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Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability

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ABSTRACT. Regulation must target the financial sector, which often funds and profits from environmentally unsustainable development. In an era of global financial markets, the financial sector has a crucial impact on the state of the environment. The long-standing movement for ethically and socially responsible investment (SRI) has recently begun to advocate environmental standards for financiers. While this movement is gaining more adherents, it has increasingly justified responsible financing as a path to be prosperous, rather than virtuous. This trend partly owes to how financial institutions view their legal responsibilities. The business case motivations that now predominantly drive SRI are not sufficient to make the financial sector a means to sustainable development. Some modest legal reforms to improve the quality and extent of SRI have yet to make a tangible difference. A more ambitious strategy to promote SRI for environmental sustainability is possible, based on reforming the fiduciary duties of financial institutions. Such duties, tied to concrete performance standards, could make financiers invest in more ethically responsible ways. Other collateral reforms to financial markets, including improved corporate environmental reporting, are required to promote sustainability.

KEY WORDS: financial markets, ethical investment, socially responsible investment, sustainable development, environmental law

The SRI agenda and its environmental challenges

Ethical investment, or socially responsible investment (SRI) as this financing movement is more commonly known today, increasingly downplays ethics. Traditionally, it championed an explicit ethical agenda, notably associated with the anti-slavery campaigns of the Quakers in the 1700s and, in the 1970s, the divestment boycott against South Africa's apartheid regime. These investors addressed social or environmental concerns not for any financial reward, but for the moral desire and responsibility to improve the world. The renaissance of SRI in the mainstream financial markets since the late 1990s has problematically disavowed this ethical posture. Responsible investors increasingly pitch their case for taking social or environmental issues into account on business grounds, on the assumption that SRI will make them prosperous, rather than merely virtuous. They tend to heed such issues only when they are perceived to be "financially material" – in other words, when they pose tangible financial risks or lucrative investment opportunities. While business case SRI is becoming popular, it risks perpetuating business-as-usual and reducing the SRI movement's capacity to leverage lasting change for environmental sustainability. Environmental problems have become the most important SRI cause today, yet it is doubtful whether present forms of SRI will make a significant difference to their resolution.

Ethical investment to promote sustainability should no longer be a discretionary option for financiers, to follow only if there is a compelling business case. In a world facing grave ecological problems, the financial sector must shoulder some of the responsibility to shift economic activity towards sustainable development. This is not an argument to conscript private capital for public purposes. Rather, ethical investment for sustainability proceeds from the assumption that private investment has public costs to the environment that must be accounted for.

Sustainability, as the crucial policy goal, entails the viability of natural systems, such as the global

climate, and societal and economic issues that may impinge upon environmental management, such as public health and poverty (Daly, 1997). The financial sector, incorporating banks, pension plans and other types of financiers that facilitate development by distributing capital and managing financial risks, exerts massive economic influence. For instance, the recent collapse of the sub-prime mortgage market in the United States has reverberated worldwide beyond the banking sector. The financial markets are also where ''wholesale'' decisions concerning future development, and thus eventual environmental pressures, arise. These pressures, once warned the United Nations' Millennium Ecosystem Assessment Board (2005, p. 5), are ''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''. Environmental degradation requires some radical changes to the accountability of economic institutions including the financial sector.

Accepting the inevitability of ecological limits to economic growth will entail redefining societal measurements of value and success. While business case SRI like any investment choice can be viewed as a manifestation of some basic ethical position, such as utilitarianism, it does not reflect credible ethical standards to safeguard ecological systems over the long term. Many environmentalists contend that only through a new ethical paradigm can humanity evolve sustainably, living in harmony with nature (Devall and Sessions, 2001). In 1992, some 1700 international scientists proclaimed their ''Warning to Humanity'', cautioning that ''[h]uman beings and the natural world are on a collision course'' (Union of Concerned Scientists, 1992). To avert a catastrophe, they called for ''[a] new ethic … a new attitude towards discharging our responsibility for caring for ourselves and for the earth''. Many others now agree that progress towards sustainability depends upon challenging the anthropocentric and instrumental values of industrialised, capitalist society (Soskolne, 2007). Any other solution would likely just respond to the symptoms rather than the root causes of unsustainable development. An ethical view helps decision-makers to understand and improve human behaviour, providing additional grounds to act when, for instance, the financial incentives are deficient. Yet, lofty rhetoric for more enlightened behaviour on its own will be unlikely to inspire change voluntarily. Nor will market forces engender changes except within the framework of the business case. Because business entities are not natural persons, they require formal rules and procedures to help inculcate ethical behaviour.

This article explores the limitations of business case SRI and considers how the legal system can restore an ethical basis to ethical investment for furthering environmental sustainability. Among possible reforms, it is argued that redefining the fiduciary duties of investment institutions is most crucial. Certainly, there will always be some room for individuals to choose lawful investments according to their own moral scruples. Yet, as financial institutions invest on behalf of millions and wield enormous economic influence, they must be seen as endowed with public responsibilities and be governed by standards that protect natural systems for the long term. Fiduciary duties, which govern how financial decision-makers should manage the assets of investors, presently are framed in a way that may accommodate business case SRI. But they hardly license ethical investment.

SRI's morph to the business case

The SRI movement is seeking greater accountability of the financial sector for the environmental problems connected to the economic activities it funds (Jeucken, 2001; Labatt and White, 2002). Investors have traditionally been remote to the environmental sequelae of their financing decisions (Thomas, 2001). Causal relationships between finance and its environmental impacts are dispersed widely across time and space, often obscuring investors' responsibility for the degradation. In a sense, financial institutions are the unseen polluters (Richardson, 2008), contributing in obscured ways to environmental troubles which they sponsor and profit from. Having long outgrown its origins of religious-based, *ad hoc* causes, contemporary SRI is starting to address the financial sector's role in unsustainable development. Yet, SRI actors' motivations for improving the environmental performance of the financial sector increasingly are generally not ethically driven.

Business case SRI – the principal form of SRI – scrutinises social, environmental and corporate

governance issues in terms of their effect on the financial performance of investments. These issues acquire significance primarily to the extent that they are perceivable as financially ''material'' to an investment portfolio (UNEPFI, 2004b). The tools of business case SRI include light-touch investment screens filtering out only the most insidious firms (so as not to significantly diminish portfolio diversification and thus returns), polite engagement with corporate management and more nuanced evaluations of the financial consequences associated with corporations' social and environmental activities. This approach has been endorsed by leading international SRI networks. Catering mainly to the institutional investment sector, the United Nations Environment Program Finance Initiative (UNEPFI, 2006, p. 4) 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…''. In another UNEPFI report (2004a, p. 5), financial analysts are advised to demonstrate ''material links to business value; … [and] avoid moral arguments''. In the retail market, such as among mutual funds, SRI is also awash with business case rhetoric, with funds marketed for how they can help investors to reap higher returns and outperform the market (Brill et al., 1999).

Alternatively, some investors, particularly in the religious sector, see SRI as principally a matter of ethical necessity. From the framework of teleological ethics, they may treat SRI as a means to change the criteria of capital allocation and motivate firms to improve their environmental and social behaviour. This contrasts to the traditional and increasingly rarer deontological type of ethical investment, involving investors who personally do not wish to profit from unethical activities (e.g. gambling or pornography), rather than placing a priority on changing the behaviour of others. Either way, investors are expected to act ethically without being constrained by profit motives. The ethical case, however, does not ignore the bottom line, as investors of any persuasion are not charities. Yet, it diverges from business case justifications for SRI by prioritising ethical issues for their own sake. They may accept lower financial returns in order to defend ethical values.

Ethical investment was pioneered by religious institutions (Triolo et al., 2000, pp. 26–53). They campaigned for social and environmental concerns not for any financial advantage but for the moral imperative to improve the world. The churches spearheaded a divestment campaign against companies profiting from apartheid in South Africa, contributing to its eventual demise. Some faith-based institutions continue to be the vanguard of change, such as the Interfaith Center for Corporate Responsibility's campaigns concerning climate change and environmental justice.[1] Ethically motivated investors are also found to some extent in the credit union sector, such as Canada's VanCity credit union; in the banking sector, notably the Umweltbank (Germany) and in some mutual funds that offer dedicated ethically screened portfolios, as Domini Social Investments (United States). The ethical approach is expressed even more strongly in some of the SRI governance standards advocated by civil society groups, such as the 2003 Collevecchio Declaration on Financial Institutions.[2]

Unless considered financially tangible, the social and environmental issues championed by ethical investment may be overlooked by business case investors. Often they perceive such issues as too nebulous for workable financial quantification (McGeachie et al., 2005, p. 57). Sometimes ''reputational risks'' associated with unethical environmental or social practices may trigger action. Given that somewhere between 50% and 70% of large public companies' value is considered intangible, including brand name and goodwill, risk to their reputation may induce more ethical behaviour.[3] A pioneering report commissioned by the World Resources Institute (Herz et al., 2007) argues that the poor and marginalised can benefit from the business case approach where financiers find that their projects need community consent and legitimacy. Nonetheless, reputational 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 publicise their plight. And, some financiers or firms of low public visibility may not be particularly vulnerable to such reputational risks in the first place.

The economy-wide portfolios of large institutional investors provide another potential basis for business case SRI. Hawley and Williams (2000) proclaim ''universal investors'' such as large pension funds as a growing force for corporate responsibility,

as their broad stock portfolios should make them interested in the health and long-term sustainability of the entire economy. In contrast, an investor in just one company or one economic sector is not as broadly focused, and presumably therefore will care only about the financial performance of that narrow interest and not necessarily on the costs it may impose on others. It would be optimistic however to imply that such institutional investors can coordinate their investments to keep economic growth within biosphere limits. The market contains no mechanism to scale the economy within the carrying capacity of the planet (Daly, 1992). In the absence of regulatory restraints, such as a cap on the economy's carbon emissions, universal investors are unlikely to cooperate readily to moderate economic growth imperatives. Further, institutional investors commonly act through intermediaries – fund managers – whose reward system and short-term investment mandates encourage narrow and myopic investment decision making (Golding, 2002).

Such factors probably help to explain why the SRI market remains small. It likely holds below 10% or more likely 5% of the capital markets of major economies. In the United States market, the Social Investment Forum (SIF) reported that in 2007 (SIF, 2008, p. ii) that US $2.71 trillion or ''one out of every nine dollars under professional management in the United States today is involved in socially responsible investing''. 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 €1033 trillion (incorporating further the value of shareholder activism and engagement). The latter, larger figure was the equivalent of between 10% and 15% of managed assets in European funds.

Even these modest numbers strain credibility, as much finance masquerading as SRI likely hardly contributes to sustainable development. The United States study relied on very broad standards for measuring the SRI universe, counting the entire portfolio of funds that screen merely against one issue, such as tobacco, alcohol or gambling. Indeed, 25% of nominal SRI funds screened only on the basis of *one* of these criteria. The Eurosif research tallied the value of shareholder engagement and proxy voting practices, yet there is no extensive research on the actual extent and quality of such practices. Because the SRI market is likely to be much smaller than these surveys suggest, its capacity to leverage change by raising the financing costs of polluters or pressuring for change through shareholder activism is probably rather limited (Angel and Rivoli, 1997; Gillan and Starks, 1998).

SRI legal reforms

The relationship between SRI and the legal system has generally not been adequately scrutinised by policy-makers or commentators (Richardson, 2008). Certainly, in the broader corporate social responsibility (CSR) debate, there is widespread wrangling over the extent to which corporations can be motivated to act responsibly without the necessity of regulatory compulsion. In a recent contribution to that debate, Reich in his best-seller *Supercapitalism* (2007) dismisses the possibilities of CSR and calls for the strengthening of democratic processes and public regulation to control corporate excesses. On the other hand, Davis et al. (2006) exude confidence in the capacity of the mass investor society to forge positive change through their pension funds and other investment intermediaries. Indeed, historically, one of the forces behind the growth of SRI has been faith in its ability to provide a form of surrogate market regulation. In the absence of appropriate official regulation, investors hope to leverage change through market pressure. For example, the divestment campaign against South African-based companies was motivated by the failure of governments to act. Yet, as will be argued here, SRI does not stand apart from the legal system. The prevalence of business case SRI not only reflects the pressure of economic fundamentals in a competitive market, it also owes to the legal arrangements governing financial institutions. Conversely, to stimulate *ethical* investment will likely require the state to alter the incentives and obligations to undertake SRI.

Legal reforms in some countries to promote SRI have generally yet to transform the status quo, which assumes that the market is efficient and functions best with minimal governmental oversight. Traditionally, authorities have connected ecological and social problems only to those companies that most visibly consume and pollute nature. The SRI reforms to counter that perception have been

adopted at both national and international levels, although in the latter they tend to be only voluntary, aspirational standards (Richardson, 2007a). Congruent with trends in governance worldwide away from "command-and-control" regulation, SRI policy reforms have tended to emphasise market-based and informational standards that leave financiers with significant discretion over investment decisions.

Thus, SRI regulation commonly involves process standards including mechanisms for financiers to report their SRI policies, proxy voting activities and environmental impacts of financial significance. Such process standards enable the assessment, verification and communication of performance, and in theory thereby can put pressure on environmental laggards to change or reward leaders through competitive market advantages. In the UK and several other European states, and Australia, occupational pension funds must disclose any policies they adopt for SRI.[4] In Canada and the United States, mutual funds are required to disclose their proxy voting policies and voting records.[5] Voluntary standards have also been developed in the SRI sector, including the Global Reporting Initiative[6] and the Carbon Disclosure Project.[7] Under such transparency regulation, financiers may choose *not* to invest ethically, so long as they disclose that decision. In practice, their mandated disclosures often entail vague, perfunctory statements that reveal little about the methodology behind SRI decisions or their implementation (Fair Pensions, 2006). SRI funds seldom demonstrate the level of transparency and participation they demand of the corporations that make up their portfolios. External consultants and fund managers often enjoy much more influence than fund members in setting SRI policies.

Normative standards, providing substantive principles for investment practices, constitute another less common style of SRI governance. In some jurisdictions, national pension funds are obliged to invest responsibly and ethically. These measures have been adopted in France, New Zealand, Norway and Sweden. For example, Sweden's *National Pension Insurance Funds (AP-Funds) Act* of 2000 requires state pension funds to take "environmental and social considerations … into account without relinquishing the overall goal of a high return on capital".[8] An ethics council guides the Swedish pension funds in discerning ethical investment choices. The UNEPFI's (2007, p. 7) recent survey of these and other public sector funds "highlight[ed] a range of some of the most advanced and creative approaches to responsible investment". Occasionally, states have sought to actually ban certain investments, such as Belgium's prohibition on the financing of companies that produce, distribute or in other ways are connected to cluster bombs (Netwerk Vlaanderen, 2007).

Among voluntary normative regimes, the UN Principles of Responsible Investment (UNPRI) of 2006 has acquired great attention in the SRI community. It contains six core principles, each of which is illustrated by several "possible actions".[9] The Principles are heavily subscribed but likely primarily because of their voluntary nature and the lack of radical changes expected of signatories. The UNPRI does not require a signatory to demonstrate any particular performance grade with regard to human rights or environmental protection. The Principles also lack compliance machinery, and signatories are presently not obliged to report publicly on their compliance. The Equator Principles, which address project financing, prescribe more detailed sustainable development standards based on the International Finance Corporation's policies.[10] They contain more credible public reporting and consultation standards, although evidence that some banks continue to sponsor environmentally degrading projects suggests that implementation of the Principles is uneven (Hardenbrook, 2007).

Governments have introduced some other policy instruments to stimulate SRI, including green investment tax concessions (e.g. in the Netherlands), corporate governance reforms to facilitate shareholder advocacy (e.g. in Australia and Canada) and environmental liability on lenders (e.g. in the United States) (Richardson, 2008, pp. 281–378). Few developing countries have introduced policy measures to stimulate SRI. The effectiveness of these mechanisms is patchy. In a neo-liberal policy climate where the market is widely seen as the most effective means of promoting social welfare, no jurisdiction has sought to intensify SRI regulation.

In general, the progression of the SRI market, and its governance, remains muted. A vast legal terrain of potential reform remains underexplored. Reliance on existing environmental regulatory controls that target the "front-line" businesses, such as mining

and manufacturing firms, is insufficient for many reasons. Targeting the financial sector through SRI reforms could reduce the burden on presently often ineffectual front-line regulatory controls, as companies passing the rigours of SRI standards should be easier to regulate at an operational level. Financiers' strategic economic position can also be exploited by policy-makers to overcome traditional obstacles to such regulation. Systems theory explains how the differentiation of modern society into semi-autonomous subsystems, such as the market and the legal spheres, has made it difficult for regulation to control corporations whose behaviour is accustomed to the market's norms of money, exchange, competition and profitability (Luhmann, 1995). The financial sector, while part of the market system, also occupies a strategic position often closely tied to government policy-making (e.g. as a means to implement official monetary policy on interest rates or money laundering controls). Financial institutions could also be harnessed as a means of environmental regulation, such as through requirements to promote SRI (Richardson, 2002). Above all, in a global economy shaped increasingly by cross-border investment, regulatory controls at the point of where capital is raised are crucial. Global finance, which enables financiers to invest in foreign markets with weak human rights and environmental standards, must be countered by sustainability standards embedded into financial markets.

Ethics for investing for sustainability

In a milieu where SRI is largely a matter of voluntary choice rather than regulatory compulsion, a diversity of approaches to SRI has flourished. This diversity reflects investors' different values regarding the relative importance of social, environmental and economic considerations (Mackenzie, 1998; Sparkes, 2001). Hylton (1992, p. 2) criticises the "persistent inability on the part of all participants in the debate to develop a simple, coherent definition" of SRI. Generally, the only common ingredient is a business case motivation to invest responsibly. Ethical concepts such as "sustainable development" or "corporate responsibility" are prone to being dismissed as merely subjective and personal values. Thus, when the Irish Parliament in 2006 rejected a legislative amendment to require the National Pensions Reserve Fund to invest ethically, one parliamentarian reasoned: "[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" (Parliament of Ireland, 2006, p. 5).

Alternatively, investors can hardly set their moral compass only by the law of the land. Merely because an economic activity is ostensibly "legal" does not mean it is appropriate for ethical investment. The tobacco industry is a clear example. Legal rules may simply reflect the power of vested interests or fail to meet basic international human rights and environmental standards. Given that one of the traditional purposes of SRI has been to advance change, to push corporations beyond current legal standards, it would seem counterproductive to fall back on the latter as the benchmark to follow.

Unavoidably, SRI needs a stronger ethical foundation to contribute more thoroughly to sustainability. Ownership, competition and material gain are characteristics of the financial world which reduce nature to an expedient resource for short-term gain. They reflect a wider anthropocentric worldview in most cultures that restrict moral significance to human beings (White, 1967). In a statement on unsustainable patterns of resource use, the UN Economic and Social Council (2002, p. 5) explained: "[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". Underpinning SRI with an ethic that takes into account the importance of safeguarding ecological integrity would provide the platform for SRI to contribute to sustainability policy goals more comprehensively.

Beyond the financial sector, a vibrant discourse on ecological ethics has matured. It focuses on broadening moral consideration for all animals and plants and their constituent ecosystems (Light and Rolston, 2003; Schmidtz and Willott, 2002; Stone, 1987; Taylor, 1998). It is shaped by recognition of humankind's dependence on nature's life sustaining

properties (Capra, 1996). However, rejecting the anthropocentric traditions of environmental resource management, this approach also affirms the sanctity of all species for their ''intrinsic value'', regardless of any perceived instrumental worth to human welfare. While this outlook does not deny human beings' entitlement to use other forms of life, given that we are ''participants in the evolutionary process'' (Engel, 2005, p. 62), it provides humankind with a framework to think beyond its own interests. The environmental practices of indigenous communities to some extent reflect such values (Durning, 1992).

It is very unlikely, however, that moral exhortations alone will alter financiers' behaviour. Such ethical prescriptions must be articulated and protected legally as formal standards and procedures. Various peremptory principles have been drafted for this purpose. The Earth Charter evokes the kind of universal principles compatible with ethically framed SRI.[11] It was adopted in 2000 following lengthy consultation mainly held among non-governmental organisations (NGOs) and presently has endorsements some 3000 organisations worldwide. The Charter's principles most relevant for the business sector state:

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.

Nonetheless, the Earth Charter is a general statement of principles not tailored for the financial sector. Its provisions are generally framed too broadly to provide meaningful guidance. Only 180 business organisations have endorsed the Charter to date.

More directly relevant to SRI is the Collevecchio Declaration on Financial Institutions, drafted in 2003 by a coalition of NGOs.[12] It sets ethical standards specifically for financial markets, based on six core principles, namely sustainability, ''do no harm'', responsibility, accountability, transparency, and sustainable markets and governance. The Declaration's accompanying implementation guide outlines immediate steps that financial institutions should take. Yet, apart from the pension fund behemoth, the California Public Employees' Retirement System, financiers have largely shunned the Declaration (most of the some 100 signatories are NGOs). Financiers likely find its standards too radical. For instance, the Declaration's 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 …''. Further, the ''do no harm'' principle entails categorical prohibitions for the most socially and environmentally egregious transactions. The Declaration also seeks to strengthen financiers' accountability and transparency, expecting them to be ''responsive to stakeholder needs for specialised information'' and that ''commercial confidentiality should not be used as an excuse to deny stakeholders information''.

The financial sector's disavowal of such exacting 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. Ethical investment will have no lasting impression on the financial sector if investors regard it simply as regulatory prescription. Rather than relaying on regulatory commands based on a rigid laundry list of allowable investments, ethical standards could be incorporated into financial decision making by redefining the fiduciary duties of investment institutions. Indeed, as fiduciary duties set the overarching investment norms, they should be central to legal reforms for SRI.

Legal reforms for ethical investment

Fiduciary duties

Financial institutions manage the capital of investors, such as the members of a pension fund, contributors to a mutual fund or shareholders of a bank. Long-established legal principles govern the relationships between fund managers and investors. While individuals may invest directly in the market, in recent

decades most rely on a financial intermediary. In Britain, for example, the proportion of all corporate shares held by individuals fell from 54% in 1963 to below 13% in 2006 (UK, Office for National Statistics, 2007). The legal system imposes fiduciary standards on financial intermediaries to invest carefully in the interests of their beneficiaries and in accordance with the purpose of the particular fund.

Essentially, a fiduciary relationship is a bond of responsibility and dependency, where one person exercises some discretionary power in the interests of another (Shepherd, 1981). This relationship of "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 (Hudson, 1999). Functionally, similar legal arrangements in financial regulation tend to exist in civil law jurisdictions. The relationship of trust involves a duty of loyalty, requiring the fiduciary to act in the beneficiaries' sole or best interests (Langbein, 2005). The fiduciary also has a duty of competence, requiring skill and diligence, which is usually expressed in investment management as the "prudent investor rule" (Longstreth, 1986). Depending on the jurisdiction, the sources of their legal duties come from the common law, legislation and the specific instruments governing an investment entity (e.g. a pension plan's founding agreement). Fiduciary responsibilities however are not uniform across the financial sector. Occupational pension fund trustees are subject to clear fiduciary duties, while the directors of commercial banks do not generally owe an equivalent duty to their depositors.

Fiduciary standards were first seen as a potential constraint to SRI in the 1980s, during the South African divestment campaign (Troyer et al., 1985). Today, the impact of fiduciary duties on a much wider SRI agenda including environmental issues is debated. The World Economic Forum (2005, p. 10) has recommended that authorities "[m]odify pension fiduciary rules which discourage or prohibit explicit trustee consideration of social and environmental aspects of corporate performance". Confidently, a report commissioned by UNEPFI (Freshfields Bruckhaus Deringer, 2005, p. 13) 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". Such an optimistic conclusion however assumes SRI driven by business case criteria.

Fiduciary standards can constrain SRI to the extent they prioritise unadulterated financial goals. Conceptually, a "benefit" to beneficiaries need not be limited to financial values. If they share a moral objection to a particular investment, they may psychologically benefit if their fund avoids it, possibly even to their financial detriment (Palmer et al., 2005, p. 97). In one United States case, the court viewed the nature of a fiduciary relationship as requiring the trustees to safeguard "unique scenic, paleontological, and archaeological values that would have little economic value on the open market".[13] 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 *maximise* financial returns. A judge in one British case opined: "I cannot conceive that trustees have an unqualified duty … simply to invest trust funds in the most profitable investment available".[14] Consequently, fiduciaries may further collateral social and environmental goals so long as financial returns are not unreasonably compromised. Indeed, given evidence that SRI funds do not generally underperform the market (UNEPFI and Mercer, 2007),[15] socially responsible companies can arguably constitute a prudent financial choice. Some social and environmental risks may ultimately affect shareholder value, such as through litigation, regulatory actions, consumer backlash and other costly responses (Edwards, 1998; Mercer, 2005).

The question of whether current fiduciary standards can accommodate SRI also depends on several other variables, including the *methods* of SRI. Strict ethical screens that exclude large portions of the market reduce portfolio diversification and thereby likely diminish risk-adjusted returns (Ellison, 1991). Other SRI strategies such as best-of-class, selecting the most socially responsible firms in each particular economic sector, should allow for retention of an adequately diversified portfolio. Further, shareholder advocacy, whereby investors seek to influence companies from within through shareholder resolutions and other tactics, should contribute to the fulfilment of fiduciary duties (Myners, 2001, p. 92). Finally, the applicable legal instrument constituting the fund is often the foremost authority in governing

a fiduciary's duties and investment decisions.[16] This reflects another aspect of the duty of loyalty. If the trust deed of a pension plan expressly requires social investment to further a specified mission, then the fiduciary must fulfil those criteria unless legislation dictates otherwise.[17]

Disputes about the legality of SRI have resulted in several court rulings. In the UK, the fiduciary responsibilities of trustees were considered in *Cowan v. Scargill*,[18] *Martin v. City of Edinburgh District Council*,[19] and *Harries and others v. Church Commissioners* for England.[20] In *Cowan*, 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, the best interests of the beneficiaries normally meant only their *financial* interests.[21] Trustees could consider non-financial criteria in constructing such a portfolio, provided such alternate investments were equally beneficial to the beneficiaries. The most noteworthy United States case on SRI is the *Board of Trustees of Employee Retirement System of the City of Baltimore v. City of Baltimore*. It involved public sector pension plans that were directed under the municipality's ordinances to divest from companies engaged in business in South Africa. In a legal challenge, 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".[22]

Because SRI is increasingly viewed as a means to prosperity, entailing no financial sacrifice, such legal precedents pose little hindrance to its advancement. Indeed, the average SRI portfolio sometimes appears little different to a regular investment fund. 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 corporation to be considered as an SRI portfolio company" (Hawken, 2004, p. 16). Investment policies that prioritise ethical goals of course remain problematic, except to some extent in the retail market where mutual funds can tailor ethical investment products to meet any public demand. Otherwise, fiduciary investment standards do not *require* consideration of social and environmental matters.

Fiduciary finance: performance metrics for sustainability

A reformed fiduciary standard to stimulate ethically based SRI will be unworkable if financial institutions are merely accountable to vague prescriptions such as to "promote sustainable development". Such values must be expressed in concrete formulae to be meaningful to financiers. Social accounting and sustainability indicators provide metrics that could help quantify social and environmental performance to underpin a new fiduciary standard.

Social accounting aims to measure the collateral benefits (e.g. public infrastructure and environmental protection) and costs (e.g. damage to natural resources) of economic activity (Quarter et al., 2003; Unerman et al., 2007). Social accountants however have yet to devise means to valuate all social or environmental impacts. Social accounting differs from conventional methodologies associated with the Generally Accepted Accounting Principles (GAAP), by focusing on community and environmental impacts rather than on factors exclusively related to corporate financial health. Nonetheless, years of research on social accounting has hardly influenced conventional financial accounting (Gray et al., 1996). 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 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" sections in corporate financial statements.

While social accounting is not a means of perpetuating business case SRI – for it focuses on pricing social welfare rather than serving corporate business needs – it may not induce better quality SRI. It implies a cost–benefit paradigm that may not ensure maintenance of ecological integrity, as nature may be trumped or substituted by seemingly more pressing values. The Ford Pinto case in the 1970s, where corporate managers used a cost–benefit analysis to conclude that the 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 dangers of instrumental economic calculations (Birsch and

Fielder, 1994). Similar social accounting goals could perhaps be achieved through economic policy instruments such as environmental taxes charged to polluting companies (which in turn would create costs to be accounted for in investment decisions). The usefulness of such economic policy instruments depends on the integrity of the environmental policy goals that they are meant to serve. Social accounting is therefore probably most suitable as one means to help price the cost of social and environmental behaviour and facilitate cost-effective solutions, but it itself does not embody sustainability performance standards.

More useful in this respect are sustainability indicators. They allow progress towards sustainability based on certain social, environmental and other markers to be tracked over time (Bell and Morse, 2008). 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 *per se* require financial quantification. 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 success.

Sustainability indicators differ from traditional indicators of social, economic and environmental progresses that measure changes in one domain (e.g. water quality) by seeking to reflect interconnections among such metrics 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 (Wackernagel and Rees, 1996). New sustainability metrics are being designed for various scales of economic activity, ranging from the global level down to the local community, company and project levels (Keeble et al., 2003). A vast research industry has mushroomed to develop corporate sector sustainability indicators. Ratings of corporate social and environmental performance have become crucial for the SRI industry, providing the basis for portfolio selections. Yet, their competitive proliferation and lack of regulatory oversight and coherence have hindered their reliability.

Sustainability indicators for financial institutions' portfolios as a whole have not been adequately designed. Efforts by a group of European banks to design a set of environmental indicators specifically at the financial sector did not extend to the ecological effects associated with financial transactions. 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…" (Schmid-Schönbein and Braunschweig, 2000, p. 12). One innovative attempt to quantify one 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 (a seminal indicator of sustainability). Its evaluation of 185 investment funds in 2007 found that 25% of the so-called SRI funds polluted more than industry benchmarks (Trucost, 2007).

One cannot assume that if individual firms are acceptable enough to form part of a sustainable portfolio, then the financial institution as a whole is investing sustainably. Mistakenly, 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. Those decision-making systems are important indicators of future performance, whereas most sustainability indicators are lagging indicators tracking only historic impacts. Furthermore, evaluating some environmental impacts at a portfolio level rather than merely an individual firm level helps to provide a more comprehensive picture, consistent with the universal investor thesis, such as of business supply chains and product life-cycle impacts.

Concomitantly, we should be mindful that sustainability indicators and social accounting systems will not reflect all social and environmental aspects of investment. Some issues are too complex for these methods, at least presently. One example is the evaluation of the social equity in the distribution of the benefits and burdens of use of the environment. While investment fiduciaries may be able to effectively respond to discrete social problems, such as divesting from firms that exploit child labour or practice racially discriminatory hiring, fiduciaries can hardly address pervasive social and economic inequalities inherent in a capitalist economy.

Together, sustainability indicators and social accounting provide tools for fiduciary duties to further ethical investment for some aspects of sustainability. The equally significant challenge is how those duties should be legally framed.

Fiduciary duties for SRI

Fiduciary duties for ethical investment may be redefined along a spectrum of ever-increasing exactitude (Richardson, 2007b). At the most liberal end of the spectrum, fiduciary duties could merely authorise fiduciaries to consider those social and environmental factors which they view as financially material. Arguably, this business case approach is already allowable, indeed essential if environmental risks jeopardise short-term returns. Such a reform to fiduciary duties would put the matter beyond doubt. Some jurisdictions already have altered fiduciary standards to give decision-makers more discretion. Connecticut legislation provides that controllers of the Connecticut Retirement Plans and Trust Funds *may* consider the environmental and social implications of investments.[23] 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''.[24] In 2005, a similar provision was grafted into Manitoban pension legislation.[25]

Obviously, the weakness of such a discretionary standard is that it does not *oblige* consideration of social or environmental impacts. Nor does it allow affected third parties to enforce their interests. There is a difference between taking the interests of various parties into account and *owing a duty* to those parties. The duty of loyalty that a fiduciary owes under this model would remain to the fund's beneficiaries.[26] In the absence of other legislative means of recourse, this would make any legal recognition of the social and environmental consequences of investment functionally unenforceable. The main advantage of a discretionary approach is that it would enable fiduciaries to take pre-emptive measures to improve the environmental performance of their investments rather than merely react to known costs or tangible risks.

Alternatively, legislation could enshrine *procedures* to improve the likelihood that fiduciaries would consider the social and environmental impacts of their portfolios. Consideration of such impacts could still be discretionary, but procedural reforms should make it more likely that fiduciaries would act responsibly. Preferably, financiers should be obliged not only to disclose their SRI policies – as required in some jurisdictions – but also their investment methodology and implementation efforts. Financiers' disclosures on SRI could also be audited independently, and deficiencies publicly exposed. More invasively, regulation could authorise outside stakeholders to have a voice in financial institutions' governance, as representatives of particular social and environmental interests or constituencies, or at least to require fiduciaries to consult with third parties. Already, the Equator Principles require signatory banks to consult with local communities who may be affected by projects that they plan to 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 of society. They commonly lack expertise on SRI issues and do not adequately understand modern social and environmental challenges (Gribben and Gitsham, 2006). Appropriately chosen representatives of key stakeholders could strengthen the ethical envelope of investment. 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. In several jurisdictions, legislative proposals have been tabled to include stakeholder rights, including the UK's *Corporate Responsibility Bill* and Australia's *Corporate Code of Conduct Bill*, albeit without success so far (McBeth, 2004).

Reshaping fiduciary duties by these ways is controversial (Donaldson and Preston, 1995). The potential multitude of interests that a fiduciary would need to consider could unduly complicate decision making (Jensen, 2000). Where a fiduciary must consider numerous conflicting interests without any way of prioritising among them, any decision taken that is not blatantly self-interested possibly becomes defensible. One solution would be to

accommodate a voice for stakeholders in an external entity, such as a national ethics council responsible. 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. Sweden and Norway have already established ethics councils to guide their public pension funds.

Further along the spectrum of possible reforms, fiduciaries could be obliged to act for sustainable development or a similar general performance standard. The difficulty would be to design a performance standard with sufficient clarity to make fiduciaries accountable. A vague duty "to promote sustainability" would alone probably not work. Like the societal debates about sustainable development, such a general goal would be subject to discretionary interpretations that would allow problematic trade-offs and perfunctory implementation. It would therefore need to be embellished with prophylactic rules.

Certainly, investing in an ostensibly lawful activity would not necessarily suffice. Commonly, no simple distinction between a permissible and prohibited economic activity exists; typically, most corporate activities or products are controlled, subject to impact assessments, permits and other regulatory checks. And 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 CSR 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 director's duties", according to Williams and Conley (2007, p. 354). Section 172(1) of this legislation requires the directors of a company in promoting the success of their firm to "have regard" to "the impact of the company's operations on the community and the environment". Breach of this duty could make a transaction voidable and result in civil liability for directors. Applied to financial institutions, such a standard could help to redefine fiduciary duties of institutional investors along the lines of Hawley and Williams' (2000) "universal owner" thesis. The financial success of institutional investors, with economy-wide portfolios, is unlikely to be insulated from the social and environmental stresses that a single corporation may avoid.

Yet, this model has limitations. The profitability of the financial institution and, ultimately, its beneficiaries, remains the overarching goal. Without other reforms, this construction of fiduciary duties could jeopardise any inclination to invest sustainably. While universal owners may respond to the externalities of individual companies that create costs elsewhere in the economy, universal owners may be blind to the externalities of the market as a whole. Moreover, the tendency to delegate investment management to specialist fund managers, with short-term performance targets, coupled with reliance on corporate valuation models that do not measure economic factors holistically, further undermines universal sustainable investing. Additional reforms are required to align universal owners with ethical investment.

For example, sustainability indicators could be prescribed by regulation to effectively set fiduciary performance benchmarks, such as for the carbon footprint of a portfolio or other broad indicators enabling a fuller view of environmental performance. By this approach, fiduciaries would not be required to estimate and account for the social and environmental costs and benefits of investments. Rather, they would need to ensure that their total investment portfolio adheres to prescribed sustainability benchmarks by whatever means they choose. Its advantages are setting clear benchmarks for financiers while avoiding prescribed methods for arriving at set results. Financial institutions that fail to meet such standards could be subject to regulatory sanctions including future restrictions on their investment choices or financial penalties to reflect social costs.

Thus, the fiduciary standard by this model would effectively emphasise the "returns" to society as a whole. While the language of "returns" may sound too instrumental for ecological ethicists, it simply is one way of articulating in the vocabulary of financial analysts the goals of maintaining and enhancing ecological integrity. But, crucially, while investors could continue to be legally defined as the sole beneficiaries of such fiduciary duties, diminishing sustainability would no longer be a permissible means of obtaining financial gain. While some values and practices, particularly in areas such as human

rights, may defy simplification into sustainability indicators, supplementary means such as duties to conduct social impact assessments and consult with affected stakeholders might assist. The next section canvasses some options for additional reforms to promote ethical investment for sustainability.

Secondary reforms

To keep ethical investment ethical will require more from law-makers than redefined fiduciary obligations. For example, in the retail investment market, mutual funds have much more flexibility in their investment choices and conceivably can cater to any value that investors demand including those oppressive to environmental considerations. In the banking sector, in most jurisdictions lenders do not owe depositors a fiduciary duty, and banks have sometimes been implicated in financing environmentally controversial projects (BankTrack, 2004). Therefore, other kinds of policy tools must be harnessed to capture the diverse array of financial entities and transactions.

As a priority, reformers must seek to improve the quality of corporate environmental and social reporting. Having companies report regularly and comprehensively on their environmental and social activities and impacts can help greatly to generate reliable information to inform SRI choices (Harte et al., 1991). Certainly, in the current investment climate, such information alone will not induce SRI if the financial implications of corporate behaviour are not apparent to financiers. But, conversely, without such information, financiers mandated to invest ethically would face enormous difficulties deciding which firms represent ethical choices. Traditionally, corporate financial reporting has not reflected the social and environmental costs and benefits of business activity. Securities regulation in the United States, Canada and other major jurisdictions requires disclosure of financially material environmental costs, but implementation of such requirements has been patchy (Government Accountability Office, 2004). Alternatively, in some jurisdictions, separate corporate environmental reporting standards have been legislated, such as in France, the Netherlands, Sweden and Denmark, among various examples (KPMG, 2005).

Corporate governance must also be reformed. The importance of democratising governance within financial institutions has already been canvassed. Comparable reforms at the corporate level are necessary given that social investors sometimes rely on shareholder advocacy as a means of changing recalcitrant firms from within. Shareholder resolutions sponsored by institutional investors are a seminal means by which financiers can seek to influence company policy (Del Guercio and Hawkins, 1999). In some jurisdictions, significant barriers to shareholder activism persist, such as restrictions on the type of issues that can be raised in a shareholder resolution and the passive culture of voting fostered by proxy contest rules (Sarra, 2003). Among possible reforms beyond liberalising the use of shareholder resolutions, investment institutions could be required to register their share votes, so as to encourage them to formulate and express a view on all issues put to a vote at shareholder meetings. Another possibility is the appointment of more minority-independent directors to corporate boards, nominated by various stakeholder constituencies rather than by the firm's management (Gilson and Kraakman, 1991, p. 870).

Economic instruments, such as pollution taxes and tradeable emission allowances, provide another area for reform. They can attribute quantified negative and positive externalities to firms, for reflection in their earnings, competitiveness and, ultimately, share prices and other financial indicators. This attribution, in turn, should influence the allocation of capital, making polluters competitively disadvantaged. While SRI regulation cannot rest only on a system of monetary incentives if it wishes to move beyond the business case, it is one of the most politically viable reforms. Already, the Netherlands' tax incentives for green project investments have catalysed the Dutch SRI market, accounting for about half of its SRI (Scholtens, 2005). Taxes can also reward long-term investment, such as by levying charges on short-term gains from trading shares. While such measures can help strengthen the business case for SRI, they can also help reduce resistance to ethical investment by negating the countervailing economic incentives.

Another kind of economic instrument is created by liability rules, under which a company or even its financial sponsor is responsible for the costs of

pollution or other environmental damage. This can illuminate the environmental impacts of investment more acutely to financial investors. Liability of financiers could arise where an institutional shareholder was in a position to exert significant influence or where a lender disregarded due diligence requirements for assessing a borrower's environmental safeguards. Such costs would ultimately affect the cost of finance. In the United States, lender liability under the 1980 "Superfund" legislation for cleanup of contaminated lands had some sobering effects on the behaviour of banks (Norton, 1995). However, financier liability has several drawbacks that limit its contribution to SRI. Unlike environmental taxes, the liability model depends upon a well-resourced plaintiff willing to challenge a polluter in court. Further, the complex evidential rules under which such law suits must be proved, greatly hinder the chances of successful litigation. More fundamentally, tying the liability of a bank or investment fund to the environmental harms of the firms that it finances ignores the argument that sometimes financiers should be held to a higher standard of behaviour given both their strategic environmental significance and the wider economic repercussions if they fail.

States must also get their own house in order. Public finance, such as public sector pension funds, can be "a potentially powerful catalyst for change" towards sustainable development (Hess, 2007, p. 42). States could mobilise public capital to address strategic social and environmental issues, as occurs to some extent in the national pension plans of Scandinavia and France that are obliged to invest ethically and responsibly. Through their central banks, states could also influence capital allocation by giving preferential treatment to environmentally critical industries. In an international context, foreign aid and multilateral development investments provide further contexts for SRI (Handl, 2001; Tarp, 2000). Public–private financing partnerships, availed sometimes in multilateral finance, offer a novel way by which governments can guide financial markets (French, 1998). Environmental-conditioned partnerships on preferential terms could bridge the cost gap between what private financiers wish to commit and what is necessary for environmentally sustainable investments.

Finally, among possible collateral reforms for SRI that are less tied to economic incentives and self-interest, an international treaty setting social and environmental standards for global finance would be beneficial. SRI governance can no longer hinge solely on national standards (Doering et al., 2002, p. 54). International level financial regulation would mitigate a deleterious race to the bottom, as common standards should reduce the incentives for financiers to flee to the most regulatorily benign markets. The existing panoply of voluntary international standards, such as the UNPRI or Equator Principles, lacks the exacting standards required. An international treaty could prescribe a general fiduciary duty for sustainability, clear sustainability performance standards and more robust procedural standards on public disclosure and consultation. Certainly, this is not an easy path, for the fate of the UN Norms on the Responsibilities of Transnational Corporations proposed in 2002 illustrates the obstacles that vested interests would create to such a comprehensive challenge to the freedoms of global finance.

Conclusions

So far, SRI has had an evolutionary rather than revolutionary impact on financial markets. In its traditional guise, SRI provides both a warning and an opportunity to the financial sector. It warns that investment practices often impair ecological health and intensify social injustice. It also presents an opportunity to reform those practices and thereby enable financiers to contribute to sustainability policy goals. While the SRI market is flourishing, underlying practices remain largely unchanged; investors may acknowledge environmental problems where they are financially material to the bottom line, but they discreetly eschew deeper ethical issues. The business case model of SRI sanguinely transforms the tensions between environmental protection and profitable investment into a harmonious relationship. Of course, that environmental care and business success can be compatible is not deniable – financiers should benefit from companies that reduce their ecological footprint.

The objection arises in how some financiers masquerading as responsible investors merely tinker with unsustainable practices. Tethered to a philosophy of financial materiality, the business case may address some environmental problems through

improved research and analysis. However, it cannot accommodate ecological issues not valued by the market, and existing strategies in this model are unlikely to transform investment "value" to incorporate other non-financial factors. 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, a countervailing business case for intensifying environmentally unsustainably practices will be evaluated. Thus, despite the SRI industry's rhetoric about climate change risks, the fossil fuel industry has hardly changed as surging investment in Alberta's oil sands lamentably shows (Makin, 2007).

To keep ethical investment ethical necessitates many changes to SRI regulation. The legal system is the midwife of society, translating its values and expectations into workable policy instruments for implementation. Among the menu of reforms, the reformulation of 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 thereby financiers steered towards 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 the environment. Legal reforms to improve the business case for SRI can help, but harnessing economic self-interest must be a means to an end, not the end itself. To properly address the causes of humankind's unsustainable path, the financial sector like other economic sectors must function within a broader ethical envelope that prioritises other values.

Notes

[1] See http://www.iccr.org/issues/globalwarm/goalsobjectives.php.

[2] http://www.foe.org/camps/intl/declaration.html.

[3] Remarks, Noel Purcell, Group General Manager, Westpac (UNEPFI Global Roundtable, Melbourne, 24–25 October 2007).

[4] For example, UK's *Occupational Pension Schemes (Investment) Regulations*, 2005: cl. 2(3)(b)(vi)–(3)(c); Australia's *Corporations Act*, 2001 (Cth), s. 1013D(1)(l) and France's *Projet de loi sur l'épargne salariale* (7 February 2001). No. 2001-152, arts. 21, 23.

[5] Securities Exchange Commission (SEC), "Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies" (SEC, 31 January 2003), 17 CFR Parts 239, 249, 270 and 274; Canadian Securities Administrators (CSA), *National Instrument 81-106 Investment Fund Continuous Disclosure and Companion Policy 81-106CP* (CSA, 2005).

[6] http://www.globalreporting.org.

[7] http://www.cdproject.net.

[8] *Lag om allmänna pensionsfonder* (AP –Fonder), *Svensk författningssamling* (2000): 192, as amended.

[9] http://www.unpri.org/principles.

[10] http://www.equator-principles.com.

[11] http://www.earthcharter.org.

[12] See http://www.foe.org/camps/intl/declaration.html.

[13] *National Parks and Conservation Authority v. Board of State Lands* (1993) 869 P.2d 909, 921 (S.C. Utah).

[14] *Martin v. Edinburgh (City) District Council* [1988] S.L.T. 329, 334 (per Lord Murray).

[15] Though, one possible reason why SRI funds tend not to underperform is that many do not hold investment portfolios significantly different to the market generally.

[16] See *McCreight v. 146919 Canada Ltd* [1991] O.J. No. 136.

[17] Pension legislation often mandates priority to financial investment returns [e.g. US's *Employee Retirement Income Security Act* 1974, s. 404(a)(1)(D)].

[18] [1985] 1 Ch. 270.

[19] [1988] S.L.T. 329.

[20] [1992] 1 W.L.R. 1241; [1993] 2 All E.R. 300.

[21] [1985] 1 Ch. 270.

[22] (1989) 317 Md. 72; 562 A.2d 720, 107.

[23] Conn. Gen. Stat. (2002), s. 3-13d(a).

[24] *Trustee Act*, S.M. 1995, s. 79.1.

[25] *Pension Benefits Amendment Act*, S.M. 2005, s. 28.1(2.2).

[26] [2004] 3 S.C.R. 461, 2004 S.C.C. 68, para. 43.

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