companies they support can have salient financial repercussions. A polluting company, for instance, may attract adverse publicity or even liability in a manner that affects its solvency. Consequently, a new style of SRI is emerging that increasingly jettisons any pretensions to ethical criteria, focusing instead on the business case for investing responsibly. SRI actors increasingly frame their choices on a business case, on the assumption that SRI will make investors prosperous rather than merely virtuous. While business case SRI has led to some growth in the SRI market, because many social and environmental issues cannot be financially quantified using techniques familiar to financial institutions, the sector's growth faces structural limits. Moreover, the mostly voluntary standards of SRI have enabled fungible and dubious investment practices masquerading as ethical choices to proliferate.

This article assesses how a more ethical approach to environmental regulation could be developed, in the context of the financial sector, through legal standards for SRI. It is not confined to examining these issues in a Canadian context, and canvasses the policy and legal context internationally, including reforms in the United States and Europe. The article touches on a rather novel topic for most environmental law scholars and policy-makers, many of whom have yet to appreciate the potential of the financial sector as a pathway for promoting sustainable development. The financial sector is profoundly influential on the state of the planet, given that it is where "wholesale" decisions regarding future development, and thus environmental pressures, arise. Targeting the financial sector through SRI reforms could reduce the burden on current front-line regulatory controls, as companies passing the rigours of SRI standards should be easier to regulate at an operational level. Also, given the growth of cross-border investment, which allows financiers to invest in foreign markets lacking rigorous human rights and environmental standards, it is crucial to impose standards in the locales where funds are actually raised.

Yet, left largely to the vagaries of the market without legal imprimatur, SRI has yet to engender widespread change. Pious calls for more ethical conduct, on their own, will unlikely motivate change in the austere financial world. Some tentative legal reforms to facilitate SRI have arisen in the last decade or so, but have achieved only modest results. These reforms include transparency regulations requiring funds to be more explicit about their SRI policies, taxation incentives for environmental investment, and improved shareholder rights to enable investors to engage with corporations from within. Rarely, however, have financial institutions been told how they should invest, and even less frequently have they been held liable for environmental problems connected to the companies they choose to finance.

This article explores a different route to ethical investment for sustainability, based on reforming the fiduciary duties of financial institutions. When financial institutions manage investors' money, the legal system imposes fiduciary standards for these institutions to invest carefully in the best interests of investors. Fiduciary duties have traditionally been understood to require maximization of financial returns, without regard to collateral costs or benefits to other interests. While these fiduciary duties are now being interpreted in a way that accommodates business case SRI, they certainly constrain ethical investment. A spectrum of reforms is conceived in this article, ranging from mild procedural reforms to mandatory sustainability performance standards. Because financial institutions are not natural persons, they need formal rules and procedures to play the equivalent role that virtues play for individuals.

These arguments are premised on a specific understanding of what should constitute SRI or ethical investment. There will always be some room for individuals to choose lawful investments according to their own moral scruples, such as eschewing financial ties to companies that engage in activities they find personally offensive, whether it be manufacturing alcohol or operating a casino. But where financial institutions manage the assets of millions of people and have the capacity to exert huge economic influence, they must be governed by environmental standards that protect natural systems for the long term. They should be regarded as institutions with special public responsibilities based on ecological ethics. Today, barely a week passes without alarming environmental news. In 2005, the United Nations Millennium Ecosystem Assessment Board (MEAB) warned that "[h]uman activity is putting such strain on the natural functions of the Earth that the ability of the planet's ecosystems to sustain

future generations can no longer be taken for granted.”⁶ In an era of finance capitalism, where pension plans, insurance companies, and banks manage financial empires that vastly exceed those of states, the kind of development they fund must be scrutinized to avert the disasters feared by the MEAB.⁷

Therefore, the ultimate goal of SRI, as a potential new arm of environmental law, must be to achieve sustainability.⁸ Sustainability concerns the fundamental integrity of ecological systems (global climate and other vital life-supporting services) and socio-economic issues that may impinge upon environmental management (*e.g.*, health, human rights, and poverty).⁹ Although it remains a contested discourse, sustainable development describes the processes by which the goal of sustainability can be achieved. Maintaining ecological integrity requires that the use of renewable resources not exceed their rate of regeneration, and that rates of pollution remain within the assimilative capacity of the environment.¹⁰ Sustainability, therefore, values different principles and methods of decision making, entailing a more long-term perspective that protects the interests of all life.¹¹ In 1992, some 1,700 world scientists issued their “Warning to Humanity,” calling for “[a] new ethic ... a new attitude towards discharging our responsibility for caring for ourselves and for the earth.”¹² Other solutions address the symptoms without confronting the underlying causes of humanity’s unsustainable trajectory.

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6. Millennium Ecosystem Assessment Board (MEAB), *Living Beyond Our Means: Natural Assets and Human Well-Being* (Statement from the Board) (MEAB, 2005) at 5, online: <<http://www.millenniumassessment.org/en/BoardStatement.aspx>>
 7. See Julie Froud, Adam Leaver & Karel Williams, “New Actors in a Financialised Economy and the Remaking of Capitalism,” (2007) 12 *New Pol. Econ.* 339.
 8. See especially Benjamin J. Richardson & Stepan Wood, eds., *Environmental Law for Sustainability: A Reader* (Oxford: Hart, 2006).
 9. See Paul Harrison, *The Third Revolution: Population, Environment and a Sustainable World* (London: Penguin, 1992); Gretchen C. Daily, *Nature’s Services: Societal Dependence on Natural Ecosystems* (Washington: Island Press, 1997).
 10. See Herman E. Daly, *Beyond Growth: The Economics of Sustainable Development* (Boston: Beacon Press, 1996).
 11. Christian Brodhag, “From Rationality to Governance: The Decision Process of Sustainable Development,” (1999) 2 *Int’l J.S.D.* 388.
 12. Union of Concerned Scientists, “World Scientists’ Warning to Humanity” (1992), online: <<http://www.ucsusa.org/ucs/about/1992-world-scientists-warning-to-humanity.html>>. See also Andrew Light & Holmes Rolston III, eds., *Environmental Ethics: An Anthology* (Oxford:

II. SOCIALLY RESPONSIBLE INVESTMENT (SRI)

A. SRI: ITS BUSINESS AND ETHICAL MOTIVATIONS

Having evolved from its traditions of church-based, single-issue activism, the modern era of SRI arose in the early 1970s in the wake of opposition to corporate ties to the Vietnam War and the apartheid regime of South Africa. SRI now spans a broad constellation of interests campaigning for socially and environmentally responsible financing.¹³ It tackles issues as diverse as animal welfare, genetically modified organisms, climate change, and Indigenous peoples' rights. Its proponents include pension plans interested in sustainable, long-term investment, mutual funds selling SRI portfolios to the general public, and banks requiring their borrowers to minimize the environmental degradation of financed projects.¹⁴

While investors often market the language of SRI promiscuously, it has become increasingly recognized as primarily a means to further sustainable development.¹⁵ Yet, as with the contested sustainability discourse, the motivations to incorporate environmental considerations in investment are diverse. The dominant motivation is business case SRI, which seeks financial advantage, in contrast to a smaller strand of ethical investment that serves values-based investors.

Business case investors tend to scrutinize social, environmental, and corporate governance issues as factors that may affect the financial condition of companies. Such factors garner attention when considered to be financially "material."¹⁶ Materiality implies significant financial risks or investment

Blackwell, 2003); Colin L. Soskolne, ed., *Sustaining Life on Earth* (New York: Lexington Books, 2007).

13. Russell Sparkes, "A Historical Perspective on the Growth of Socially Responsible Investment," in R. Sullivan & C. Mackenzie, eds., *Responsible Investment* (Sheffield: Greenleaf, 2006) 39.
14. See Marcel Jeucken, *Sustainable Finance and Banking: The Financial Sector and the Future of the Planet* (London: Earthscan, 2001); Sonia Labatt & Rodney R. White, *Environmental Finance: A Guide to Environmental Risk Assessment and Financial Products* (New York: John Wiley & Sons, 2002).
15. For an early perspective, see Susan Meeker-Lowry, *Economics as if the Earth Really Mattered: A Catalyst Guide to Socially Conscious Investing* (Gabriola Island: New Society, 1988).
16. United Nations Environment Program Finance Initiative (UNEPFI), *The Materiality of Social, Environmental and Corporate Governance Issues in Equity Pricing* (Geneva: UNEPFI, 2004).

opportunities. The United Nations Environment Program Finance Initiative (UNEPFI), which is a voluntary program coordinated by the UN to promote SRI, explains in its report, *Show Me the Money*, that “[t]he first—and arguably for investors the most important—reason to integrate [SRI] issues is, simply, to make more money.”¹⁷ In another UNEPFI report, financial analysts are cautioned to “[c]ommunicate on issue-specific, proven, quantifiable, material links to business value ... [and to] avoid moral arguments.”¹⁸ Business case SRI is typically implemented through light-touch screens which filter only the most pernicious companies from an investment portfolio (because of a perceived financial advantage), through polite engagement with corporate management, and through technical analyses to reveal financial risks and profitable opportunities inhering in corporate social and environmental behaviour.

Business case SRI considers social and environmental issues in imperfect ways. Unless they have tangible financial implications, ethical issues may be ignored. Often they are perceived as too nebulous for workable financial quantification.¹⁹ Sometimes “reputational risks” associated with unethical environmental or social practices may be of sufficient consequence to financiers to garner attention. Given that somewhere between fifty to seventy per cent of large companies’ economic value is intangible, including their brand name and goodwill, risk to their business reputation can induce more ethical behaviour.²⁰ A poor reputation can affect the value of a firm’s shares, as well as its ability to attract and retain a higher quality workforce. A pioneering report by the World Resources Institute (WRI) argues that the poor and marginalized can benefit from the business case approach in cases where financiers find that their projects need community consent and legitimacy.²¹ Nonetheless, reputational

17. UNEPFI, *Show Me the Money: Linking Environmental, Social and Governance Issues to Company Value* (Geneva: UNEPFI, 2006) at 4.

18. UNEPFI, *Generation Lost: Young Financial Analysts and Environmental, Social and Governance Issues* (Geneva: UNEPFI, 2004) at 5 [Executive Summary].

19. Environment Canada, *Finance and the Environment in North America: The State of Play of the Integration of Environmental Issues into Financial Research* by Sue McGeachie, Matthew Kiernan & Eric Kirzner (Ottawa: Minister of Public Works and Services Canada, 2005) at 57.

20. Dr. Noel Purcell, (Address delivered at the UNEPFI Global Roundtable, Melbourne, 24-25 October 2007).

21. Steven Herz, Antoni la Vina & Jonathan Sohn, *Development without Conflict: The Business Case for Community Consent* (Washington: World Resources Institute, 2007).

risk to financiers is not an echo for all underlying societal concerns, as sometimes the most disadvantaged groups and victims of environmental hardship lack the means to publicize their plight.

A further basis for business case SRI is said to rest on the role of institutional investors as “universal owners.” In *The Rise of Fiduciary Capitalism*, Hawley and Williams herald institutional investors such as large pension funds and insurance companies as a new force for corporate responsibility.²² The growth of large and diverse institutional investment holdings has, they believe, spawned the conditions for a new kind of responsible investment. Hawley and Williams contend that universal owners with broad stock portfolios in many economic sectors have an interest in the health and long-term sustainability of the entire economy. By contrast, an investor in just one company or one market will not be as broadly focused and will presumably care only about the financial performance of that narrow interest and not necessarily about the costs it may impose on others.

These assumptions are debatable. It is certainly unlikely that “universal” institutional investors can coordinate their investments to keep economic growth within fundamental ecological limits.²³ The financial market contains no inherent mechanism to keep the size of the economy within natural limits, such as by restraining pollution within the assimilative capacity of the environment. In the absence of regulatory restraints, such as a legislative cap on the economy’s greenhouse gas emissions, universal investors face steep hurdles in working collectively to moderate economic growth imperatives. Further, they commonly act through intermediaries such as hired fund managers, creating additional barriers to investing sustainably. The fund managers’ system of remuneration, based on short-term performance and coupled with short-term contracts, encourages myopic investment decision making.²⁴

The main alternative style of SRI is principally a matter of ethical compulsion.²⁵ Generally, there are two ethical approaches evident in this type of

22. James Hawley & Andrew Williams, *The Rise of Fiduciary Capitalism* (Philadelphia: University of Pennsylvania Press, 2000).

23. Herman E. Daly, *Toward a Steady-State Economy* (San Francisco: W.H. Freeman, 1973).

24. See Tony Golding, *The City: Inside the Great Expectation Machine* (London: Financial Times and Prentice Hall, 2002).

25. Alice Marlin, “Social Investing: Potent Force for Political Change” (1986) *Bus. Soc’y Rev.* 96.

SRI. It has traditionally been based on deontological ethics, involving investors who do not wish to profit from unethical activities, such as gambling or pornography. This approach focuses on the supposed rightness or wrongness of an activity. The dominant form of ethical investment today is associated with teleological ethics, which focuses on the consequences of a particular action. This style of ethical investment is promoted in order to leverage change in the environmental or social behaviour of companies. Such an ethical approach does not ignore the financial “bottom line,” yet it diverges from business case SRI by insisting on the consideration of ethical issues for their own sake, and not only for financial benefit. It presumes that an individual or organization remains moral when faced with any decision, including financial management: there is no dichotomy.²⁶

Religious institutions pioneered ethical investment.²⁷ They addressed social and environmental concerns not for their financial advantages, but for the moral desire and commission to improve the world. The churches used their financial muscle to campaign against apartheid in South Africa in the 1980s, contributing to the regime’s eventual demise. The South African divestment campaign was not motivated by a desire to reap greater profits, but rather, morally, it was perceived as the right course of action. Today, some faith-based investors again champion SRI, such as the Interfaith Center for Corporate Responsibility’s campaigns for climate change and environmental justice.²⁸ Ethically motivated investors are also found to some extent in the credit union sector, such as in Canada’s Vancouver City Savings Credit Union; in the banking sector, such as the Cooperative Bank (Britain) and Umweltbank (Germany);²⁹ in public sector pension funds, notably the UK’s Universities Superannuation Scheme;³⁰ and in some mutual funds that

26. Wesley Cragg, “Business Ethics and Stakeholder Theory” (2002) 12 *Bus. Ethics Q.* 113.

27. Niklas Kreander, Ken McPhail & David Molyneux, “God’s Fund Managers: A Critical Study of Stock Market Investment Practices of the Church of England and UK Methodists” (2004) 17 *AAAJ* 408; Paola Triolo, Martin Palmer & Steve Waygood, *A Capital Solution: Faith, Finance and Concern for a Living Planet* (London: Pilkington Press, 2000) at 26-53.

28. See Interfaith Centre on Corporate Responsibility, “Global Warming, Working Groups,” online: <<http://www.iccr.org/issues/globalwarm/goalsobjectives.php>>.

29. See The Co-Operative Bank, online: <<http://www.co-operativebank.co.uk>>; UmweltBank, online: <<http://www.umweltbank.de>>.

30. See VanCity, online: <<http://www.vancity.com>>; Universities Superannuation Scheme, online: <<http://www.usshq.co.uk>>.

offer dedicated, ethically screened portfolios, such as Domini Social Investments (United States).³¹

Neither business nor ethical compulsions have so far proved adequate to make SRI dominant in the market. The ethical approach is too controversial for most investment institutions, which fear financial losses or unresolvable disputes over the correct ethical course. The business case, while potentially more appealing, cannot work widely because most social and environmental issues defy easy measurement in financial terms, or simply because there remains a compelling countervailing business case for continued environmentally unsustainable practices.

Thus, because of these reasons, the SRI sector appears to hold below 10 or 5 per cent of the capital markets of major economies. Further, much of the finance nominally counted as SRI hardly contributes to sustainable development. In the US market, the Social Investment Forum (SIF) reported in 2007 that US\$2.71 trillion or “[a]bout one out of every eleven dollars under professional management ... is involved in socially responsible investing.”³² The European Social Investment Forum (Eurosif) reported in its 2006 survey that SRI in western Europe was worth between €105 billion (based on core SRI screens) and €1,033 billion (incorporating further the value of shareholder activism and engagement).³³ The latter, larger figure was the equivalent of between 10 to 15 per cent of managed assets in European funds.³⁴ A survey of the Canadian SRI sector, conducted in 2006 by the Social Investment Organization (SIO), found Canadian SRI of CAD\$503 billion, amounting to nearly 20 per cent of that market.³⁵

Discrepancies between these jurisdictions likely reflect different surveying methodologies rather than significant underlying differences in investors’ interest in SRI, although some differences exist. The US study relied on very broad standards for measuring what constitutes SRI, and counted funds that

31. Domini Social Investments (DSI), *Global Investment Standards* (Boston: DSI, 2006).

32. Social Investment Forum (SIF), *2007 Report on Socially Responsible Investing Trends in the United States* (Washington: SIF, March 2008) at ii.

33. Eurosif, *Socially Responsible Investment among European Institutional Investors* (Paris: Eurosif, 2006) at 4-5.

34. *Ibid.* at 13.

35. Social Investment Organization (SIO), *Canadian Social Investment Review 2006* (Toronto: SIO, 2007) at 5-6.

screen out investments involved in only one issue, such as tobacco or gambling. Indeed, 25 per cent of nominally SRI funds screened out investments on the basis of only one of these criteria.³⁶ The Canadian study included SRI where the fund self-declared in a questionnaire that it follows certain shareholder engagement and voting practices to influence corporate management. The Canada Pension Plan (CPP), whose investment portfolio was accepted by the survey as “SRI,” in fact only engages with up to fifteen companies per year of the nearly two thousand in its portfolio.³⁷ Moreover, some of its investments remain in companies of dubious social and environmental records, such as the mining behemoth Goldcorp, which was assigned a grade of D+ in a recent *Globe and Mail* survey of corporate social responsibility.³⁸

Because the SRI market is likely to be much smaller than these surveys suggest, its capacity to leverage change by raising the cost of finance for polluters or pressuring for change through shareholder activism has been rather limited. Regulatory and public policy changes are therefore probably essential to improve the quality and extent of SRI.

B. SRI GOVERNANCE

The dominance of the business case in the SRI movement not only reflects the power of economic fundamentals in a competitive market, but also demonstrates how financial institutions view their legal obligations and their accountability solely for their financial performance.

Legal reforms worldwide to promote SRI have quickened in recent years, though overall they remain rather modest and ad hoc, and have hardly touched fiduciary investment standards. They range from measures to regulate substantive investment criteria to procedural changes that tinker with investment decision processes. So far, the latter has been the dominant style of SRI regulation, and it has yet to demonstrate a significant impact. Worldwide, there is little appetite for anything approaching a command economy,

36. *Supra* note 32.

37. Donald Raymond, “Mainstreaming Responsible Investment: Our Approach” (Presentation delivered on behalf of the CPP Investment Board at Globe 2006, Vancouver, 30 March 2006), online: CPP Investment Board <http://www.cppib.ca/files/PDF/speeches/2006_0330_DR_Globe.pdf>.

38. “CSR Mining” *The Globe and Mail* (22 February 2007), online: <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070222.rmcsrming/BNStory/specialROBmagazine/>>.

stigmatized by the socialist experiment of Eastern Europe. Under the sway of neo-liberal thinking, lightly regulated financial markets are viewed by policy-makers as more efficient and conducive to economic growth.³⁹ Governments have thus mostly confined themselves to broad oversight and prudential regulation, intervening aggressively only in cases of market crises.⁴⁰

Reforms to promote SRI have been adopted at both national and international levels, although in the latter sphere they tend to set only voluntary, aspirational standards.⁴¹ Consistent with general governance trends away from command-and-control regulation, SRI policy reforms have tended to emphasize market-based and informational tools that alter the procedures and processes of SRI decision making. Such standards do not require additional societal agreement concerning what is “ethical” or “socially responsible.” Rather, they shape the way investments are chosen and implemented, providing for greater transparency and accountability, and thereby serve to apply pressure on laggards to change and market rewards for leaders. By modifying how financiers view the environmental and social repercussions of their actions, process standards may stimulate changes in social values that contribute to sustainability.⁴² Process-oriented legal scholarship and deliberative approaches to democracy both emphasize the potential of such procedures for engineering changes in values.⁴³ Participation in environmental decision making has been linked to the cultivation of deeper, ethical concerns for nature.⁴⁴ Reflexive law theorists also contend that encouraging companies to reflect and learn about

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39. Edward S. Shaw, *Financial Deepening in Economic Development* (New York: Oxford University Press, 1973); Ajit Singh, “Financial Liberalisation, Stockmarkets and Economic Development” (1997) 107 *Econ. J.* 771.
40. W.A. Lee, “Modern Portfolio Theory and the Investment of Pension Funds,” in P.D. Finn, ed., *Equity and Commercial Relationships* (Sydney: Law Book Company, 1987) 284 at 314-15 (arguing that “[p]ension funds belong to pensioners and to no one else As a rule in the law of trusts a settlor may dispose of benefits as he thinks fit, since he has furnished the fund”).
41. Benjamin J. Richardson, “Financing Sustainability: The New Transnational Governance of Socially Responsible Investment” in Ole Kristian Fauchald & David Hunter, eds., *Yearbook of International Environmental Law* (New York: Oxford University Press, 2008) 73.
42. David W. Case, “Changing Corporate Behavior Through Environmental Management Systems” (2006) 31 *Wm. & Mary Envtl. L. & Pol’y Rev.* 7.
43. Amy Gutmann & Dennis Thompson, “Deliberative Democracy Beyond Process” in J. Fishkin & P. Laslett, eds., *Debating Deliberative Democracy* (Oxford: Blackwell, 2003) 31.
44. Ben Boer, “Social Ecology and Environmental Law” (1984) 1 *Envtl. & Planning L.J.* 233.

their ecological impacts may sometimes exert greater long-term influence than regulating firms through coercion or rewards.⁴⁵

Among the policy instruments currently available are requirements for investment institutions to disclose their policies for addressing social and environmental issues, as well as their policies for exercising shareholder proxy votes. The most prominent transparency reforms were introduced in the UK, several other European states, and Australia, obliging occupational pension funds or other types of funds to disclose their SRI policies, if any.⁴⁶ Another reform, adopted in Canada and the US, requires mutual funds to disclose their shareholder proxy voting policies and voting records.⁴⁷ Prominent voluntary standards used in the SRI industry include the Eurosif Transparency Guidelines,⁴⁸ the Global Reporting Initiative,⁴⁹ and the Carbon Disclosure Project.⁵⁰

Research on the implementation of some of these standards reveals shortcomings.⁵¹ In practice, mandated disclosures often entail vague, boilerplate statements that reveal little about the methodology behind SRI decisions or their implementation.⁵² Process standards have rarely extended to democratizing investment policy-making, which remains dominated by fund managers,

45. See Gunther Teubner, Lindsay Farmer & Declan Murphy, eds., *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (Chichester: John Wiley & Sons, 1994).

46. See e.g. UK's *The Occupational Pension Schemes (Investment) Regulations 2005*, S.I. 2005/3378, ss. 2(3)(b)(vi)-(3)(c); Australia's *Corporations Act 2001* (Cth.), s. 1013D(1)(l); and France's *Loi n° 2001-152 du 19 février 2001 sur l'épargne salariale*, J.O., 20 February 2001, 2774, arts. 21, 23.

47. US, *Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies*, S.E.C. (31 January 2003), 17 CFR, Parts 239, 249, 270, and 274; *Investment Fund Continuous Disclosure and Companion Policy*, O.S.C. NI 81-106 and NI 81-106CP (11 March 2005).

48. European Social Investment Forum (Eurosif), *The Eurosif SRI Retail Fund Transparency Guidelines* (Paris: Eurosif, 2004).

49. The Global Reporting Initiative (GRI), online: <<http://www.globalreporting.org>>.

50. The Carbon Disclosure Project (CDP), online: <<http://www.cdproject.net>>.

51. Chris Gribben & Adam Faruk, *Will UK Pension Funds Become More Responsible? A Survey of Trustees, January 2004 Edition* (London: UK Social Investment Forum, 2004); Fair Pensions, *UK Pension Scheme Transparency on Social, Environmental and Ethical Issues* (London: Fair Pensions, 2006).

52. Mark Schwartz, "The 'Ethics' of Ethical Investing" (2003) 43 J. Bus. Ethics 195 at 199-200.

investment analysts, and other experts. Transparency regulation gives financiers the option of choosing *not* to take social, environmental, and other ethical matters into account, provided that they disclose that decision.

Another type of SRI governance that is less evident sets normative standards, which provide substantive principles and guidance toward desirable performance. One example is the UN Principles of Responsible Investment (UNPRI) of 2006, a concise document of six core principles, each of which is illustrated by several “possible actions.”⁵³ For instance, the first principle states that signatories “will incorporate environmental, social and corporate governance (ESG) issues into investment analysis and decision-making processes.” These principles are heavily subscribed to, but largely because of their voluntary nature and the lack of substantial changes expected of signatories. The UNPRI do not require a signatory to demonstrate any specific SRI performance standards with regard to human rights or environmental protection. They also lack compliance machinery and signatories are not obliged to report publicly on their performance. Another voluntary standard is the Equator Principles, which address the banking sector and projects it finances.⁵⁴ They contain stronger environmental assessment and process standards than the UNPRI, although implementation appears to have lagged and some banks remain mired in environmentally controversial projects.⁵⁵

Among official regulations, mandatory SRI standards are rare. Some governments have banned specific undesirable investments, as an adjunct to primary controls. One illustration is Belgium’s prohibition on investments in companies that produce or distribute cluster bombs.⁵⁶ Another example is the bans instituted by some US states on pension fund investments in Sudan, which is presently associated with extensive human rights atrocities.⁵⁷ Obligations to actively promote SRI appear confined to public pension funds,

53. The Principles for Responsible Investment (PRI), online <<http://www.unpri.org/principles>>.

54. The Equator Principles, online: <<http://www.equator-principles.com>>.

55. Michelle Chan-Fishel, *Unproven Principles: The Equator Principles at Year Two* (Utrecht: BankTrack, 2005); Andrew Hardenbrook, “The Equator Principles: The Private Financial Sector’s Attempt at Environmental Responsibility” (2007) 40 *Vand. J. Transnat’l L.* 197.

56. Netwerk Vlaanderen, Press Release, “Belgium Bans Investments in Cluster Munitions” (2 March 2007), online: <<http://www.netwerkvlaanderen.be>>.

57. Lucien J. Dhooge, “Condemning Khartoum: The Illinois Divestment Act and Foreign Relations” (2006) 43 *Am. Bus. L.J.* 245.

with reforms adopted in France, New Zealand, Norway, and Sweden. For example, Sweden's *National Pension Insurance Funds (AP-Funds) Act* of 2000⁵⁸ requires state pension funds to take "environmental and social considerations ... into account without relinquishing the overall goal of a high return on capital."⁵⁹ While the applicable legislation does not differentiate between specific investment choices, the funds are guided by an ethics council. Referring to internationally recognized standards for human rights and sustainable development as their benchmarks, the ethics council can flexibly accommodate case-by-case evaluations of specific investments and thereby abjure an ethics that "become[s] standardised and reduced to a few abstruse ratios."⁶⁰ In 2007, the UNEPFI's detailed survey of the Swedish and other public sector funds "highlight[ed] a range of some of the most advanced and creative approaches to responsible investment."⁶¹

Among other policy instruments applied to financial markets are economic incentives (*e.g.*, green investment tax concessions in the Netherlands), corporate governance reforms that enable greater shareholder advocacy (*e.g.*, in Australia and Canada), and environmental liability on lenders for pollution problems connected to their borrowers (*e.g.*, in the US).⁶² However, their track record in boosting SRI is patchy, and in the case of environmental liability for lenders in the US, the rules were changed to protect lenders after a deluge of lawsuits.⁶³ Conversely, popular mechanisms such as the Dutch taxation concessions are

58. *Lag om allmänna pensionsfonder (AP-Fonder)*, SFS 2000, 192.

59. Requirement of Sweden National Pension Fund, cited in Oxford Business Knowledge, *Recent Trends and Regulatory Implications of Socially Responsible Investment for Pension Funds* (2007) at 21, online: <<http://www.oecd.org/dataoecd/3/0/38550550.pdf>>. (This paper was prepared for the 2007 Organisation for Economic Co-operation and Development (OECD) Roundtable on Corporate Responsibility).

60. Paul Dembinski *et al.*, "The Ethical Foundations of Responsible Investment" (2003) 48 J. Bus. Ethics 203 at 213.

61. UNEPFI Asset Management Working Group & UK Social Investment Forum, *Responsible Investment in Focus: How Leading Public Pension Funds are Meeting the Challenge* (UNEPFI, 2007) at 7.

62. See Benjamin J. Richardson, "Financing Environmental Sustainability: A New Role for the Law" in Suzanne Benn & Dexter Dunphy, eds., *Corporate Governance and Sustainability: Challenges for Theory and Practice* (London: Routledge, 2006) 122.

63. Olaf de Senerpont Domis, "New Law Finally Limits Environmental Liability" *American Banker* (2 October 1996) 3.

appealing precisely because they reward positive behaviour rather than penalize harmful conduct.⁶⁴

In sum, the progression of the SRI market, and its governance, remains evolutionary rather than revolutionary. The mostly market-friendly styles of governance do not appear to have been any more effective than traditional forms of environmental law based on command-and-control regulation. Indeed, the paucity of such regulation, such as the lack of caps on greenhouse gas emissions, has directly hindered action by progressive-minded financiers who would likely take climate change more seriously if governments rigorously taxed or restricted carbon emissions. The responsibility for upholding the integrity of the voluntary mechanisms has largely fallen on nongovernmental organizations (NGOs) such as BankTrack, which scrutinize the behaviour of financial institutions against the standards they pledge to follow. A vast legal terrain for strengthening SRI for sustainable development remains under-explored.

III. ETHICS FOR ETHICAL INVESTMENT

A. BUILDING AN ETHICAL CONSENSUS

An ethical approach to SRI raises questions about the fundamental qualities of the human character, our ability to cultivate new ethical values, and the capacity of our institutions to give effect to those values. Some people refute the very possibility of ethical change, interpreting social values as reflective of intrinsic, fixed characteristics of human nature.⁶⁵ Others see human behaviour as dynamic and motivated by many factors beyond narrow materialistic wants.⁶⁶ Hauser argues in *Moral Minds* that individuals are endowed with a moral faculty that conveys judgments of right and wrong based on unconsciously operative principles of action.⁶⁷ Drawing on Chomsky's theory of generative

64. Marcel Jeucken, *Sustainable Finance and Banking: The Financial Sector and the Future of the Planet* (London: Earthscan, 2001) at 92-94.

65. See the populist work of evolutionary psychologists Alan S. Miller & Satoshi Kanazawa, *Why Beautiful People Have More Daughters* (New York: Perigee Trade, 2007).

66. See e.g. Herbert Gintis, "Beyond *Homo economicus*: evidence from experimental economics" (2000) 35 *Ecolog. Econ.* 311.

67. Marc D. Hauser, *Moral Minds: How Nature Designed Our Universal Sense of Right and Wrong* (New York: HarperCollins, 2006).

grammar,⁶⁸ Hauser contends that all humans possess a universal moral grammar, hard-wired into the brain. While Hauser does not specifically discuss environmental ethics, major changes in ethical values are not unprecedented in history, such as the abolition of slavery and the rising status of women in many countries.

A similar major ethical shift has not yet occurred in the financial sector. The diversity of approaches to SRI partly reflects investors' different values regarding the relative importance of social, environmental, and economic considerations.⁶⁹ Hylton indicts a "persistent inability on the part of all participants in the debate to develop a simple, coherent definition" of SRI.⁷⁰ Even where responsible investors share specific goals, they may differ on how to achieve them.⁷¹ For example, during the anti-apartheid campaign, social investors disagreed on whether to divest entirely, or to retain financial ties and seek change through dialogue and tactical pressure. In today's postmodern world of ethnic and cultural diversity, concepts such as "sustainable development" or "corporate responsibility" may be read differently, depending on the actors and their situation.⁷² Thus, when the Irish Parliament in 2006 decided to reject a legislative amendment to require the National Pensions Reserve Fund to invest ethically, one parliamentarian offered this reasoning:

A major difficulty in deciding on ethical investment policy is where to draw the line in defining the parameters of the policy, given that there will inevitably be different opinions and intense debate on what constitutes ethical and socially responsible investment Furthermore, the list of what might be considered unacceptable investment is likely to change in light of developments in the political, social and scientific spheres.⁷³

68. Noam Chomsky, *Language and Mind* (New York: Harcourt, Brace & World, 1968).

69. See Craig Mackenzie, "The Choice of Criteria in Ethical Investment" (1998) 7 *Bus. Ethics Euro.* 81; Russell Sparkes, "Ethical Investment: Whose Ethics, Which Investment?" (2001) 10 *Bus. Ethics Euro.* 194.

70. Maria O'Brien Hylton, "'Socially Responsible' Investing: Doing Good versus Doing Well in an Inefficient Market" (1992) 42 *Am. U.L. Rev.* 1 at 2.

71. Schwartz, *supra* note 52.

72. See John S. Dryzek, *The Politics of the Earth: Environmental Discourses*, 2d ed. (New York: Oxford University Press, 2005).

73. Republic of Ireland, Leinster House, *Parliamentary Debates*, vol. 44 at 5 (23 February 2006).

Nor can investors simply set their moral compass by the law of the land, as legal rules may reflect the power of vested interests and, in a world of global finance, the legal standards of one jurisdiction may not be compatible with another. Thus, an economic activity that is ostensibly “legal” may not necessarily be appropriate for ethical investment. The tobacco industry is a classic example.

Ethical investment certainly spans a potpourri of philosophies, ranging from evangelical Christianity to animal liberation, but ecological ethics represents a specific kind of ethical investment. Ecological ethics, as the following section explains, stands a stronger chance of eventually securing a broad social consensus that even economic actors may embrace because they are rooted in the reality of a looming planetary crisis. We must distinguish between a system of ethical investment based on ecological ethics that addresses pervasive threats to the biosphere, humans included, and other ethical positions in the investment community that reflect preferences regarding gambling, pornography, alcohol, and other traditional concerns of SRI.

Even granted a national or international societal consensus on SRI norms, considerable obstacles to the ability of these norms to shape economic behaviour remain. Luhmann theorizes how the economy tends to be functionally differentiated and semi-autonomous from other domains of society.⁷⁴ With money as its lingua franca, the economic system has forged its own values and goals around competition, acquisition, growth, and profitability. The cost-benefit approach is central to economic management, and ethical norms not congruent with that framework may have little influence. Considerations such as biodiversity conservation or human rights which are not factored in the values of the market tend to lack traction. The dominance of business case SRI precisely illustrates the barriers to incorporating non-economic factors into investment analysis.

Conceivably, individual actors may be guided by values that differ from the prevailing norms of the economy.⁷⁵ Luhmann’s framework itself distinguishes

74. Niklas Luhmann, *The Differentiation of Society*, trans. by Stephen Holmes & Charles Larmore (New York: Columbia University Press, 1982).

75. Oren Perez, Yair Amichai-Hamburger & Tammy Shterental, “Between Public and Private Regulation: ISO 14001, Environmental Commitment and Organizational Civic Behaviour” (2007) at 13 [working paper, Bar-Ilan University, Ramat-Gan, Israel].

between social systems (the economy, legal system, et cetera) locked in their idiosyncratic logic, and human agents and organizations.⁷⁶ Investors may commingle values from other spheres of life. Ethical investment by churches shows how one group's participation in the economy is guided by values from beyond the market. Abundant other evidence of ethical motivations in the marketplace exists, including consumers who pay a premium for green products and workers who accept lower wages for altruistic employment or refuse to work for unethical firms.⁷⁷ Such values, however, are unlikely to become widespread without altering the regulatory framework of financial markets.

B. ECOLOGICAL ETHICS FOR SRI

What kind of ethics could support a system of financial investment that values the environment and respects ecological constraints? The financial world generally treats nature instrumentally as a resource for short-term gain, owing no direct accountability to environmental law standards that are considered only an operational matter for the companies they invest in. The financial sector's values reflect a wider anthropocentric worldview in Western societies that restricts moral significance to human beings.⁷⁸ In a statement on unsustainable patterns of resource use, the UN Economic and Social Council (ECOSOC) explained that "[t]he value systems reflected in these patterns are among the main driving forces which determine the use of natural resources. Although the changes required for converting societies to sustainable consumption and production patterns are not easy to implement, the shift is imperative."⁷⁹ An ethic that values all life, mirrored by legal reform, would

76. Niklas Luhmann, *Social Systems* (Palo Alto: Stanford University Press, 1995) at 97-99, 139-45.

77. Daniel Kahneman, Jack Knetsch & Richard Thaler, "Fairness as a Constraint on Profit Seeking: Entitlements in the Market" (1986) 76 *Am. Econ. Rev.* 728. See also Robert Frank, "Can Socially Responsible Firms Survive in a Competitive Environment?" in D.M. Messick & A.E. Tenbrunsel, eds., *Codes of Conduct: Behavioural Research into Business Ethics* (New York: Russell Sage Foundation, 1997) 95 at 96.

78. Lynn White Jr., "The Historical Roots of our Ecologic Crisis" (1967) 155 *Science* 1203. For a classic defence of anthropocentrism, see John Passmore, *Man's Responsibility for Nature: Ecological Problems and Western Traditions* (London: Duckworth, 1980); Eugene Hargrove, *Foundations of Environmental Ethics* (New Jersey: Prentice Hall, 1989).

79. UN Economic and Social Council, *Implementing Agenda 21: Report of the Secretary-General*, E/CN.17/PC.2/7 (2002) at 5.

broaden the scope of corporate responsibility to include the interests of a wider group beyond investors and their financial returns.

A mature discourse on ecological ethics has evolved, which some environmental lawyers such as Taylor and Bosselmann champion for providing the only enduring path to sustainability.⁸⁰ This discourse focuses on broadening moral consideration for all living creatures and their ecosystems.⁸¹ Such ecological ethics emphasize the ecological reality of humankind as an integral and interdependent part of the “web of life.”⁸² A cognate aspect of this ethic recognizes the sanctity of all life forms for their “intrinsic value,” regardless of their contribution to human needs and wants.⁸³ Ecological ethics already feature to some extent in the culture of some Indigenous communities.⁸⁴ That perspective does not deny humans entitlement to use other forms of life because it “is a condition of our existence as participants in the evolutionary process.”⁸⁵ Yet, while these values neither refute nor prioritize human needs, they do enable humankind to see beyond its exclusive needs. Maintaining ecological integrity requires that humankind learn to live more simply, so that other life may simply live. Dependent on the biosphere as all other species are, humankind has no choice.

While ecological ethics is a deeply rooted tree, not a reed, it still leaves room for debate about how best to further its norms. Ecological ethics may not offer solutions in specific situations entailing “hard choices.” Thus, how does

80. See e.g. Prue Taylor, *An Ecological Approach to International Law* (London: Routledge, 1998); Klaus Bosselmann, *The Principle of Sustainability: Law and Governance* (Aldershot: Ashgate, 2008).

81. For overviews, see Robyn Eckersley, *Environmentalism and Political Theory: Towards an Ecocentric Approach* (Albany: State University of New York Press, 1992); Christopher Stone, *Earth and Other Ethics* (New York: Harper & Row, 1987); and David Schmidt & Elizabeth Willott, eds., *Environmental Ethics: What Really Matters* (Oxford: Oxford University Press, 2002).

82. Fritjof Capra, *The Web of Life: A New Scientific Understanding of Living Systems* (New York: Anchor Books, 1996).

83. Notably, Nicholas Agar, *Life's Intrinsic Value: Science, Ethics and Nature* (New York: Columbia University Press, 2001).

84. Alan Durning, *Guardians of the Land: Indigenous Peoples and the Health of the Earth* (Washington: Worldwatch Institute, 1992).

85. Ron Engel, “The Moral Power of the World Conservation Movement to Engage Economic Globalization” (2005) 22:3 *The George Wright Forum* 58 at 62.

one reconcile legitimate human economic wants in the short term with the need to protect the biosphere from irreparable depletion over the long term? The sustainable development discourse also seeks to address this fundamental question. Yet it often does so, in practice, through principles and techniques that in fact have tended to perpetuate business as usual. By contrast, ecological ethics seeks to open up issues of value that would otherwise be closed under an exclusively anthropocentric perspective to sustainable development.

It is unlikely that moral exhortations will have any greater effect in changing financiers' environmental behaviour unless they become crystallized and protected in legal institutions as formal standards and procedures. These range from setting substantive standards that enshrine basic ecological values to restructuring decision-making processes to deal with local and specific applications. Legal structures for ethical deliberation, instrumental to education and motivating action, are one example.

Ethical investment will have no lasting impression on the financial sector if investors regard it simply as academic wisdom or rigid regulatory prescription. Opening investment institutions to participatory, ethical deliberation may help attenuate such attitudes.⁸⁶ In some jurisdictions, pension fund governance is being reformed to give employees more voice in investment policies.⁸⁷ Such mechanisms may reduce the possibility that the ethics of SRI will only reflect the views of the powerful, without sufficient introspection to debate the moral merits of its current habits and practices.

Various peremptory principles that have evolved through international negotiation may help frame and unify such ethical deliberations. The Earth Charter, for instance, evokes the kind of universal principles compatible with ethically framed SRI.⁸⁸ The Charter was adopted in 2002 following lengthy consultation, mainly held among NGOs, and drew inspiration from the UN's

86. Maarten Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford: Clarendon Press, 1995) at 16-21; Sheila Jasanoff & Marybeth Martello, eds., *Earthly Politics: Local and Global in Environmental Governance* (Cambridge: MIT Press, 2004).

87. Gordon Clark, "Expertise and Representation in Financial Institutions: UK Legislation on Pension Fund Governance and US Regulation of the Mutual Fund Industry," (2007) 2 *Twenty-First Century Society* 1.

88. The Earth Charter Initiative, *The Earth Charter* (2000), online: <<http://www.earthcharterinaction.org/assets/pdf/EC.English.pdf>>.

1982 World Charter for Nature.⁸⁹ It comprises a series of core principles and supporting principles, the most relevant for the business sector being the following:

6. Prevent harm as the best method of environmental protection and, when knowledge is limited, apply a precautionary approach.
7. Adopt patterns of production, consumption, and reproduction that safeguard Earth's regenerative capacities, human rights, and community well-being.
- ...
10. Ensure that economic activities and institutions at all levels promote human development in an equitable and sustainable manner.⁹⁰

Still, the Earth Charter is not tailored to the financial sector, and many of its provisions are cast much too broadly. The Earth Charter International Council's "Business Initiative" is trying to increase its appeal to this group, explaining that "[t]he challenge is how to break out of the current 'business-as-usual' model, while maintaining the best of the private sector's entrepreneurial, technological and financial skills and innovative capacity."⁹¹ So far, approximately 180 business organizations worldwide have endorsed the Charter, out of some 3,000 endorsements.

The Collevocchio Declaration on Financial Institutions, drafted in 2003 by a coalition of NGOs, is possibly the most useful ethically related code for SRI.⁹² Unlike the Earth Charter, the Collevocchio Declaration sets ethical standards specifically for financial markets. It requires a commitment to six core principles: sustainability, "do no harm," responsibility, accountability, transparency, and the creation of sustainable markets and governance. The accompanying implementation guide outlines immediate steps that financial institutions should take.

Apart from the Californian pension fund giant CalPERS, financiers have largely shunned the Declaration.⁹³ Most of the 100 signatories are NGOs.⁹⁴

89. (1983) 22 I.L.M. 455.

90. *Supra* note 88.

91. Alan Atkisson, *The Earth Charter and the Business Sector: How a Consensus on Global Values Can Add Values* (Stockholm: Earth Charter International, 2006) at 5.

92. Friends of the Earth, *The Collevocchio Declaration on Financial Institutions* (2003), online: <<http://www.foe.org/camps/intl/declaration.html>>.

93. See Friends of the Earth, online: <<http://www.foe.org/camps/intl/endorsements.html>>.

94. *Ibid.*

Financiers likely perceive it as an abrasive, ideologically driven NGO initiative, with rigorous requirements too exacting for the financial sector. For instance, the ambitious “commitment to sustainability” principle obliges signatories to “fully integrate the consideration of ecological limits [and] social equity ... into corporate strategies and core business areas (including credit, investing, underwriting, advising), to put sustainability objectives on an equal footing to shareholder maximization and client satisfaction”⁹⁵ Further, the Declaration’s “do no harm” principle entails categorical prohibitions for the most socially and environmentally egregious transactions. It also seeks to strengthen financiers’ accountability and transparency, expecting them to be “responsive to stakeholder needs for specialised information” and holding that “commercial confidentiality should not be used as an excuse to deny stakeholders information.”⁹⁶

The financial sector’s disavowal of such demanding principles suggests that an ethical framework must be based on more than a voluntary code, although its standards should certainly be formulated with input from applicable institutions. The contrasting success of the voluntary UNPRI, with over 250 signatories in the financial sector with assets of over US\$10 trillion as of early 2008,⁹⁷ is not necessarily a model either, as its standards are too facile with little public accountability.

How, then, can ethical imperatives attain stronger legal expression to guide SRI? Reframing the fiduciary duties of investment decision makers offers one crucial direction for environmental law reform, which is the focus of the remainder of this article.

IV. REGULATORY REFORMS FOR ETHICAL INVESTMENT

A. FIDUCIARY DUTIES

Long-established legal principles govern financial institutions’ management of the capital of their investors. While individuals may invest directly in the market, in recent decades the vast majority of investors use the services of a

95. *Supra* note 92.

96. *Ibid.*

97. See Principles for Responsible Investment, online: <<http://www.unpri.org/signatories>>.

financial intermediary, such as a mutual fund or pension plan.⁹⁸ In the UK, for example, the proportion of all corporate shares held by individuals fell from 54 per cent in 1963 to below 13 per cent in 2006.⁹⁹ Where financial institutions manage the capital of others, the legal system often imposes fiduciary standards on them to invest carefully in the interests of their beneficiaries and in accordance with the purpose of the particular fund.¹⁰⁰ Although very occasionally individual investors can be effective catalysts for change, such as Ralph Nader in the US or Yves Michaud in Canada, the following focus on financial intermediaries and their fiduciary duties is wholly justified given their massive resources and market influence.

Institutional investors have generally dismissed calls that they should choose investments on ethical grounds, contending that, as their fund members likely hold diverse ethical views on social and environmental issues, it would be impossible to achieve a consensus of values to guide financial decision making. Alternatively, the maximization of financial returns is considered a clear and easily measurable benchmark to which fund managers should be held accountable. This stance relegates ethics to a matter of subjective, personal taste, compared to the supposed hard objectivity of financial returns. Consequently, ethics is not understood as including fundamental principles for addressing the challenges of sustainability.

The impact of fiduciary standards on SRI was first appreciated in the 1980s during the South African divestment campaign.¹⁰¹ Today, lawyers and financial experts debate whether fiduciary duties can support a much wider sustainability agenda. The World Economic Forum has recommended that governments “[m]odify pension fiduciary rules which discourage or prohibit explicit trustee consideration of social and environmental aspects of corporate

98. On the rise of financial intermediaries, see generally H.J. Blommestein & N. Funke, eds., *Institutional Investors in the New Financial Landscape* (Paris: Organisation for Economic Co-operation and Development, 1998).

99. Office for National Statistics (ONS), *Share Ownership: A Report on Ownership of UK Shares as at 31st December 2006* (London: ONS, 2007).

100. Alastair Hudson, *The Law on Investment Entities* (London: Sweet & Maxwell, 2000) at 16-19.

101. Thomas A. Troyer, Walter B. Slocombe & Robert Boisture, “Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds” (1985) 74 *Geo. L.J.* 127.

performance.”¹⁰² Conversely, a report commissioned by UNEPFI suggested that “integrating [SRI] considerations into an investment analysis so as to more reliably predict financial performance is clearly permissible and is arguably required in all jurisdictions.”¹⁰³ Some legal commentators go so far as to assert that “[i]nstitutional investors could face negligence claims unless the investors take account of environmental, social and corporate governance when making decisions.”¹⁰⁴ Such upbeat conclusions, however, appear to assume SRI governed by business case criteria.

In generic terms, a fiduciary relationship is a bond of responsibility and dependency.¹⁰⁵ It typically arises where the exercise of some discretionary power in the interests of another person gives rise to a relationship of trust. The “trust” is a concept of English law by which specific assets are held and managed by the trustee (*i.e.*, the fiduciary) in the interests of the beneficiary.¹⁰⁶ Functionally similar legal arrangements in financial regulation often exist in many non-common law jurisdictions. Consequential to the powers provided, fiduciaries must act in the beneficiary’s interests, and not their own. Thus, the fiduciary’s foremost duty is to act in the sole or best interests of the beneficiary (the duty of loyalty).¹⁰⁷ Further, the fiduciary has a duty of competence, requiring skill and diligence, usually expressed in the context of investment management as the “prudent investor rule.”¹⁰⁸ Depending on the jurisdiction, the sources of these legal duties come from the common law, legislation, and

102. World Economic Forum (WEF), *Mainstreaming Responsible Investment* (Geneva: WEF, 2005) at 10.

103. Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* (Geneva: UNEPFI, October 2005) at 13.

104. Leon Gettler, “Big funds warned on negligence,” *The Age* (30 November 2005), (commenting on the Freshfields report).

105. See generally J.C. Shepherd, “Towards a Unified Concept of Fiduciary Relationships” (1981) 97 L.Q. Rev. 51.

106. See David Hayton, “The Irreducible Core Content of Trusteeship,” in A.J. Oakley, ed., *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996) 47; Alastair Hudson, *Principles of Equity and Trusts* (London: Cavendish, 1999).

107. John Langbein, “Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?” (2005) 114 Yale L.J. 929.

108. See generally B. Longstreth, *Modern Investment Management and the Prudent Man Rule* (New York: Oxford University Press, 1986).

specific instruments governing investment entities (*e.g.*, a pension plan's founding agreement).

Fiduciary responsibilities materialize in different ways across the financial sector. They apply particularly to occupational pension funds structured as trusts. Commercial banks do not normally owe their depositors a fiduciary duty and may use deposited money as they see fit within the parameters of banking regulation. Although fiduciary principles operate in mutual fund governance requiring managers to further the specific purpose of the fund, contractual techniques and disclosure-based regulation are primarily used for aligning investment decisions with the interests of fund members.

Fiduciary standards in these contexts are often understood to require prioritizing financial goals over all other concerns. However, conceptually, a "benefit" to beneficiaries need not be limited to a financial benefit. If beneficiaries share a moral objection to a particular form of investment, they may psychologically benefit if their fund avoids that investment, possibly even at the cost of a lower financial return.¹⁰⁹ In one US case, the court viewed the fiduciary relationship as requiring the trustees to safeguard "unique scenic, paleontological, and archaeological values that would have little economic value on the open market."¹¹⁰ Even where the purpose of the trust is construed as only to provide financial benefits, some courts have interpreted the duty of loyalty as only to seek a reasonable rate of return rather than to *maximize* financial returns. A judge in one British case stated, "I cannot conceive that trustees have an unqualified duty ... simply to invest trust funds in the most profitable investment available."¹¹¹ Consequently, fiduciaries may further collateral social and environmental goals so long as financial returns are not unreasonably compromised.

Indeed, given evidence that SRI funds achieve financial returns commensurate to other investment institutions,¹¹² SRI can arguably constitute a

109. Paul Palmer *et al.*, *Socially Responsible Investment: A Guide for Pension Schemes and Charities* (London: Haven, 2005) at 97.

110. *National Parks and Conservation Authority v. Board of State Lands*, 869 P.2d 909 at 921 (Utah Sup. Ct. 1993).

111. *Martin v. City of Edinburgh District Council*, [1988] SCLR 90, S.L.R. 329 at 334 (Scot.) (per Lord Murray).

112. See UNEPFI Asset Management Working Group & Mercer, *Demystifying Responsible Investment Performance: A Review of Key Academic and Broker Research on ESG Factors*

prudent financial choice.¹¹³ Some social and environmental risks may ultimately affect shareholder value, due to possible costly consequences such as litigation, regulatory actions, and consumer backlash.¹¹⁴ Some ecological and human rights issues have become so pervasive and serious that few investors can ignore their impact. Climate change is an emerging example of interest to business case SRI actors.¹¹⁵

Other factors affect the relationship between fiduciary standards and SRI. The specific methods of SRI are relevant. Strict ethical investment screens that exclude large portions of the market reduce the diversity of assets in an investment portfolio, which economists predict will increase the risk of lower returns.¹¹⁶ This would run afoul of fiduciary duties.¹¹⁷ Other SRI strategies may be congruent with prudent investment standards. Best-of-class methods, selecting the most socially responsible firms in each particular economic sector, should allow for retention of an adequately diversified portfolio. Further, shareholder advocacy, where investors seek to influence companies from within through shareholder resolutions and other tactics, should contribute to the fulfillment of fiduciary responsibilities.¹¹⁸ Finally, the applicable legal instrument constituting the fund is often the foremost authority in governing a fiduciary's duties and investment decisions.¹¹⁹ This reflects another aspect of the duty of loyalty. If the trust deed of a pension plan or mutual fund expressly

(Geneva: UNEPFI, 2007). One possible reason why SRI funds tend not to under-perform is that many do not hold investment portfolios significantly different from the market generally.

113. See Sonia Labatt & Rodney White, *Environmental Finance: A Guide to Environmental Risk Assessment and Financial Products* (Hoboken: John Wiley & Sons, 2002) at 151-55.

114. See e.g. Sandra Waddock & Samuel Graves, "The Corporate Social Performance Financial Performance Link" (1997) 184 *Strategic Mgmt. J.* 303; David Edwards, *The Link Between Company Environmental and Financial Performance* (London: Earthscan, 1998).

115. Mercer Investment Consulting, *A Climate for Change: A Trustee's Guide to Understanding and Addressing Climate Risk* (Toronto: Mercer Investment Consulting, 2005).

116. Harry Markowitz, "Portfolio Selection" (1952) 7 *J. Fin.* 77.

117. Robin Ellison, "The Golden Fleece? Ethical Investment and Fiduciary Law" (1991) 5:4 *Trust L. Int'l* 157.

118. Paul Myners, *Institutional Investment in the United Kingdom: A Review* (London: HM Treasury, 2001) at 92.

119. See *McCreight v. 146919 Canada Ltd.*, [1991] O.J. No. 136 (QL) (Ont. Ct. J. (Gen. Div.)).

requires social investment to further a specified mission, then the fiduciary must fulfill those criteria unless legislation dictates otherwise.¹²⁰

Courts have ruled on some of these considerations. In the UK, the country with the richest SRI case law, the fiduciary responsibilities of trustees were considered in *Cowan v. Scargill*,¹²¹ *Martin v. City of Edinburgh District Council*,¹²² and *Harries and others v. Church Commissioners for England*.¹²³ In *Cowan*, the most publicized case, Vice-Chancellor Robert Megarry disagreed with the SRI policy of the union-nominated trustees, holding that where the trust's purpose is to provide financial benefits for the beneficiaries, their best interests normally meant their financial interests.¹²⁴ Trustees could consider non-financial criteria in constructing such a portfolio, provided such alternative investments were equally beneficial to the beneficiaries. The most noteworthy US case on the legality of SRI is the *Board of Trustees of Employee Retirement System of the City of Baltimore v. City of Baltimore*.¹²⁵ It dealt with a public sector pension plan directed under the City's ordinances to divest from companies engaged in business in South Africa. In a challenge to the legality of these provisions of the ordinances, the court cautiously endorsed the SRI policies, ruling that "if ... social investment yields economically competitive returns at a comparable level of risk, the investment should not be deemed imprudent."¹²⁶

Despite such legal skirmishes, which are now rather dated, SRI has become increasingly less controversial to the market precisely because it hardly challenges the economic values that underpin fiduciary norms. The SRI market presently sits quite comfortably with the prevailing legal norms because it often represents business as usual. The composition of many mutual funds' SRI portfolios is remarkably similar to regular portfolios. A 2004 survey by the Natural Capital Institute concluded that "the screening methodologies and exceptions employed by most SRI funds allow practically any publicly-held

120. Pension legislation often mandates priority to financial investment returns. See e.g. US's *Employee Retirement Income Security Act*, 29 U.S.C. §1104(a)(1)(D) (1974).

121. [1985] 1 Ch. 270.

122. [1988] S.L.T. 329.

123. [1992] 1 W.L.R. 1241, [1993] 2 All E.R. 300.

124. *Supra* note 121.

125. 317 Md. 72, 562 A.2d 720 (1989).

126. *Ibid.* at 107.

corporation to be considered as an SRI portfolio company.”¹²⁷ For most financiers, any interest in SRI is largely a means to manage another perceived business risk rather than a tool for enlightened change. However, investment policies that prioritize ethical goals over financial returns remain problematic, except to some extent in the retail market where mutual funds can tailor ethical investment services to the public, if there is demand. Otherwise, fiduciary investment standards do not *require* consideration of social and environmental matters. They remain discretionary considerations, to be weighted by the very market forces that have habitually promoted unsustainable development.

B. FIDUCIARY FINANCE

1. ACCOUNTING FOR SUSTAINABILITY

Before canvassing possible legal formulae for recasting fiduciary duties to support ecological ethics, the instruments for defining environmental goals and tracking performance must be identified. The critical challenge is developing meaningful sustainability performance benchmarks with which to clothe fiduciary duties. A fiduciary standard will be unworkable if financial institutions are merely accountable to vague ethical goals such as to “promote ecological integrity.” One way to articulate a workable standard is to use the analytical framework of “returns” that is central to the basic calculations of financiers. Sustainability, as the goal of ecological ethics, implies that fiduciaries must take into account the “returns” to society and the environment, in addition to investors’ private financial returns.¹²⁸ Social accounting and sustainability indicators provide metrics to help quantify social and environmental returns.

Social accounting provides a way to measure the collateral benefits (*e.g.*, job creation, public infrastructure, and environmental protection) and collateral costs (*e.g.*, damage to natural resources and intensification of social inequalities) of economic activity.¹²⁹ Social accounting differs from conventional

127. Paul Hawken, *Socially Responsible Investing* (Sausalito: Natural Capital Institute, 2004) at 16.

128. See Steven Lydenberg, “Universal Investors and Socially Responsible Investors: A Tale of Emerging Affinities” (2007) 15 *Corp. Governance* 467.

129. Jeffrey Unerman, Jan Bebbington & Brendan O’Dwyer, eds., *Sustainability Accounting and Accountability* (New York: Routledge, 2007); Daniel Rubenstein, “Bridging the Gap Between Green Accounting and Black Ink” (1992) 17 *Acct., Org. & Soc’y* 501; and Jack

methodologies associated with Generally Accepted Accounting Principles (GAAP) by focusing on community and environmental impacts rather than on factors exclusively related to corporate financial health. Similar models being advanced to measure economic activities in their entirety provide alternatives to national gross domestic product (GDP) accounting that discount the costs of natural resources exploitation.¹³⁰ Social accounting is not a means of perpetuating business case SRI, for it focuses on quantifying social welfare rather than merely furthering corporate business needs.

While several decades of social accounting research have helped to advance the measurement of companies' social and ecological footprints,¹³¹ it has hardly influenced conventional financial accounting. The GAAP measures an entity's expenses and income associated with past, not future, market transactions. Accounting for the disparate and often ethereal externalities of firms in a financier's portfolio, through accounting reforms to corporate and financial institutional reporting, would require fundamental changes to this model. So far, social accounting has mostly influenced the propagation of satellite, narrative reporting schemes, such as the "management discussion and analysis (MD&A)" sections in business financial statements.

Regardless, social accounting is not a panacea for all the problems of unethical investment. Social accountants, like ecological economists, cannot yet appropriately value all social or environmental impacts. Further, these methods may prove controversial if predicted financial returns outweigh any diminution in social or natural capital. As a form of "accounting," it may imply an instrumental and exploitative cost-benefit paradigm that does not ensure the maintenance of ecological integrity, which may sometimes be required at any high cost. The Ford Pinto case, where managers used a cost-benefit analysis to

Quarter, Laurie Mook & Betty Richmond, *What Counts: Social Accounting for Nonprofits and Cooperatives* (New Jersey: Prentice Hall, 2003).

130. Robert Repetto *et al.*, *Wasting Assets: National Resources in the National Income Accounts* (Washington: World Resources Institute, 1989); Kjell Brekke, *Economic Growth and the Environment: On the Measurement of Income and Welfare* (Cheltenham: Edward Elgar, 1997).
131. See Rob Gray, David Owen & Carol Adams, eds., *Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (New Jersey: Prentice Hall International, 1996); David Owen & Brendan O'Dwyer, "CSR: The Reporting and Assurance Dimension," in Andrew Crane *et al.*, eds., *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008).

conclude that costs of correcting a defective fuel system design on one of the company's cars outweighed the expected litigation costs of deaths and/or injuries, highlights the concern with reliance on instrumental economic calculations.¹³² Sagoff cautions that, even granting quantification of all environmental values in monetary terms, questions of balancing environmental values against other "goods" should be determined by public, participatory processes, rather than by reference to people's private willingness to pay.¹³³

The potential limitations of social accounting are reasons to consider another tool for ethical investment, namely sustainability indicators. These allow progress towards sustainability based on certain social, environmental, and other markers to be tracked over time.¹³⁴ They can also assist decision makers by translating ecological, economic, and social data into performance standards, and warning of impending problems. While sustainability indicators can be just as methodologically complex to determine as social accounting metrics, they do not require financial quantification per se. And they do not dictate *how* underlying performance standards be met. With further refinement, they even could replace shareholder value as the dominant measure of corporate wealth.

Sustainability indicators differ from traditional indicators of social, economic, and environmental progress that measure changes in one domain (e.g., air quality) by seeking to reflect interconnections among many areas, enabling a more systemic, comprehensive, and multidisciplinary perspective. Some useful proxy indicators of sustainability have been pioneered, the "eco-footprint" concept being the most promising.¹³⁵ Indicators as a policy tool are not new. Classic indicators include inflation rates or unemployment levels—such powerful and recognizable indicators of economic performance that they may bring governments down.

132. Douglas Birsch & John Fielder, *The Ford Pinto Case: A Study in Applied Ethics, Business, and Technology* (Albany: State University of New York Press, 1994).

133. Mark Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment* (New York: Cambridge University Press, 1988).

134. See generally OECD, *Towards Sustainable Development: Indicators to Measure Progress* (Paris: OECD, 2000); Simon Bell & Stephen Morse, *Sustainability Indicators: Measuring the Immeasurable* (London: Earthscan, 2008).

135. Mathis Wackernagel & William Rees, *Our Ecological Footprint: Reducing Human Impact on the Earth* (Gabriola Island: New Society, 1996).

Efforts to design sustainability metrics have occurred at various scales, ranging from the global level down to the local community, company, and project levels.¹³⁶ Indicators at business-unit levels are complicated as their robustness requires an account of business supply-chain and product life-cycle effects.¹³⁷ Ratings of corporate social and environmental performance have become crucial for the SRI industry, providing the basis for portfolio selections. A vast research industry has mushroomed to develop corporate sector sustainability indicators.¹³⁸ Yet, their competitive proliferation and lack of regulatory oversight and coherence have hindered their reliability, and they have so far not had much effect in altering the dominant business case approach to SRI.¹³⁹

A further weakness of current approaches is that sustainability indicators for financial institutions' portfolios as a whole have not been adequately designed. In 2000, a consortium of German and Swiss banks created a set of environmental indicators for the financial sector, but declined to set indicators for the ecological effects associated with financial transactions.¹⁴⁰ Their report explained that, apart from methodological problems in setting such indicators, "it is the client's primary responsibility to document these changes to the environment"¹⁴¹ The Global Reporting Initiative (GRI) provides a useful starting point for designing robust sustainability indicators and performance standards for the financial sector. Although primarily a template for corporate-level reporting, the GRI has a financial sector supplement that acknowledges the environmental effects of financial transactions.¹⁴² One innovative attempt to

136. Justin Keeble, Sophie Topiol & Simon Berkeley, "Using Indicators to Measure Sustainability Performance at a Corporate and Project Level" (2003) 44 J. Bus. Ethics 149.

137. Dicksen Tanzil and Beth Beloff, "Assessing Impacts: Overview of Sustainability Indicators and Metrics" (2006) 15:4 *Envtl. Quality Mgmt.* 41.

138. Henry Schäfer *et al.*, *Who is Who in Corporate Social Responsibility Rating?* (Bertelsmann Foundation, 2006).

139. Åsa Skillius and Urlika Wennberg, *Continuity, Credibility and Comparability: Key Challenges for Corporate Environmental Performance Measurement and Communication* (Lund: Lund University, 1998), s. 5.2.

140. Oliver Schmid-Schönbein and Arthur Braunschweig, *EPI-Finance 2000: Environmental Performance Indicators for the Financial Industry* (Zurich: E2 Management Consulting, 2000).

141. *Ibid.* at 12.

142. GRI, *Financial Services Sector Supplement: Environmental Performance – Pilot Version 1.0* (Amsterdam: GRI, 2005).

quantify an important externality of an entire investment portfolio is Trucost's annual "carbon counts" survey, which measures and ranks UK investment funds according to the carbon intensity of their portfolios.¹⁴³ Its recent evaluation of 185 investment funds found that one-quarter of the so-called SRI funds polluted more than industry benchmarks. A portfolio's total carbon footprint is one of the most seminal indicators of sustainability.

There may be an assumption that if individual firms are acceptable enough to form part of a sustainable portfolio, it follows that the financial institution is also acting sustainably. Erroneously, this assumption would not reflect aspects of a financial institution's management systems relevant for ethical investment, such as the democratic quality of its decision making. If many companies are rated by the SRI industry for the quality of their corporate governance, so too should their financial sponsors. Those decision-making systems are important indicators of future performance, whereas most sustainability indicators are lagging indicators tracking only historic impacts.¹⁴⁴ Furthermore, evaluating environmental impacts at a portfolio level rather than merely an individual firm level may help provide a holistic picture, consistent with the universal investor thesis, such as that of business supply chains and product life-cycle impacts.

Of course, sustainability indicators and new social accounting systems will not capture all issues involved in ethical investment. Some policy issues are too complex for these methods, at least for now. For instance, environmental sustainability implies social equity (the principle of "intragenerational equity"), which is problematic for financial markets that exacerbate inequalities.¹⁴⁵ While investment fiduciaries may be able to effectively respond to discrete social problems, such as divesting from firms that exploit child labour or practise racially discriminatory hiring, fiduciaries can hardly address pervasive social and economic inequalities inherent in a capitalist economy. Different forms of public regulation must respond to such challenges.

143. Trucost, *Carbon Counts 2007: The Carbon Footprint Ranking of UK Investment* (London: Trucost, 2007).

144. Marc Epstein & Priscilla Wisner, "Using a Balanced Scorecard to Implement Sustainability" (2001) 11:2 *Envtl. Quality Mgmt.* 1.

145. See Julian Agyeman, Robert Bullard & Bob Evans, *Just Sustainabilities: Development in an Unequal World* (Cambridge, MA: MIT Press, 1993).

Both sustainability indicators and social accounting therefore can provide tools for fiduciary duties to further ethical investment. The question of how those duties should be framed is canvassed next.

2. THE SPECTRUM OF FIDUCIARY DUTIES FOR SRI

i. DISCRETIONARY STANDARDS

Redolent of business case SRI, the minimalist option in reframing fiduciary duties would expressly authorize fiduciaries to consider social and environmental factors when they are viewed as financially material. As previously noted, materiality implies that there be tangible financial risks or investment opportunities. For example, trustees of a pension fund investing for the long term might respond to climate change risks by including more renewable energy and clean technology firms in their portfolio. Arguably, this approach is already allowable, indeed essential, if environmental risks jeopardize short-term returns.¹⁴⁶ Such a reform to fiduciary duties would put the matter beyond doubt.

Already some jurisdictions authorize SRI as a legitimate adjunct consideration. Legislation in the state of Connecticut provides that controllers of the Connecticut Retirement Plans and Trust Funds *may* consider the environmental and social implications of investments.¹⁴⁷ Its latest 2007 investment policy contains provisions which suggest it prioritizes such factors when selecting assets, voting proxies, and other similar actions.¹⁴⁸ Two Canadian provinces, Manitoba and Ontario, provide further examples. In 1995, Manitoba's *Trustee Act* was amended to permit trustees to consider non-financial criteria in their investment policies, so long as "the trustee exercises the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others."¹⁴⁹ In 2005, a similar provision was grafted into Manitoban pension legislation.¹⁵⁰ Ontario's former *South African Trust*

146. See e.g. Jane Ambachtsheer et al., *Fiduciary Guide to Toxic Chemical Risk* (Oakland: Rose Foundation for Communities and the Environment & the Investor Environmental Health Network, 2007).

147. Conn. Gen. Stat. § 3-13d(a) (2002).

148. State of Connecticut Office of the Treasurer, *Investment Policy Statement for the State of Connecticut Retirement Plans and Trust Fund* (State of Connecticut Office of the Treasurer, 2007) (see e.g. "Appendix B: Domestic/Global Proxy Voting Policies" at 32).

149. *Trustee Act*, S.M. 1995, s. 79.1.

150. *Pension Benefits Amendment Act*, S.M. 2005, s. 28.1(2.2).

Investments Act of 1988 permitted a trustee to eschew investments in companies doing business in South Africa, despite any effect on investment returns.¹⁵¹

In a corporate context, the Supreme Court of Canada has endorsed a similar reformulation of directors' fiduciary duties. *Peoples Department Stores v. Wise* was a suit brought by the trustee in bankruptcy representing various trade creditors who argued that an arrangement agreed to by defendant directors concerning two firms under their control had violated duties to trade creditors.¹⁵² The Court interpreted the phrase "best interests of the corporation" in section 122(1) of the *Canada Business Corporations Act* as being distinguishable from the best interests of shareholders. Accordingly, it ruled that it was appropriate for directors to consider factors beyond the maximization of shareholder value, including "employees, suppliers, creditors, consumers, governments and the environment."¹⁵³ Constituency statutes in the US attempt to achieve similar effects through explicit legislation.¹⁵⁴

Perhaps the main advantage of a discretionary approach is that it enables fiduciaries to respond proactively, rather than reactively, to the social and environmental impacts of investment. Fiduciaries could confidently initiate steps to promote sustainable development, rather than merely react as material environmental risks and liabilities arise. It would also offer the most politically feasible option for SRI-minded regulators.

Conversely, the principal constraint of this fiduciary standard is that it does not *oblige* consideration of societal interests. It would problematically treat ethical precepts to protect ecological integrity as discretionary considerations to be weighed against existing business imperatives. There would be no obvious sanctions for failing to promote sustainable development unless investment policies recklessly hurt beneficiaries' financial returns. Nor would such a fiduciary standard necessarily allow affected outsiders to enforce their interests. In the case of *Peoples Department Stores*, the Court stressed the difference between taking the interests of various parties into account and *owing a duty* to those parties. The duty of loyalty that a director owes remains to the

151. R.S.O. 1990 (repealed in 1997).

152. [2004] 3 S.C.R. 461.

153. *Ibid.* at 481-82.

154. James Hanks Jr., "Playing with Fire: Nonshareholder Constituency Statutes in the 1990s" (1991) 21 *Stetson L. Rev.* 97.

corporation itself, not other parties.¹⁵⁵ This may make the legal recognition and protection of other interests functionally unenforceable.

ii. PROCESS STANDARDS

Alternatively, legislation could prescribe *procedures* to improve the likelihood that fiduciaries would consider the social and environmental impacts of their investment decisions.¹⁵⁶ This approach is already evident in some jurisdictions where lawmakers have introduced transparency regulation requiring certain types of funds to publicly report their SRI policies. In several jurisdictions, legislative proposals have been tabled that would impose more onerous procedural standards. These include the UK's *Corporate Responsibility Bill*,¹⁵⁷ and Australia's *Corporate Code of Conduct Bill*,¹⁵⁸ neither of which has been adopted as of yet.¹⁵⁹

Among the possible ambitious procedural reforms, financiers could be obliged not only to disclose their SRI policies, but also their investment methodology and implementation efforts, and where applicable, they could explain why they have not adhered to specified best practices. Authorities should also devote more resources to enforcing transparency obligations. Financiers' disclosures on SRI could be audited independently, and deficiencies penalized. More invasively, authorities could also allow outside stakeholders to have a voice in financial institutions' governance, as representatives of particular social and environmental interests or constituencies. For large pension funds, this could involve stakeholder representatives sitting on governing boards. Less prominently, fiduciaries could be required to consult and consider the interests of specific stakeholders who do not have formal representation in fund management. Already, the Equator Principles require signatory banks to ensure that local communities who may be affected are consulted in planning projects they finance.

One rationale for these reforms is that the governing boards of pension trusts, investment funds, and banks are typically drawn from a narrow segment

155. *Supra* note 152 at 482-83.

156. Gunther Teubner, "Corporate Fiduciary Duties and Their Beneficiaries" in K.J. Hopt & G. Teubner, eds., *Corporate Governance and Directors' Liabilities* (Berlin: Walter de Gruyter, 1985) 165 at 166.

157. Bill 129, *Corporate Responsibility Bill*, 2002-2003 Sess., 2003.

158. *Corporate Code of Conduct Bill 2000* (Cth).

159. Adam McBeth, "A Look at Corporate Code of Conduct Legislation" (2004) 33 *Common L. World Rev.* 222.

of society, unrepresentative of its main groups. The governing boards commonly lack expertise on SRI issues and do not adequately understand modern social and environmental challenges.¹⁶⁰ Appropriately chosen representatives of various social and environmental constituencies could strengthen the ethical envelope of investment. Even nature itself could have a voice, in a manner analogous to Stone's suggestion for authorities to appoint guardians to represent the interests of ecosystems.¹⁶¹ Stakeholder representatives of course could not have a voice without being accountable. They too would need to be bound by fiduciary obligations. More representative governing boards may be better informed of the challenges of aligning private investment with public responsibilities to ensure sustainability. They provide a means to democratically diversify the range of perspectives that inform SRI policy, and thereby bolster the social legitimacy of ethical investment decisions.

Advancing SRI in these ways does have some limitations.¹⁶² The potential multitude of interests runs counter to arguments that efficient institutions are endowed with clear, single-purpose functions, where governance procedures are not compromised by competing considerations.¹⁶³ Where a fiduciary must consider numerous interests without any way of prioritizing its obligations, any decision taken that is not blatantly self-interested becomes defensible. Because of the extreme breadth of interests to "balance," a stakeholder would struggle to prove that the fiduciary was derelict in his or her duties. The fiduciary relationship crumbles where the loyalty of the fiduciary splinters among multiple parties or stakeholders whose interests may not coincide. Though reforms to democratize governance within financial institutions would allow for

160. See the survey in Chris Gribben & Matthew Gitsham, *Will UK Pension Funds Become More Responsible: A Survey of Trustees* (London: UKSIF, 2006).

161. Christopher Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects" (1972) 45 S. Cal. L. Rev. 450.

162. For a sample of the literature from the corporate social responsibility perspective, see Thomas Donaldson & Lee Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications" (1995) 20 Acad. Mgmt. Rev. 65; Ciaran Driver and Grahame Thompson, "Corporate Governance and Democracy: The Stakeholder Debate Revisited" (2002) 6 J. Mgmt. & Governance 111.

163. See Michael Jensen, *A Theory of the Firm: Governance, Residual Claims, and Organizational Forms* (Cambridge, MA: Harvard University Press, 2000).

dialogue among these various interests, it is likely that the will of the majority, rather than a consensus, would emerge.

Alternatively, the financial sector could accommodate a voice for stakeholders in a single external entity, such as a national ethics council responsible for setting general investment standards. The state could appoint a body of representatives from key constituencies to devise standards for ethical investment for sustainable development. Fiduciaries would receive guidance on difficult ethical questions, avoiding trial and error. This option would be most acceptable for public financial institutions (*e.g.*, public investment funds, national savings schemes, and export credit agencies). Already, Sweden and Norway have established ethics councils to guide their public pension funds according to international environmental and social standards. The private sector might tolerate an ethics panel with a more restrained mandate, such as setting general guidance and voluntary standards.

Overall, process standards dovetail closely with the prescriptions of reflexive law theory, which aim to promote self-regulation within businesses by restructuring their internal decision making to facilitate more consideration of the interests of other stakeholders and social norms.¹⁶⁴ With the vision that governance should no longer arise out of external regulation but should occur through the internal reconfiguration of decision making within corporations, detailed regulatory prescription is thus replaced by mechanisms encouraging internal reflection, learning, and behavioural changes. The function of law is recast from direct control to “procedural” control.¹⁶⁵

The principal concern is that existing procedural reforms in the SRI industry have yet to engender significant change. They have allowed financiers to assert SRI policies without actually needing to demonstrate real change. This setback is possible because such reforms have not gone far enough, and have instead left too much discretion in the hands of financiers. As noted, a vast range of options has yet to be tested.

Possibly the most significant reason to include these process reforms is that they would enable more democratic decision making within financial

164. Gunther Teubner, Lindsay Farner & Decian Murphy, eds., *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organisation* (London: John Wiley & Sons, 1994); Eric Orts, “Reflexive Environmental Law,” (1995) 89 *Nw. U.L. Rev.* 1227.

165. Julia Black, “Proceduralising Regulation: Part I,” (2000) 20 *Oxford J. Legal Stud.* 597.

institutions, which is crucial to promoting ethical deliberation and creating firmer commitment to ethical principles. The democratic basis would lead to an answer to the criticism of “whose ethics?”, and it would also bolster the social legitimacy and the authority of SRI as a means of market governance. The most democratically structured financial institutions are credit unions, and it is probably no coincidence that they provide examples of some of the best community and environmental financing.¹⁶⁶ The Vancouver City Savings Credit Union is a leader in the Canadian SRI market.¹⁶⁷

iii. PERFORMANCE STANDARDS

Moving along the spectrum of possible reforms, a general fiduciary duty to act for sustainable development or ecological integrity could be legislated. Designing a credible performance standard with sufficient clarity is not easy; an undefined duty “to have regard to” or “to promote” sustainability would hardly suffice. Like the sustainability discourse itself, such a vague yardstick subject to discretionary interpretations would likely perpetuate business as usual and allow problematic trade-offs. It would therefore require prophylactic rules defining the standard of care and determining to whom duties are owed. If achievable, it could provide a powerful means to transform the financial sector.

Investing in an ostensibly lawful activity would not necessarily suffice for such a fiduciary standard. For instance, an emission license does not necessarily shield a polluter from other legal actions such as tort suits.¹⁶⁸ Further, no simple distinction between a permissible and prohibited activity exists in this area; typically, corporate activities or products are controlled, subject to impact assessments, permits, and other regulatory checks. In some countries with rudimentary systems of environmental law, even an expressly permissible activity may run afoul of elementary international sustainability standards.

Mandatory legislation for corporate social responsibility in the context of company or financial regulation is not unprecedented. Among sparse examples, the UK’s *Companies Act* of 2006 comes “close to a stakeholder model of

166. Bernd Balkenhol, ed., *Credit Unions and the Poverty Challenge: Outreach, Enhancing Sustainability* (Geneva: International Labour Organization, 1999).

167. See Vancity, online: <<https://www.vancity.com>>.

168. See e.g. the cases of *Mandrake Management v. Toronto Transit Commission* (1993), 102 D.L.R. (4th) 12 (Ont. C.A.); *Wheeler v. J.J. Saunders Ltd.* (1994), [1996] Ch. 19 (C.A.).

director's duties," according to some legal commentators.¹⁶⁹ The applicable part, section 172(1), states:

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to-

(a) the likely consequences of any decision in the long term,

...

(d) the impact of the company's operations on the community and the environment, ...¹⁷⁰

The UK reforms do not accommodate non-shareholder interests in actual corporate governance, yet oblige directors to consider how environmental and social impacts affect corporate success. Breach of this duty could make a transaction voidable and result in civil liability for directors. Applied to financial institutions, such as pension funds, this standard could help to redefine fiduciary duties along the lines of the "universal owner" thesis.¹⁷¹ The financial success of institutional investors, who have a stake in much of the economy, is even more likely to be affected by diverse social and environmental interests than that of a single corporation operating in a discrete sector.

From a sustainability policy perspective, obliging financial institutions to consider social and environmental issues to the extent they affect investment returns has certain limitations. The focus remains on profitability of the financial institution and, ultimately, its beneficiaries. Without other measures, this approach to fiduciary duties could still suppress social and environmental considerations. Most fundamentally, while institutional investors ("universal owners") may respond to externalities of individual companies that create costs elsewhere in the economy, they may be blind to externalities of the market as a whole, such as long-term climate change. Moreover, the tendency to delegate investment management to specialist fund managers with short-term performance targets, coupled with reliance on corporate valuation models that

169. Cynthia Williams & John Conley, "Triumph or Tragedy: The Curious Path of Corporate Disclosure Reform in the UK" (2007) 31 *Wm. & Mary Envtl. L. & Pol'y Rev.* 317 at 354.

170. *Companies Act (2006)* (U.K.), 2006, c. 46, s. 172(1).

171. Hawley & Williams, *supra* note 22; Stephen Davis, Jon Lukomnik & David Pitt-Watson, *The New Capitalists: How Citizen Investors are Reshaping the Corporate Agenda* (Cambridge, MA: Harvard Business School Press, 2006).

do not measure economic factors holistically, further constrains this approach in the absence of additional measures.

Improvements to social accounting and sustainability indicators could make a mandatory performance standard workable for ethical investment. The fiduciary's obligation could remain to serve the interests of its beneficiary investors, but only so long as specified social and environmental impacts are accounted for and the ecological footprint of an investment portfolio remains within tolerable thresholds. Sustainability indicators could be prescribed by regulation to effectively set performance benchmarks for fiduciaries, such as the carbon footprint of a portfolio and other broad indicators enabling a fuller view of environmental performance. Fiduciaries would not be required to calculate the social and environmental costs and benefits of investments under this approach. Rather, they would be required to ensure that the overall portfolio adheres to indicators of sustainability by whatever means they choose. Advantages of performance standards based on sustainability indicators are that they can set clear, achievable benchmarks for financiers while avoiding prescribed methods for arriving at set results.

Alternatively, performance standards could require financiers to ensure their investment portfolios account for and make deductions for social and environmental costs ascertained through new social accounting standards.¹⁷² With the spread of economic instruments ascribing monetary value to environmental behaviour, such as carbon taxes and tradable emission permits, quantification of some externalities should improve to help financiers find the most cost effective ways to meet ethical investment standards. While the cost-benefit calculus may seem controversial to some environmental ethicists, the calculus would apply only to *how* to achieve an ethical standard rather than to the determination of the content of that standard.

Thus, through these approaches, the fiduciary standard would effectively prioritize ecological integrity over private investment returns. While investors could continue to be legally conceived as the sole beneficiaries of such fiduciary duties, their "best interests" would be redefined so that diminishing

172. Edward Zelinsky, "The Dilemma of the Local Social Investment: An Essay on 'Socially Responsible Investment'" (1984-85) 6 *Cardozo L. Rev.* 111 at 130-31; Kathleen Herbohn, "A Full Cost Environmental Accounting Experiment" (2005) 30 *Acct. Org. & Soc'y* 519; and Julie Desjardins & Alan Willis, *Environmental Performance: Measuring and Managing What Matters* (Toronto: Canadian Institute of Chartered Accountants, 2001).

sustainability would no longer be a viable means of obtaining financial gain. While some values and practices, particularly in areas such as human rights, may defy measurement in social accounting or simplification into indicators, supplementary tools, such as duties to conduct social impact assessments and consult with affected stakeholders, might assist.

Such reforms, however, would prove very controversial, even to seasoned practitioners of SRI, and would be very complex to implement. Yet, ultimately they are surely essential steps to safeguard ecological integrity. Finance capitalism as it presently functions likely has no future if humankind is to have one. In the near term, interim steps could be taken, such as adopting specific ecological criteria for greenhouse gas emissions. A vast industry is rapidly evolving to measure and account for such emissions, such as the Carbon Disclosure Project¹⁷³ and the International Organization for Standardization (ISO) 14064 standard.¹⁷⁴

C. COLLATERAL REFORMS

Some of the collateral measures necessary to support a reformulation of financiers' fiduciary duties for SRI can be briefly canvassed. While the following measures certainly could be construed as tools for furthering the business case for SRI, they also provide the means to enable financiers to more readily achieve fiduciary standards for safeguarding ecological integrity.

Economic instruments, such as pollution taxes, emission allowance trading, and discrete subsidies, can strengthen SRI by pricing social and environmental externalities into the cost of development capital. In conjunction with social accounting reforms, economic instruments can attribute quantified negative and positive externalities to firms, for reflection in their earnings, competitiveness, and, ultimately, share prices and other financial indicators. This in turn should influence the allocation of capital, making polluters competitively disadvantaged. While a system of SRI governance nurturing ethical investment cannot rest only on a system of monetary incentives, it is one of the most politically viable reforms. The Netherlands' tax incentive for green project investments catalyzed the Dutch SRI market, accounting for about half

173. See Carbon Disclosure Project, online: <<http://www.cdproject.net>>.

174. International Organization for Standardization, *ISO 14064-1: 2006, Greenhouse gases - Part 1: Specification with guidance at the organization level for the quantification and reporting of greenhouse gas emissions and removals* (Geneva: ISO, 2006).

of all its SRI.¹⁷⁵ Taxes can also reward long-term investment by targeting appropriate financial transactions. Meaningful taxes on short-term gains on trading shares, applied on a decreasing scale as the holding period lengthens, must be assessed.

Financier liability provides another means to penalize creditors or shareholders for the environmental and social harms they finance. Liability could arise where an institutional shareholder acting alone or in concert was in a position to exert significant influence, or where a lender disregarded due diligence requirements for assessing a borrower's environmental safeguards. Faced with such risks, fiduciaries must factor the costs of potential liability into any investment decisions made. In the US, lender liability under the "Superfund" legislation for cleanup of contaminated lands had some positive effects on the environmental behaviour of banks.¹⁷⁶ However, as a reactive and adversarial tool, liability should not be the primary route to ethical investment. Many social and environmental problems are so numerous, diffused, and intertwined that the individual causal linkages between acts and damages are too remote to impose liability according to evidential rules in courts. The liability model also assumes that governments worldwide can create a comprehensive system of command regulation capturing and appropriately penalizing all costly externalities. Environmental liability, however, should retain a role in some situations to make financiers more accountable for harms that they are closely associated with.

Among other collateral reforms for SRI, at an international level, a new treaty setting social and environmental standards for global finance would be beneficial. With foreign ownership of stock markets increasing, SRI governance cannot hinge solely on national standards.¹⁷⁷ International financial market regulation would help to prevent a race to the bottom, as common standards would preclude capital fleeing to the most regulatorily benign markets. The

175. Bert Scholtens, "What Drives Socially Responsible Investment? The Case of the Netherlands" (2005) 13 *Sust. Dev.* 129.

176. *Comprehensive Environmental Response, Compensation and Liability Act*, 42 U.S.C. §§ 9601-9675 (2000); see Joseph Jude Norton, "Lender Liability in the United States: A Decade in Perspective" in Ross Cranston, ed., *Banks, Liability and Risk* (London: Lloyds of London Press, 1995) 329.

177. World Resources Institute, *Tomorrow's Markets - Global Trends and their Implications for Business* (Washington: World Resources Institute, 2002) at 54.

existing range of international voluntary standards, such as the UNPRI or the Equator Principles, fall short of the exacting standards required with regard to both substantive performance standards and procedural controls, including public disclosures, auditing, and grievance mechanisms. Reforms to fiduciary duties outlined earlier in this article could be set as international standards for states worldwide to adopt in their domestic legislation. There are no doubt steep political obstacles to such an international treaty, as the fate of the proposed UN Norms on the Responsibilities of Transnational Corporations illustrates.¹⁷⁸

Finally, public sector finance must set an example for SRI. Some commentators herald public pension funds as “a potentially powerful catalyst for change” towards sustainable development.¹⁷⁹ Short of a command economy, states should at least mobilize public capital to address strategic social and environmental issues, as occurs to some extent in the national pension plans of Scandinavia and France. Beyond empowering public pension funds as SRI leaders, states could also influence capital allocation through central banks, giving preferential treatment to environmentally critical industries. In an international context, foreign aid and multilateral development investment provide further nodes for sustainable development financing.¹⁸⁰ Co-financing partnerships between public and private institutions, sometimes used in multilateral finance, offer a novel way by which governments can guide private financiers to behave more responsibly.¹⁸¹ Environmentally conditioned public finance on preferential terms could bridge the cost gap between what private financiers wish to commit and what is necessary for environmentally sustainable investments.

178. UN Economic and Social Council, Sub-Commission on Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 2003, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

179. David Hess, “Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development” (2007) [Working Paper No. 1080, Ross School of Business, University of Michigan] at 42.

180. Among the literature, see Finn Tarp, *Foreign Aid and Development: Lessons Learned and Directions for the Future* (New York: Routledge, 2000); Gunther Handl, *Multilateral Development Banking: Environmental Principles and Concepts Reflecting General International Law and Public Policy* (London: Kluwer Law International, 2001).

181. See Hillary French, *Investing in the Future: Harnessing Private Capital Flows for Environmentally Sustainable Development* (Washington: Worldwatch Institute, 1998).

V. CONCLUSIONS

SRI both impeaches and challenges financial markets. It indicts long-standing investment practices for impairing ecological health and social justice. It also presents an opportunity to reform those practices to respect social and environmental values so essential to the long-term health of the economy. Despite some recent growth of the SRI market, most financial institutions have not heeded this message. Rather, they largely perpetuate business as usual by evaluating ecological necessities from the perspective of financial advantage, while discreetly rejecting deeper ethical questions about the investment process.¹⁸² The business case model of SRI sanguinely transforms the tensions between environmental protection and profitable investment into a harmonious arrangement. Of course, that environmental care and financial prosperity can be compatible is not an objectionable proposition, in principle. Financiers should benefit from companies that reduce their ecological footprint.

The qualm is that some financiers masquerading as responsible investors will just tinker with unsustainable modes of development. Tied to a concept of financial materiality, the business case may address some environmental problems through improved research and analysis. However, it cannot accommodate ecological issues that are not valued by the market, and it promotes trade-offs when prioritizing financial gains to private investors. Concomitantly, business reputational risks may provide a flimsy basis for assuring ethical conduct. One reason is that the marketplace has a short institutional memory; for instance, how many remember that Lee Iacocca was the man behind the Ford Pinto? Many corporate reputation-enhancing measures are superficial, and the public image of responsible behaviour often masks a different reality.¹⁸³

Thus, without demonstrated financial advantage, an investment analysis may advocate delaying or halting measures that mitigate pollution, especially in the absence of effective government regulation and stakeholder pressure. In fact, in corporate decision making a countervailing business case for intensifying

182. David Owen, "Towards a Theory of Social Investment: A Review Essay" (1990) 15 *Acct. Org. & Soc'y* 249 at 259-64.

183. George Pitcher, "Corporate Responsibility Isn't Always About Charity" *Marketing Week* (14 March, 2002) 33.

environmentally unsustainable practices may be evaluated. For example, despite the SRI industry's rhetoric about climate change risks, the fossil fuel industry has hardly changed. The surge of investment in Alberta's oil sands is one controversial example.¹⁸⁴ Without an additional layer of ethical responsibility, many financiers lack incentive to take actions beyond those prescribed by a conservative business case.

The belief that economic investment can best contribute to prosperity and human welfare when financial institutions have the unfettered freedom to determine their own goals must be rejected. Achieving the potential of SRI requires many changes, foremost of which is to reframe the governance of financial institutions to facilitate or mandate ethical investing for sustainability. The market alone is unlikely to create adequate signals for change. There must be stronger environmental regulatory and civil society pressure and democratic debate. As a priority, SRI should evaluate companies with reference to enhancing sustainability and invest in those leading companies irrespective of short-term, bottom-line results. The only permissible financial returns should be those achieved without unaccounted-for public costs to the environment and social welfare. SRI certainly does not mean financial returns are rendered unimportant; rather, the focus of the investment objectives should be over the long term, so that in the long-term interests of the financial market itself, natural and social capital are not degraded. The sustainability of the financial sector ultimately depends on the sustainability of life.

Ethically driven investment realistically cannot address all sustainability challenges, as some are too complex to be packaged into social accounting metrics or sustainability indicators, or are simply better managed directly through state protective legislation. On the institutional side, some financiers will remain better placed than others to champion SRI. Public sector pension plans, cooperative banks, credit unions, and some religious groups, with closer ties to civil society and more democratic methods of governance, will likely continue to set the pace.

Booming emerging markets pose further crucial challenges to SRI. In November 2007, PetroChina surpassed the US energy behemoth Exxon Mobil

184. Kirk Makin, "High-stakes Battle Looms over Oil-Sands Pollution" *The Globe and Mail* (15 August 2007) A1.

as the world's largest corporation measured by the market value of its total stock.¹⁸⁵ PetroChina's investments in Sudan and other contentious places have been associated with human rights abuses and environmental problems.¹⁸⁶ As a largely Western discourse and practice, SRI will require fresh ideas and techniques to influence firms such as PetroChina in emerging economies. Global sustainability is impossible unless SRI can speak to the concerns of communities and investors in the developing world. SRI networks such as Association for Sustainable and Responsible Investment should thus be crucial for pioneering SRI in these regions.¹⁸⁷

A robust framework for such ethical investment necessitates many changes to SRI governance. Among the menu of reforms for environmental law, the reformulation of financiers' fiduciary duties is crucial. They define the core goals and processes of decision making within financial institutions. Through fiduciary duties the traditional concept of "benefit" to investors can be ethically redefined, and financiers thereby steered toward sustainability. If grounded in new forms of social accounting, sustainability indicators, and performance standards, such fiduciary standards could bring financiers much nearer to a system of ethical investment that respects ecological integrity.

If financial markets continue to ignore imperatives for reform, more radical solutions may have to be implemented to secure our future.¹⁸⁸ Timothy Flannery, in *The Weather Makers*, warns of a hypothetical "carbon dictatorship" where an "Earth Commission for Thermostatic Control" controls the economy to safeguard a looming climate crisis.¹⁸⁹ Ethical investment, if followed seriously, could help avert such bitter alternatives. Financial markets have

185. Donald Greenlees and David Lague, "PetroChina Shares Triple Value in Record IPO" *International Herald Tribune* (5 November 2007).

186. See "The China-Sudan Connection: Options for Concerned Investors" (Session at 18th Annual SRI in the Rockies Conference, Santa Ana Pueblo, New Mexico, 3-6 November 2007).

187. See The Association for Sustainable and Responsible Investment in Asia, online: <<http://www.asria.org/>>.

188. See the suggestions of Michael Jacobs, *The Green Economy: Environment, Sustainable Development and the Politics of the Future* (London: Pluto Press, 1991) at 45; Hazel Henderson, *Paradigms in Progress: Life Beyond Economics* (Indianapolis: Knowledge Systems, 1991); and J.E. Lovelock, *Gaia: A New Look at Life on Earth* (Oxford: Oxford University Press, 1979).

189. Tim Flannery, *The Weather Makers: How Man Is Changing the Climate and What It Means For Life on Earth* (New York: Atlantic Monthly Press, 2005) at 290-95.

become the single most important sector of the global economy, and reducing their ecological footprint through credible legal standards for SRI may yield a better dividend than any other environmental law strategy currently available.