

Protecting Indigenous Peoples Through Socially Responsible Investment

BENJAMIN J. RICHARDSON*

I	IMAGINING A NEW APPROACH	206
II	THE FINANCIAL SECTOR: A LEVIATHAN TO RIVAL THE STATE	207
	Finance Capitalism	207
	Indigenous Peoples in the Financial Economy	209
III	SOCIALLY RESPONSIBLE INVESTMENT	211
IV	SRI FOR INDIGENOUS PEOPLES	213
	Opportunities and Constraints	213
	Multilateral Development Banks	215
	Private Sector SRI	217
	<i>SRI Screens</i>	217
	<i>Shareholder Activism</i>	219
	<i>Community Finance</i>	221
V	SRI GOVERNANCE FOR INDIGENOUS PEOPLES	223
	Introduction	223
	Equator Principles	224
	UN Norms on the Responsibilities of Transnational Corporations	226
	SRI Stock Market Indexes	228
	National Laws for SRI	230
VI	CONCLUSION	233

* Osgoode Hall Law School, Toronto. Professor Richardson is the co-director of Osgoode's Intensive Program in Aboriginal Lands, Resources and Governments. He wishes to thank Osgoode law student Linda Chiasson for her editorial assistance.

This paper canvasses a new approach to protecting Indigenous peoples that targets the institutions that financially sponsor the development projects and companies that can often harm Indigenous livelihoods. To revitalize and protect their communities and legal systems, Indigenous peoples must reckon with the power of financial markets. Encouragingly, through the movement for socially responsible investment, which has had earlier successes such as its campaign against investment in apartheid South Africa, some financiers are beginning to respect Indigenous rights and interests. Some mutual funds remove companies that violate Indigenous rights from their investment portfolios, while other investors seek change through shareholder activism. Much more needs to be done, however, if SRI is to have an impact. Some states have started to introduce informational and incentive based policy mechanisms to promote SRI, which may eventually enable the financial sector to be a source of support rather than an obstacle to Indigenous self-determination.

I IMAGINING A NEW APPROACH

Imagine the following scenarios. First, a bank declines to finance a mining company owing to concerns that its mine poses unacceptable risks to the environment of Indigenous peoples. Then, a pension fund divests from agricultural businesses that misuse Indigenous land. Further, a mutual fund boycotts a lucrative pharmaceutical company that infringes on Indigenous medicinal knowledge. In this picture, these decisions are normal, everyday occurrences in the financial world.

If all this were true—not just in the realm of imagination—Indigenous peoples would presumably be in a much better position to revitalize their communities and legal systems. Aboriginal title, resource rights, self-government, and other familiar indicia of Indigenous self-determination are necessary but insufficient conditions for revival. The state is not the sole source of power to reckon with. Indigenous right-holders must also contend with markets and the business sector. Land rights lose some of their lustre where capital markets decline to invest in Indigenous communities and thereby hinder economic development. Conversely, mining or energy companies financed by international banks may take advantage of an indigent First Nation to profit from environmentally and culturally problematic development on their territory.

Such was the plight of many peoples in the so-called “developing countries” of Africa, Latin America and other regions whose hopes for prosperity in the wake of decolonization were dashed. The inequalities of a world economic system that denies them fair trade, access to capital

resources and control over their economic policy have left many of these people destitute.¹ Post-colonial scholarship has illuminated how attainment of formal political sovereignty may obfuscate an ongoing, and often veiled, oppression of the developing world by new and unequal economic relations.²

Starting from the premise that Indigenous peoples must not ignore the impact of the business sector on their prospects for self-determination, this article focuses on the financial sector and the potential of the socially responsible investment (“SRI”) movement to provide a pathway for revitalization of Indigenous communities. First Nations should not see their relationship to the state as the only means for obtaining recognition and protection of their cultural and legal interests. Indigenous peoples must also reckon with the financial sector such as banks and pension funds, which play a pivotal role in sponsoring economic development that may harm or benefit First Nations. Presently, financial institutions are generally not regulated for the social and environmental impacts of the projects and companies they support. However, through the SRI movement, financiers are beginning to pay attention to human rights and sustainable development. Whether SRI can achieve sufficient influence without new forms of regulation is debatable however.

II THE FINANCIAL SECTOR: A LEVIATHAN TO RIVAL THE STATE

Finance Capitalism

Through its extensive investments worldwide, the financial sector has become a leviathan. Incongruously, that pervasive power has not been matched by increased public accountability. Indeed, the financial sector’s growth is partly a direct result of government policy to deregulate and

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1. See S. George, *A Fate Worse Than Debt* (London: Penguin Books, 1990); I. Wallerstein, “Dependence in an Interdependent World: The Limited Possibilities of Transformation within the Capitalist World Economy” (1974) 17 *African Studies Rev.* 1; S. Amin, *Unequal Development: An Essay on the Social Formations of Peripheral Capitalism* (New York: Monthly Review Press, 1976); R.P. Buckley, “International Capital Flows, Economic Sovereignty and Developing Countries” *Y.B. of International and Financial Law* (London: Kluwer Law, 1999) at 17.
 2. See G. Rajan & R. Mohanram, eds., *Postcolonial Discourse and Changing Cultural Contexts* (Westport, Conn.: Greenwood Press, 1995); P. Williams & L. Chrisman, eds., *Colonial Discourse and Post-Colonial Theory: A Reader* (New York: Longman, 1994).

liberalize financial markets.³ Environmental protection and social justice hardly feature in contemporary financial regulation. Financial institutions remain generally legally unaccountable for the social and environmental sequelae of their investments. Yet, as the financial sector sponsors and profits from economic development, it arguably should share accountability for the impacts of that development on Indigenous peoples and their interests.

The function of a financial system is essentially to distribute capital from actors with surpluses to those with shortages.⁴ Financial institutions play a crucial mediating role in circulating capital. Behind the development activities of “ordinary” corporations (and often governments too), financial institutions such as banks and mutual funds supply the capital necessary for economic activity.⁵ The finance sector is thus essentially where wholesale decisions about future development begin.

Institutional investors now rival or exceed governments in the financial resources they command, marking an era of “finance capitalism.”⁶ Finance capitalism has entailed the ceding of sovereignty to financial markets, particularly through deregulation of financial activities,⁷ growing corporate demand for external financing, and granting more power to fund managers, credit-rating agencies and other intermediaries. Finance capitalism reflects a shift in the power of the corporation away from managers to shareholders and institutional investors who represent them. They are concentrating formerly dispersed shareholders with ownership stakes unknown since the great industrialists of the 19th century. Some critics view this trend as the greatest threat to our democratic institutions.⁸ Others such as Stephen Davis welcome it, because to him as pension plans and mutual funds are invested

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3. Other factors include technology advances, underlying income growth, and demographic changes resulting in more savings for retirement: P.L. Davies, “Institutional Investors in the United Kingdom” in D.D. Prentice & P.R.J. Holland, eds., *Contemporary Issues in Corporate Governance* (Oxford: Clarendon Press, 1993) at 69, 72-73; H. Blommestein & N. Funke, “Introduction to Institutional Investors and Institutional Investing” in OECD, ed., *Institutional Investors in the New Financial Landscape* (Paris: OECD, 1998) at 15-16.
 4. R.G. Hubbard, *Money, the Financial System, and the Economy* (New York: Pearson/Addison-Wesley, 2005).
 5. J. Corbett & T. Jenkinson, “How is Investment Financed: A Study of Germany, Japan, the United Kingdom and the United States” (1997) 65:1 *Manchester School Supplement* 69.
 6. L. Neal, *The Rise of Financial Capitalism: International Capital Markets in the Age of Reason* (Cambridge: Cambridge University Press, 1990).
 7. World Bank, *Financial Deregulation: Changing the Rules of the Game* (Washington, D.C.: World Bank, 1992) (e.g., removal of interest-rate controls, fewer restrictions on foreign investment, and the removal of regulations segmenting financial service markets).
 8. N. Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* (New York: Free Press, 2002); E. Toussiant, *Your Money or Your Life: The Tyranny of Global Finance* (Chicago: Haymarket Books, 2005).

on behalf of millions of beneficiaries, to whom they owe fiduciary duties, they are surreptitiously democratizing corporate ownership.⁹

Indigenous Peoples in the Financial Economy

The finance sector affects Indigenous peoples in two primary ways. First, it finances specific projects and companies that bring changes to Indigenous livelihoods. In recent years, various large infrastructure projects financed by banks have wrought great harm to Indigenous peoples in their vicinity.¹⁰ Such projects include Ok Tedi mine (Papua New Guinea), Freeport mine (Indonesia), Narmada dam (India), Jabiluka mine (Australia) and Sakhalin II pipeline (Russia). For instance, the expansion of Freeport mine was, according to BankTrack, “only made possible by a massive capital raising campaign, in which banks underwrote new equity shares and bonds, and lent hundreds of millions of dollars in general purpose loans.”¹¹ Within Canada, some of the big banks have also been implicated in financing forestry and mining companies on unceded Aboriginal lands.¹² Too often lenders only belatedly and defensively consider the impacts of such ventures when protests and other actions create reputational risks and expensive delays for them.

The second way the finance sector threatens Indigenous peoples is more diffuse and harder to quantify. The finance sector, as the handmaiden of capitalism, helps propagate values in the development process that are controversial for Indigenous peoples.¹³ Certainly, First Nations have a long history of forced or consensual adaptation to markets and trading.¹⁴ Such

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9. S. Davis, J. Lukomnik & D. Pitt-Watson, *The New Capitalists. How Citizen Investors Are Reshaping the Corporate Agenda* (Boston: Harvard Business School Press, 2006) at 3-6.
 10. E.g., C. Ballard & G. Banks, “Resource Wars: The Anthropology of Mining” (2003) 32 *Annual Review of Anthropology* 287; W.F. Fisher, “Going Under: Indigenous Peoples and the Struggle Against Large Dams” (1999) 23:3 *Cultural Survival Quarterly* 29; A. Gedicks, *The New Resource Wars: Native and Environmental Struggles Against Multinational Corporations* (Cambridge, Mass.: South End Press, 1993).
 11. Letter from Johan Frijns, Coordinator, on behalf of the BankTrack network, to Dr. John Ruggie, United Nations Secretary General’s Special Representative on Human Rights & Business, “The Role of the Financial Services Sector in Respecting Human Rights” (18 December 2006), online: BankTrack <<http://www.banktrack.org>> at 3.
 12. Forest Action Network (“FAN”), *Banking Can Be This Destructive* (British Columbia: FAN, 2001) at 11.
 13. J. Nash, “Indigenous Development Alternatives” (2003) 32 *Urban Anthropology and Studies of Cultural Systems and World Economic Development* 57; Chun-Chieh Chi, “Capitalist Expansion and Indigenous Land Rights: Emerging Environmental Justice Issues in Taiwan” (2001) 2:2 *Asia Pac. J. Indigenous Land Rights* 1444.
 14. E.g., A.J. Ray, *Indians in the Fur Trade* (Toronto: University of Toronto Press, 1974).

adaptation has often been costly, bringing unwelcome cultural change.¹⁵ Consider, for instance, the stark differences in the environmental values between Indigenous cultures and Western capitalist societies. In contrast to the instrumental and utilitarian views of nature in industrial capitalism, Indigenous peoples traditionally saw themselves as part of the community of nature, aware that misuse of the environment would inevitably reverberate and harm their livelihoods.¹⁶ As Indigenous peoples have become increasingly drawn into a world market, where Indigenous lands and resources are conscripted into economic development servicing global needs, these environmental values have weakened.¹⁷

Unacceptably, existing international laws concerning Indigenous peoples ignore the financial sector. The International Labour Organisation (“ILO”) *Convention No. 169* (1989)¹⁸ and *United Nations Declaration on the Rights of Indigenous Peoples* (2006)¹⁹ both disregard financial and corporate sectors. This is a curious omission for instruments otherwise pioneering for their putative recognition of Indigenous peoples as an international legal personality. By failing to impose a responsibility on business to respect Indigenous rights, the ILO *Convention* and UN *Declaration* conceptualize international legal obligations conservatively. These instruments blithely assume that the behaviour of business is simply a matter for states to supervise and need not concern international law-makers.²⁰

Indigenous peoples themselves at times also fail to appreciate the influence of those financing developments that threaten their livelihoods.

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15. The resistance of many Indigenous peoples to the appropriation and commercialization of their traditional knowledge is one example. For example, the 1993 *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* states: “Commercialisation of any traditional plants and medicines of Indigenous peoples must be managed by the Indigenous peoples who have inherited such knowledge. A moratorium on any further commercialisation of Indigenous medicinal plants and human genetic materials must be declared until Indigenous communities have developed appropriate protection mechanisms”: online, Alaska Native Knowledge Network <<http://www.ankn.uaf.edu/IKS/mataatua.html>> at clauses 2.6-2.8.
 16. See A. Dunning, *Guardians of the Land: Indigenous Peoples and the Health of the Earth* (Washington, D.C.: Worldwatch Institute, 1992); T. Inglis, ed., *Traditional Ecological Knowledge: Concepts and Cases* (Ottawa: International Development Research Centre, 1993). Though, there is some evidence to the contrary, suggesting Indigenous people’s association with ecological degradation: T. Flannery, *The Future Eaters* (Auckland: Reed Books, 1995).
 17. B.J. Richardson & D. Craig, “Indigenous Peoples, Law and the Environment” in B.J. Richardson & S. Wood, eds., *Environmental Law for Sustainability* (Oxford: Hart Publishing, 2006) 195 at 200.
 18. *ILO Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries*, 27 June 1989, 28 I.L.M. 1382 (entered into force 5 September 1991).
 19. UN Doc. A/HRC/1/L.10 (30 June 2006).
 20. Large transnational corporations can yield more economic resources and power than some nation-states: see D.C. Korten, *When Corporations Rule the World* (Bloomfield, Conn.: Kumarian Press, 1995); S. Beder, *Global Spin: The Corporate Assault on Environmentalism* (White River Junction, Vt.: Chelsea Green, 1998).

Their protests typically do not take them to the boardrooms of international banks or pension funds. Instead, they tend to vent their concerns where threats seem to physically materialize, such as the mining site. Or they petition government regulators wrongly perceived as in charge.²¹ For instance, Indigenous peoples challenged the Sakhalin Island pipeline being constructed in eastern Russia by blocking roads leading to the oil and gas facility projects.²² These tactics are much like other civil societal groups, though there is evidence of increased NGO campaigning directly against financial institutions.²³

III SOCIALLY RESPONSIBLE INVESTMENT

Socially responsible investment, also known as ethical investment, considers the social, environmental and ethical consequences of providing financial capital to companies. By focusing on the financial market aspect of development, SRI promises a novel way to achieve social justice for Indigenous peoples. SRI is, in effect, a form of market governance, whereby ethical financial institutions attempt to discipline companies needing funds by setting social and environmental standards.

SRI rejects the traditional conceptualization of financial markets as amoral, driven only by economic rationality. From the 1700s, the Quakers were the first among many religious groups to eschew investments in sin businesses connected to slave trade or producing intoxicants.²⁴ During the 1970s and 1980s, faith-based investors also led campaigns to boycott companies doing business in apartheid South Africa.²⁵ Today, SRI has matured beyond church-based activism with single-issue concerns, into a broad agenda for socially and environmentally responsible financing.²⁶ Though growing quickly, the SRI sector nonetheless has captured only a small market; it averages just 3–5 per cent of the investment market in major

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21. A. Gedicks, *Resource Rebels: Native Challenges to Mining and Oil Corporations* (Cambridge, Mass.: South End Press, 2001); B.J. Cummings, "Dam the Rivers; Damn the People: Hydroelectric Development and Resistance in Amazonian Brazil" (1995) 35:2 *Earth and Environmental Science* 151.
 22. "Sakhalin Indigenous People Blockade Oil Development" *Environment News Service* (30 June 2005), online: <<http://www.ens-newswire.com/ens/jun2005/2005-06-30-02.asp>>.
 23. See especially S. Waygood, *Capital Market Campaigning: The Impact of NGOs on Companies, Shareholder Value and Reputational Risk* (London: Risk Books, 2005).
 24. See J.R. Soderlund, *Quakers and Slavery: A Divided Spirit* (Princeton: Princeton University Press, 1985).
 25. W. Kaempfer, J. Lehmen & A. Lowenberg, "The Economics of Anti-Apartheid Investment Sanctions" (1987) 68:3 *Social Science Quarterly* 528.
 26. R. Sparkes, "A Historical Perspective on the Growth of Socially Responsible Investment" in R. Sullivan & C. Mackenzie, eds., *Responsible Investment* (Sheffield: Greenleaf, 2006) at 39.

economies, thus limiting its ability to influence change.²⁷ But, if SRI became a mainstream approach to financing, financial markets might contribute significantly to social justice for Indigenous peoples, among other causes.

SRI is practised by a diversity of institutions.²⁸ Faith-based investors such as the Church of England and the Methodist Church remain significant ethical investors.²⁹ The U.S.-based Interfaith Center on Corporate Responsibility (“ICCR”) is the world’s leading institution for interfaith collaboration on SRI.³⁰ Some occupational pension funds, especially in the public sector and among trade unions, have emerged as ardent social investors.³¹ Banks and credit unions have begun to promote community investing and responsible project financing. The SRI sector has also expanded from the institutional to the retail sector, with a proliferation of specialist ethical mutual funds marketed to the general public.³² Finally, some micro-finance institutions dedicated specifically to Indigenous peoples have been established.

The methods of SRI are as diverse as its agenda. Investors rely primarily on screens to exclude companies involved in activities considered by the financier as inappropriate, or to actively select businesses involved in practices perceived as particularly desirable.³³ Alternatively, the “best of sector” method chooses firms that perform best in their sector according to specified indicators. Another SRI methodology commits financiers to consider social and environmental issues if perceived as financially “material.” Materiality arises when a company’s social and environmental

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27. Social Investment Forum (“SIF”), *2005 Report on Socially Responsible Investing Trends in the United States: A 10-Year Review* (Washington, D.C.: SIF, January 2006); European Social Investment Forum (“EUROSIF”), *Socially Responsible Investment among European Institutional Investors* (Paris: EUROSIF, 2003).
 28. For an overview, see M. Jeucken, *Sustainable Finance and Banking: The Financial Sector and the Future of the Planet* (London: Earthscan, 2001); S. Labatt & R.R. White, *Environmental Finance: A Guide to Environmental Risk Assessment and Financial Products* (London: John Wiley and Sons, 2002).
 29. N. Kreander, K. McPhail & D. Molyneaux, “God’s Fund Managers: A Critical Study of Stock Market Investment Practices of the Church of England and UK Methodists” (2004) 17:3 *Accounting, Auditing & Accountability Journal* 408.
 30. See their web page, online: <<http://www.iccr.org/about>>.
 31. K. Murrmann, J. Shaffer & R. Wokutch, “Social Investing by State Public Employee Pension Funds” (1984) 35:6 *Lab. L.J.* 360; J. Quarter, *et al.*, “Special Investment by Union-Based Pension Funds and Labour-Sponsored Investment Funds in Canada” (2001) 56:1 *Industrial Relations* 92.
 32. C. Cowton, “The Development of Ethical Investment Products” in A. Prindl & B. Prodhan, eds., *Ethical Conflicts in Finance* (Oxford: Blackwell, 1994).
 33. See P. Kinder, S. Lydenberg & A. Domini, *The Social Investment Almanac* (New York: Henry Holt, 1992); R. Sparkes, *The Ethical Investor* (New York: HarperCollins, 1995).

performance poses risks and liabilities or may improve financial returns.³⁴ Finally, some investors deliberately target problematic businesses to change them from within. Through corporate engagement and shareholder action, a financier may actively lobby and use equity voting rights and other sources of influence to push the business to improve its environmental and social performance.³⁵

One concern is that while the SRI movement is increasingly advocating respect for Indigenous rights, First Nations are typically not significant participants in the movement, let alone financial markets. Where they are without significant assets of their own, or are unwilling to commercialize their resources, First Nations must hope that SRI institutions heed their actual concerns and interests.

IV SRI FOR INDIGENOUS PEOPLES

Opportunities and Constraints

Indigenous peoples should be a quintessential SRI cause as they elicit both human rights and environmental concerns. Indigenous land rights have cultural significance and relevance for environmental stewardship, for instance. Misuse of Aboriginal land can have severe social and ecological consequences when the Indigenous custodians are displaced.³⁶ They should therefore appeal equally to investors sensitive primarily to human rights and social justice, as well as investors preoccupied with ecological and sustainable development problems.

Socially responsible investors began to acknowledge Indigenous rights in the 1980s, coinciding with the multilateral development banks' initial policies to manage the impacts of their loans on tribal and other local peoples. While intergovernmental banks continue to develop their policies, mutual funds and pension plans, private financiers are forging other ways to respect Indigenous rights.

Compared to other SRI causes, however, Indigenous rights generally garner less attention from investors. Historically, responsible investment was driven by an ecclesiastical agenda, tied to avoiding the sins of tobacco,

34. Brokerage House Analysts, *The Materiality of Social Environmental and Corporate Governance Issues to Equity Pricing* (Geneva: United Nations Environment Programme Finance Initiative, 2004).

35. A.K. Prevost & R.P. Rao, "Of What Value Are Shareholder Proposals Sponsored by Public Pension Funds?" (2000) 73:2 *Journal of Business* 177; A. Lewis & C. MacKenzie, "Support for Shareholder Activism among U.K. Investors" (2000) 24:3 *Journal of Business Ethics* 167.

36. R. Howitt, *Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples* (London: Routledge, 2001).

gambling, alcohol and pornography.³⁷ While SRI is outgrowing its religious roots, Indigenous rights must now share a crowded field of SRI causes including climate change, armaments and child labour. Climate change attracts vastly more media attention than other issues, and therefore carries greater reputational risks for investors.³⁸ Financiers may also perceive Indigenous peoples as an idiosyncratic, country-specific concern rather than of global significance.³⁹ Even in jurisdictions with Aboriginal populations, investors have tended to treat Indigenous rights as a relatively low priority compared to corporate governance, market conditions and other seemingly more pressing economic matters.⁴⁰

Another constraint to SRI for Indigenous peoples is that investors may lack accurate and reliable information on which to base investment decisions. According to Baue:

Accessibility to information is the biggest challenge in applying [Indigenous peoples'] rights screens. The areas are remote and getting accurate information is expensive and difficult. Even where information is available, there may be questions on the credibility or reliability of such information.⁴¹

To the extent that investors heed Indigenous peoples, they are driven principally either by the financial risks or benefits at stake, or by ethical and social justice imperatives.

Financial risks and benefits are manifold. Companies that respect human rights gain reputational advantages and protect brand image. Companies' access to natural resources can improve through friendly relations with Indigenous landowners. Firms that exploit Indigenous people's knowledge and resources without consent risk resistance and litigation.⁴² Such conduct may also incur loss of preferred business partner status in competitive tendering. The social licence gained from working cooperatively with Indigenous peoples can give companies competitive market advantages.

37. Sparkes, *supra* note 26 at 39.

38. Association of Investment Companies, Press Release, "Most Investors Concerned about the Climate" (16 March 2007); J. Leggett, "Climate Change and the Banking Industry: A Question of Both Risk and Opportunity" (1996) 179 *Bankers Magazine* 25.

39. Personal communication, investment advisor, London, U.K. (27 February 2007).

40. J. Tippet, "Investors' Perceptions of the Relative Importance of Investment Issue" (2000) 24:3 *Accounting Forum* 278 (discussing the low profile of Aboriginal rights among Australian investors).

41. W. Baue, "The Emergence Story behind Indigenous Peoples Rights Screens" *Institutional Shareowner* (10 June 2004), online: <<http://www.institutionalshareowner.com/news/article.cgi?sfArticleId=1439>>.

42. E.g., I. Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (Vancouver: University of British Columbia Press, 2006); G. Manners, "Unresolved Conflicts in Australian Mineral and Energy Resource Policies" (1992) 158:2 *Geographical Journal* 129.

The case of Platinex, a Canadian mining exploration company, epitomizes the risks to companies and their investors when they disregard Indigenous interests. Platinex suffered a costly setback in 2006 when it tried to intimidate the Kitchenuhmaykoosib Inninuwug First Nation (“KIFN”) by suing them for a preposterous CAD\$10 billion and attempting to have KIFN members barred from protesting at Platinex’s drilling sites. In *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*,⁴³ the Ontario Superior Court of Justice granted KIFN an interlocutory injunction prohibiting Platinex from exploration on lands subject to KIFN’s ongoing claims. Judge Smith accepted that Platinex faced severe financial problems and possibly bankruptcy if not granted the injunction it sought. But he faulted Platinex for unilateral actions that were “disrespectful” of KIFN’s interests and for being the author of its own financial misfortune by understating to investors its problems gaining access to the drilling site.⁴⁴

Ethical compulsions to respect Indigenous peoples are similarly diverse and complex. The Interfaith Center on Corporate Responsibility explains in its *Principles for Global Corporate Responsibility* (1999) that: “by virtue of their inherent rights, [Indigenous peoples] are entitled to full participation in the business decisions which pertain to their ancestral lands and their way of life.”⁴⁵ Likewise, the preamble of the *UN Declaration on the Rights of Indigenous Peoples* proclaims: “Recognizing the urgent need to respect and promote the inherent rights of [I]ndigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.”⁴⁶ The ethical case is thus rooted in notions of social justice and the right of vulnerable peoples to self-determination.

Multilateral Development Banks

Multilateral development banks (“MDBs”), which finance economic projects and programs in developing countries, were the first financial institutions to adopt policies to address the impacts of their loans on Indigenous peoples.⁴⁷ The rationale of these policies was both for the MDBs to deflect public criticisms about the insensitivity of project financing to the

43. (2006), 272 D.L.R. (4th) 727.

44. Platinex and the Ontario government have since appealed this ruling.

45. Section 1.4P8. Prepared with other NGOs; available online: Bench Marks <www.benchmarks.org/downloads/Bench%20Marks%20-%20full.pdf>.

46. *Supra* note 19.

47. See A. Gray “Development Policy, Development Protest: The World Bank, Indigenous Peoples and NGOs” in J.A. Fox & L.D. Brown, eds., *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (Boston: MIT Press, 1998) at 267.

plight of Indigenous peoples, coupled with a belief that these peoples, because of their isolation and acculturation status, tended to be especially “vulnerable” in the development process. Therefore, the MDBs introduced procedures to help design projects that minimize adverse social impacts.

The World Bank took the lead with an operational policy on Indigenous peoples adopted in 1982.⁴⁸ This led to Operational Directive 4.20 (“OD 4.20”) in 1991, which was revised in 2005 in the form of Operational Policy and Bank Procedure on Indigenous Peoples 4.10 (“OP/BP 4.10”). The latter decreed a procedure for an assessment of a proposed project’s effects on Indigenous peoples; consultation with affected peoples; and preparation of a plan to minimize impacts on Indigenous peoples.⁴⁹ Any consequential loan contract would need to incorporate the government borrower’s obligations to adhere to measures relating to Indigenous peoples.⁵⁰ In some cases, OP/BP 4.10 contemplates that project financing may hinge on the legal recognition of Indigenous people’s land rights, equitable sharing of the benefits of commercial development and consent to the development of cultural resources and knowledge.⁵¹ Though OP/BP 4.10 does not explicitly recognize Indigenous people’s rights, through covenants included in loan agreements, the World Bank can influence states’ treatment of Indigenous peoples.⁵² Apart from the ODs, in 2003 the World Bank launched a Global Fund for Indigenous Peoples in developing countries. It supports implementation of culturally appropriate projects and programs for sustainable development, and assists the operations of the UN Permanent Forum on Indigenous Peoples.⁵³

In practice, implementation of the World Bank’s Indigenous-related policies has been erratic.⁵⁴ Disagreements about who is Indigenous and borrower resistance to what is perceived as interference in its internal political affairs have both impeded implementation of the policy.⁵⁵ Many World Bank and other MDB-financed projects such as dams, highways and

48. World Bank, *Tribal Peoples in Bank-Financed Projects, Operational Manual Statement 2.34* (February 1982). See F. McKay, “The Draft World Bank Operational Policy 4.10: Progress or More of the Same?” (2005) 22 *Ariz. J. of Int’l & Comp. L.* 65.

49. World Bank, *ibid.* at para. 1. McKay, *ibid.*, provides an excellent summary of an earlier draft of this policy, and related concerns.

50. World Bank, *ibid.* at para. 11.

51. *Ibid.* at para. 8(a).

52. G.A. Sarfaty, “The World Bank and the Internalisation of Indigenous Rights Norms” (2005) 114 *Yale L.J.* 1791 at 1796.

53. See online: World Bank, “Indigenous Peoples” <<http://www.worldbank.org/indigenous>>.

54. Sarfaty, *supra* note 52 at 1802, concludes that the World Bank Operations Evaluation Department report in 2003 “found that only 55 of the 89 projects (or about 62% of the projects) that could have potentially affected Indigenous peoples (as determined by the OED’s application of the policy’s stated criteria) actually applied OD 4.20”.

55. *Ibid.*

forestry projects have been implicated in the displacement of Indigenous communities and degradation of their environment.⁵⁶ Apart from the quality of implementation, many Indigenous peoples remain skeptical of OP/BP 4.10's policy of "free and informed *consultation*," rather than "free and informed *consent*."⁵⁷

Other international banks, such as the Asian Development Bank ("ADB") and the Inter-American Development Bank ("IADB") have issued policies addressing Indigenous peoples.⁵⁸ The ADB's *Policy on Indigenous Peoples* (1998) provides for adoption of an "Indigenous Peoples Development Plan." The Plan must ensure that "a project negatively affecting [I]ndigenous peoples [is] appropriately redesigned to mitigate negative effects, or include[s] an acceptable compensation plan."⁵⁹ The policy does not require Indigenous people's free, prior and informed consent to developments. The IADB's *Strategy for Indigenous Development* (2006) contains similar measures to avoid or mitigate adverse impacts of Bank operations on Indigenous peoples and their rights.⁶⁰

Private Sector SRI

SRI Screens

As explained earlier, an SRI screen can serve to exclude investments (companies or entire economic sectors) deemed undesirable or to favour investments that meet particular ethical, social or environmental benchmarks. Among mutual funds marketed to retail investors, relatively few offer policies that explicitly screen companies for their stance towards Indigenous peoples.

The U.S.-based Calvert Group, one of the largest families of mutual funds in the world, has one of the most detailed Indigenous screens. It professes:

56. C. McDowell, ed., *Understanding Impoverishment: The Consequences of Development-Induced Displacement* (Oxford: Berghahn Books, 1996); Fisher, *supra* note 10.

57. For an overview of the debates, see M. Satterthwaite & D. Hurwitz, "The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects" (2005) 22:1 *Ariz. J. Comp. & Int'l L.* 1.

58. See C. Charters, "Indigenous Peoples and International Law and Policy" (2007) 18:1 *Pub. L. Rev.* 22.

59. Asian Development Bank ("ADB"), *The Bank's Policy on Indigenous Peoples* (Manila: ADB, 1998) at para. 37.

60. Inter-American Development Bank ("IADB"), *Strategy for Indigenous Development* (New York: IADB, 2006) at para. 5.1.

We avoid companies that have a pattern and practice of violating the rights of Indigenous Peoples. We will not invest in companies for which we have verifiable or clear evidence of egregious practices towards Indigenous Peoples. We value companies that have adopted policies and programs respecting Indigenous Peoples. We invest in companies that positively portray all peoples, including [I]ndigenous or ethnic peoples and their religious and cultural heritage.⁶¹

These are not empty words. In 1999 Calvert ceased investment in the U.S. energy company Calpine due to concerns about its proposals to mine geothermal energy in the sacred Medicine Lake Highlands in California.⁶² In 2002 Calvert also divested from Liz Claiborne, the sportswear company, citing concerns from Indigenous peoples about the company's misuse of the name "Crazy Horse" (the famous Lakota Sioux chief) on some of its apparel. Calvert's divestment won applause from the American Indian Coalition on Institutional Accountability.⁶³ But, like many SRI decisions, Calvert lacked sufficient market clout to influence Liz Claiborne, which continues to flaunt the Crazy Horse label.⁶⁴

Calvert's stance on Indigenous rights is rare among investors. A survey of major SRI funds in Australia in 2001 found that only two of 15 funds examined screened specifically for Aboriginal land rights.⁶⁵ According to the Natural Capital Institute's statistics of approximately 110 SRI funds in the U.S. and Canada, 81 funds did not screen for Indigenous rights at all, while 28 funds used a positive screen.⁶⁶ One would expect to find even lower levels of interest among investors in jurisdictions without Aboriginal denizens. Of course, investors may incidentally capture Indigenous rights via a general "human rights" screen in the absence of a specific Indigenous policy.

A few public sector investors have adopted SRI policies that address Indigenous peoples. The Norwegian Government Pension Fund was established in 2006 with an SRI mandate. The Fund's "Ethical Guidelines"

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61. See online: Calvert: Mutual Funds that Make a Difference <<http://www.calvert.com/pdf/6132.pdf>>.
 62. M. LeBeau, "LeBeau: Protecting the Sacred Medicine Lake Highlands" *Indian Country Today* (3 December 2004), online: <<http://www.indiancountry.com/content.cfm?id=1096409955>>.
 63. International Indian Treaty Council, "Calvert's Divestment from Liz Claiborne Praised by Indigenous Leaders" (17 October 2002), online: <www.treatycouncil.org/new_page_524111.htm>.
 64. See online: Liz Claiborne <http://www.lizclaiborneinc.com/ourbrands/brand_crazy.asp>.
 65. U. Trog, *SRI—Socially Responsible Investment* (Sydney: Eco Design Foundation, 2001) at 5-6, online: The Eco Design Foundation, Resources <http://www.changedesign.org/Resources/EDF_Publications/Articles/Papers/SRI.pdf>.
 66. See online: Responsible Investing.Org <<http://www.responsibleinvesting.org/databas>> (as of 10 March 2007).

advise that the Fund: “should not make investments which constitute an unacceptable risk that the Fund may contribute to unethical acts or omissions, such as ... serious violations of human rights.”⁶⁷ In 2006 the Fund decided to divest from Freeport, owing to its mining project in Indonesia implicated in significant environmental and social impacts on local Indigenous tribes.⁶⁸ The New Zealand Superannuation Fund is also obliged by legislation to invest ethically. Though its official “responsible investment” policy does not refer specifically to Indigenous peoples (surprising given the high visibility of Maori in New Zealand),⁶⁹ the fund’s policies are broad enough to encompass them.⁷⁰

Shareholder Activism

Another SRI strategy depends on shareholder activism to encourage companies to adopt policies and practices that respect the rights of Indigenous peoples. Investors who buy shares in public companies acquire voting and other rights that in theory allow them to influence company affairs.

To illustrate, the Ethical Funds Company (Canada) in 2006 filed a shareholder resolution against Enbridge, a natural gas supply business. The resolution responded to Enbridge’s plans to build the Gateway Pipeline in British Columbia through territory subject to outstanding Aboriginal land claims. The resolution stated:

RESOLVED THAT:

The Board to prepare a report (at reasonable cost and omitting proprietary information) by September 1, 2006 assessing the impacts of company operations on ecosystems claimed by First Nations. This report should describe:

1. Environmental impact assessment procedures, including assessment of cumulative impacts on biodiversity;
2. Risk assessments detailing how current and proposed company operations may be impacted by First Nations land claims;

67. Issued 22 December 2005 pursuant to regulation on the Management of the Government Pension Fund (2004), online at: <<http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/The-Ethical-Guidelines.html?id=434894>>.

68. *Nordic Region Pensions and Investment News* (20 June 2006), 12.

69. S. 61(d), *Superannuation and Retirement Income Act 2001*.

70. Guardians of New Zealand Superannuation, *Statement of Investment Policies, Standards, Procedures* (Auckland: Guardians of New Zealand Superannuation, Sept. 2006) at 21-23.

3. Mechanisms to consult and provide compensation to affected First Nations.⁷¹

This shareholder resolution was eventually withdrawn after Enbridge management agreed to address the concerns raised by Ethical Funds, First Nations and other parties.⁷² Even when such resolutions are deliberated, a failure to muster a majority of votes does not render such efforts futile when they serve to prod corporate management into informal dialogue and, at best, an eventual policy change.

Another example is Trillium Asset Management, a U.S. investment company, which pledges to avoid companies having “demonstrated a pattern of disrespectful or exploitative behavior” towards Indigenous peoples and, “if problems emerge at a company in which we are already invested, we will engage with management in dialogue to determine if the company is committed to changing its behavior and redressing past wrongs.”⁷³ Trillium will divest as a “last resort, to be used only if dialogue and shareholder proposals fail to have a positive impact upon corporate behavior.”⁷⁴ For example, in 2001 Trillium filed resolutions for the 2001 annual meetings of BP, Chevron and ExxonMobil, calling for a modification of drilling in the Arctic National Wildlife Refuge that threatened the livelihoods of Gwich’in and Inupiat communities.⁷⁵

In Canada, Amnesty International has assisted the Grassy Narrows First Nation in Ontario to resist clear-cut logging on their ancestral lands by the forestry behemoth Weyerhaeuser. In an open letter to the company’s investors, Amnesty garnered support for a shareholder resolution filed by Capital Strategies Consulting in 2007 requesting that Weyerhaeuser assess the feasibility of suspending its purchases of wood fibre derived from the disputed forestry area until Grassy Narrows gives informed consent to further logging.⁷⁶ The dispute has a long history but previous tactics, such as site blockades and legal actions challenging licences granted to Weyerhaeuser, have failed to halt the logging of the area’s ecologically

71. Detailed at <http://www.amnesty.ca/campaigns/sharepower/enbridge_resolution.php>.

72. Ethical Funds, “The Ethical Funds Company Focus List for the 2006 Shareholder Action Program”, online: <http://www.ethicalfunds.com/do_the_right_thing/sri/focuslist/General2006.asp>.

73. Trillium Asset Management, Pamphlet, “Indigenous Rights: Our Work on Social and Environmental Issues” (2003), online: <http://www.trilliuminvest.com/pdf/tamc-indigenous_11-03.pdf>.

74. *Ibid.*

75. Trillium Asset Management, “Arctic National Wildlife Refuge: At Risk” (2001), online: <http://www.trilliuminvest.com/pages/activism/activism_issuedetail.asp?IssueID=20>.

76. T. Scurr, “Open Letter from Amnesty International (Canada) to Socially Responsible Investors with Shares in Weyerhaeuser,” Amnesty International (11 April 2007).

significant Boreal forest.⁷⁷ While Weyerhaeuser attempted to muzzle activists at its April 2007 shareholder meeting, and the resolution attracted only 5 per cent of the vote, the dispute continues to simmer unabated.⁷⁸

Similar conflicts between socially conscious investors and resource developers over Indigenous rights have flared. In May 2007 an alliance of NGOs and Aboriginal activists disrupted the Toronto shareholder meeting of Barrick, the world's largest gold mining company.⁷⁹ Barrick has an atrocious record against Indigenous inhabitants of areas it mines in Australia, the U.S., Chile and other jurisdictions.⁸⁰

Community Finance

Community finance, also known as "micro-finance," constitutes a third SRI process potentially beneficial to Indigenous peoples. While the causes of poverty in Indigenous communities are complex and wide-ranging, one factor contributing to low levels of economic development in many communities is insufficient access to credit and capital for small business development and other economic endeavours.⁸¹ Private sector financial institutions provide insufficient support to Indigenous communities.

Encouragingly, First Nations have a solution in Indigenous-controlled, locally operated financial institutions, constituted as credit unions or community banks for example. There were some 25 community finance institutions dedicated specifically to Native Americans in the U.S. in 2003.⁸² For example, the Hopi Credit Association is a tribal credit union linking banks and tribal borrowers by raising funds from banks and administering loan selection and servicing.⁸³ In Australia, a First Nations Australian Credit Union serves a similar role.⁸⁴ In Canada, the National Aboriginal Capital Corporation Association ("NCCA") assists its member network of

77. Further details at Free Grassy Narrows <<http://freegrassy.org>>.

78. Amnesty International, Press Release, "Share Power: Weyerhaeuser Mills Wood Logged from Grassy Narrows without Consent" (30 April 2007).

79. See <<http://www.protestbarrick.net>>.

80. CorpWatch, *Barrick's Dirty Secrets: Communities Worldwide Respond to Gold Mining's Impacts* (San Francisco: CorpWatch, May 2007).

81. Community Development Financial Institutions ("CDFI") Fund, *The Report of the Native American Lending Study* (Washington, D.C.: CDFI Fund, 2001); S. McDonnell & N. Westbury, "Banking on Indigenous Communities: Issues, Options, and Australian and International Best Practice", CAEPR Working Paper No. 18/2002 (Centre for Aboriginal Economic Policy Research, Australian National University, 2002).

82. S. Dewees, *Investing in Community: Community Development Financial Institutions in Native Communities* (Kyle, South Dakota: First Nations Oweesta Corporation and First Nations Development Institute, 2004) at 9.

83. *Ibid.*

84. *Ibid.* at 9.

Aboriginal financial institutions in providing customized financial products and services to Aboriginal business communities.⁸⁵

Community financiers differ from mainstream banks in several ways. While they are market-driven, community finance institutions fill niches overlooked by other lenders. They offer credit to those ignored by conventional banks,⁸⁶ and provide services that help ensure that credit is used effectively, such as financial literacy training and credit counseling to customers, and technical assistance to small businesses. Their specialized knowledge of the communities they cater to and the closer relationships they form with their customers facilitates individualized and specialized financial products and procedures. Regular banks often see these services as too costly to administer. Banks prefer standard cost-effective programs in high demand and geared towards the general market. Cost-cutting among banks has also led to branch closures, to the detriment of remote Indigenous communities.⁸⁷

Despite these differences, some mainstream commercial lenders are belatedly providing banking services and credit tailored to the needs of First Nations. In Canada, the Bank of Montreal has operated an Aboriginal Banking Unit since 1992.⁸⁸ It has opened branches on Indian reserves and provides various home ownership programs for eligible First Nations people living on reserves where conventional loan security cannot be readily provided, and banking products for Aboriginal businesses.⁸⁹ Similar Aboriginal banking units have been established in several other Canadian banks including the Royal Bank of Canada⁹⁰ and the Canadian Imperial Bank of Commerce.⁹¹ The Toronto Dominion Bank has also, in conjunction with Saskatchewan First Nations, set up an affiliated First Nations Bank with customized personal and business products and services.⁹² It should be borne in mind that Canadian banks would perhaps be less willing to assist First Nations were it not for government guarantees for some lending schemes.

85. See online: <<http://www.nacca.net>>.

86. For example, most Indian land in Canada and the U.S. is held in trust by the government, which hinders the use of land as collateral for loans, particularly housing loans.

87. McDonnell & Westbury, *supra* note 81 at 7 (discussing branch closures in Australia).

88. Bank of Montreal, "Aboriginal Business Unit", online: <http://www4.bmo.com/aboriginal/banking/0,2284,35649_975756,00.html?pChannelId=244704>.

89. C. McLaughlin, "BMO Relates to Aboriginal Goals" (Spring 2007) *Windspeaker Business Quarterly* 22.

90. See online: <<http://www.rbcroyalbank.com/RBC:RbOeyY71A8UAA1-CYiA/aboriginal/init.html>>.

91. See online: <<http://www.cibc.com/ca/small-business/aboriginal/philosophy.html>>.

92. See online: <<http://www.firstnationsbank.com/index.jsp>>.

V SRI GOVERNANCE FOR INDIGENOUS PEOPLES

Introduction

The foregoing examples of responsible financing to protect Indigenous peoples are relatively uncommon. Though growing quickly, the SRI sector nonetheless has captured only a small market. Before SRI can become mainstream, financial markets must be reformed to remove the various economic and institutional barriers to SRI.⁹³ Investment managers often lack sufficient information about the social and environmental effects of their loans and investments to inform asset selection and engagement with companies. They also face incentives to maximize short-term financial returns at times at the expense of broader social well-being. And some types of investment managers face legal and institutional barriers to sacrificing profits for ethical causes.

Encouragingly, some new voluntary and official standards for governance of investment have facilitated the growth of SRI. Often organized transnationally, these forms of governance furnish both substantive standards for responsible finance and procedures for more transparent, accountable decisions.⁹⁴ They represent mainly a form of private law, where market and civil societal institutions supply most of the governing norms. This ensemble of regulation incorporates provisions to respect the interests of Indigenous peoples. While the use of these mechanisms is mostly voluntary, for some investors, the question is no longer whether to adhere to these mechanisms, but how to apply them.

Private codes of conduct and other market-generated ordering reflect a shift to pluralistic systems of governance.⁹⁵ Braithwaite and Fisse contend that market regulation works when firms are concerned about their reputations and where it helps forestall “the less palatable alternative” of government regulation.⁹⁶ Others remain skeptical that voluntary mechanisms

93. See B.J. Richardson, “Sustainable Finance: Environmental Law and Financial Institutions” in B.J. Richardson & S. Wood, eds., *Environmental Law for Sustainability* (Oxford: Hart, 2006) at 309.

94. See D. Leipziger, *The Corporate Responsibility Code Book* (Sheffield: Greenleaf, 2003); O. Perez, “The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance” in O. Dilling, M. Herberg & G. Winter, eds., *Responsible Business: Self-Governance in Transnational Economic Transactions* (Oxford: Hart, 2007) [forthcoming].

95. See B. Krumsiek, “Voluntary Codes of Conduct for Multinational Corporations: Promises and Challenges” (2004) 109:4 *Business and Society Rev.* 583.

96. J. Braithwaite & B. Fisse, “Self-Regulation and the Control of Corporate Crime” in C.D. Shearing & P.C. Stenning, eds., *Private Policing* (London: Sage, 1987) at 221, 222.

provide a viable means of social regulation.⁹⁷ Voluntary measures may preempt regulation to forestall meaningful change.⁹⁸ Voluntary measures are vulnerable to free riding, whereby some non-participating businesses exploit the benefits of a voluntary regime without contributing to its costs.⁹⁹ For example, although many public and private financial institutions refused to help participate in China's Three Gorges Dam project—which displaced many people—some banks did not share these negative views and stepped in to provide necessary loans.¹⁰⁰

The following discussion examines the provisions regarding Indigenous peoples in the Equator Principles, UN Norms on the Responsible Investment, SRI Stock Market Indices, as well as some national level instruments. Unlike *ILO Convention No. 169* or the *UN Declaration on Indigenous Peoples*, these governance mechanisms speak directly to companies and investors. These are not the only transnational governance standards applicable to SRI. Others include the United Nations Environment Programme's Finance Initiative,¹⁰¹ and the (UN) Principles of Responsible Investment.¹⁰² However, this article discusses only those codes of conduct that refer explicitly to Indigenous peoples. Neither *ILO Convention No. 169* nor *UN Declaration on the Rights of Indigenous Peoples* targets the financial sector as a means to protect Indigenous peoples.¹⁰³

Equator Principles

The Equator Principles ("EPs"), drafted in 2003 and substantially revised in 2006, provide a voluntary code of conduct for responsible project financing.¹⁰⁴ Banks that sign the EPs agree to implement measures to minimize the social and environmental harm of financed infrastructure

97. See A. Neale, "Organising Environmental Self-Regulation: Liberal Governmentality and the Pursuit of Ecological Modernisation in Europe" (1997) 6 *Environmental Politics* 1; I. Maitland, "The Limits of Business Self-Regulation" (1995) 27:3 *California Management Rev.* 132.

98. OECD, *Voluntary Approaches for Environmental Policy in OECD Countries* (Paris: OECD, 1999) at 31-38.

99. *Ibid.*, at 40-42, 99.

100. C. Wright & A. Rwabizambuga, "Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An Examination of the Equator Principles" (2006) 111:1 *Business and Society Rev.* 89.

101. See online: <<http://www.unepfi.org>>.

102. See online: <<http://www.unpri.org/principles>>.

103. The closest the UN Declaration comes to addressing financial issues is Article 39, which provides: "Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration".

104. See online: <<http://www.equator-principles.com>>.

projects (*e.g.*, dams, highways and mines).¹⁰⁵ The principles come from the policies of the World Bank's International Finance Corporation ("IFC"), the private sector lending arm of the World Bank group. Though the EPs were drafted by the banking industry, they arose from pressure from institutional investors like the Calvert Group and demands from NGOs including the Worldwide Fund for Nature.¹⁰⁶

The EPs expect signatory banks to follow procedures for undertaking environmental and social impact studies before disbursing money, and to consult with potentially affected communities. The EPs apply to projects of a total capital cost exceeding US\$10 million. Before drawing on the loan, the borrower must covenant with the lender to comply with any social and environmental standards derived from the procedures decreed by the EPs.

Concerning Indigenous peoples, the EPs require project sponsors to assess and limit potential impacts on Indigenous lands and communities. For projects considered to pose the most significant impacts (category A projects), signatory banks must ensure "that the borrower or third party expert has consulted, in a structured and culturally appropriate way, with project affected groups, including [I]ndigenous peoples."¹⁰⁷

If the project proceeds, the sponsoring bank must require borrowers to formulate an "Indigenous people's development plan" in accordance with the IFC Performance Standard 7. This standard provides, in part:

When avoidance [of adverse impacts] is not feasible, the client will minimize, mitigate or compensate for these impacts in a culturally appropriate manner. The client's proposed action will be developed with the informed participation of affected Indigenous Peoples and contained in a time-bound plan, such as an Indigenous Peoples Development Plan.¹⁰⁸

The EPs do not, however, require borrowers to obtain the free, prior informed consent ("FPIC") of affected Indigenous communities, even though this standard has been recognized in international law. The lesser standard of "consultation" does not require developers to respond to and address the advice or concerns of Indigenous peoples. Unlike a consultation process, FPIC is a two-way, interactive negotiation that offers affected communities more input in decision-making, and is more likely to result in culturally appropriate developments.

105. T. O'Riordan, "Converting the Equator Principles to Equator Stewardship" (2005) 47:4 *Environment* 1.

106. Freshfields Bruckhaus Deringer, *Banking on Responsibility* (London: Freshfields Bruckhaus Deringer, July 2005) at 7.

107. Principle 5.

108. International Finance Corporation ("IFC"), "Performance Standard 7: Indigenous Peoples" (Washington, D.C.: IFC, April 2006) at clause 8.

Where adverse impacts are anticipated, the EPs expect borrowers to take the following steps.¹⁰⁹ First, the client will offer affected communities at least compensation (cash or in-kind) equivalent to those who hold full legal title to land under national laws. Further, the client must consider feasible alternative project designs to avoid the relocation of Indigenous peoples. If such relocation is unavoidable, the client must not proceed with the project unless it first negotiates in good faith with the affected communities.

Of approximately 45 banks that had pledged themselves to the EPs as of late 2006, only five had policies that explicitly address Indigenous peoples.¹¹⁰ JPMorganChase, with the best policy, according to the NGO watchdog Banktrack, commits itself to finance projects only where free, prior informed consultation using customary institutions results in support of the project by the affected Indigenous people; Indigenous people have been fully informed about the project; they have access to a grievance mechanism; and major Indigenous land claims have been appropriately addressed.¹¹¹ Commendable as these aims appear on paper, even JPMorganChase has been dogged by criticisms by some NGOs, such as for its participation in a financial syndicate to support a controversial oil pipeline through tribal lands in Ecuador.¹¹²

UN Norms on the Responsibilities of Transnational Corporations

The proposed UN *Norms* also compel businesses, specifically transnational corporations (“TNCs”), to respect Indigenous rights.¹¹³ The *Norms* in fact potentially may apply to a range of firms including investment companies and other financial intermediaries. They address environmental standards, labour standards and consumer protection. In contrast to the Equator Principles, the UN *Norms* purport to be legally binding if adopted by states.

109. *Ibid.*

110. The banks are ABN AMRO, Bank of America, Citigroup, HSBC and JPMorganChase: A. Durbin, *et al.*, *Shaping the Future of Sustainable Finance: Moving from Paper Promises to Performance* (London: Worldwide Fund for Nature and BankTrack, 2006) at 27.

111. JPMorganChase, “Environmental Policy”, s. 4; online: <www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/indig>.

112. “Ecuador: New Oil Pipeline Threatens Fragile Ecosystems and Communities from Amazon Rainforest to Pacific Coast”, online: World Rainforest Information Portal <<http://www.rainforestweb.org/pages/ocp.php>>.

113. ECOSOC, 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 Doc. E/CN.4/Sub.2/2003/12/Rev.2 [*Norms*]. For an historical perspective of the *Norms*, see D. Weissbrodt & M. Kruger, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (2003) 97 *Am. J. Int’l L.* 901.

The UN *Norms* posit safeguards for Indigenous people, not least the strong guarantee of non-discrimination and the inclusion of a general commitment to respect cultural rights.¹¹⁴ They stipulate:

[T]ransnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of Indigenous peoples.¹¹⁵

The official *Commentary on the Norms* elaborates on how companies should consider Indigenous rights. Companies should respect the principle of free, prior and informed consent of communities affected by development projects.¹¹⁶ The *Commentary* also advises companies to not evict communities “without having had recourse to, and access to, appropriate forms of legal or other protection pursuant to international human rights law.”¹¹⁷

The UN *Norms* incorporate several procedural requirements to strengthen implementation.¹¹⁸ In addition to the responsibilities of states,¹¹⁹ the *Norms* expect TNCs to “adopt, disseminate and implement internal rules of operation,” and “to periodically report”¹²⁰ on their progress “to all relevant stakeholders.”¹²¹ Importantly, TNCs are further compelled to “apply and incorporate [the] Norms in their contracts or other arrangements and dealings” with almost any and every party with whom they do business.¹²² Where their contracting partners violate these terms, TNCs must “cease doing business with them.”¹²³ Thus, in an unprecedented way, the UN *Norms* impose international legal obligations directly on TNCs which include financial companies.

But such a radical departure from previous intergovernmental attempts to govern TNCs has come at a price. The UN Commission on Human Rights

114. *Ibid.*, articles 10 and 12.

115. *Ibid.*, article A.1.

116. *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003) at article E.10(c).

117. *Ibid.*

118. Part H.

119. The UN *Norms* direct states to “establish and reinforce the necessary legal and administrative framework” to facilitate their implementation (article 17).

120. S. 15.

121. *Commentary*, s. 15(a).

122. S. 15.

123. *Commentary*, s. 15(c).

in early 2005 declined to endorse the *Norms*.¹²⁴ The International Chamber of Commerce and other business groups criticized the *Norms* as shifting the obligation to protect human rights from governments to private companies.¹²⁵

Even though the UN may never formally adopt the *Norms*, some SRI institutions are beginning to refer to them in their shareholder resolutions and proxy voting guidelines.¹²⁶ The Interfaith Center for Corporate Responsibility, which coordinates SRI among religious investors, is one of several to endorse the UN *Norms*.¹²⁷

SRI Stock Market Indexes

A third type of international governance mechanism for SRI that may help encourage investors to consider Indigenous peoples is the specialist SRI stock market index. Generally, market indexes serve to track price fluctuations of their listed securities. This enables comparison of stock values of selected corporate shares over time. An SRI index is distinctive in that it includes only firms that meet specified environmental and social criteria, with a view to tracking the financial robustness of the sector. Each index provider has its own criteria and methods for collecting data on companies' performance.

Several major international stock exchanges have now introduced SRI indexes to cater to investors wishing to construct an investment portfolio based on the leading responsible firms. Two such indexes are the Dow Jones Sustainability Indexes ("DJSI")¹²⁸ and the London Stock Exchange's FTSE4Good Index Series.¹²⁹ The FTSE4Good Index provides that a company must have "a stated commitment to respecting [I]ndigenous peoples' rights."¹³⁰ It makes no other reference to Indigenous peoples. The

124. ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights*, 2005, UN Doc. E/CN.4/2005/91.

125. C. Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (2003) 10:4 German L.J. 1065 at 1068.

126. E.g. Ethical Funds Company, "Proxy Voting Guidelines, at: <www.ethicalfunds.com/pdf2/sri/proxy_voting_guidelines.pdf>.

127. Interfaith Center for Corporate Responsibility, "Submission by ICCR's Human Rights Working Group to the UN High Commission on Human Rights" (24 September 2004), online: <http://www.iccr.org/news/press_releases/2004/pr_hrwgsubmiss100704.htm>.

128. See online: <<http://www.sustainability-indexes.com>>.

129. See online: <http://www.ftse.com/Indices/FTSE4Good_Index_Series>.

130. Financial Times Stock Exchange ("FTSE"), *FTSE4Good Index Series: Inclusion Criteria* (London: FTSE, 2006) at 5.

DJSI factors the protection of rights of Indigenous peoples in the narrow category under labour standards, providing that companies will be assessed against “Labor Practice Indicators; *e.g.*, cases involving discrimination, forced resettlements, child labour and discrimination of [I]ndigenous people; workplace accidents and occupational health and safety.”¹³¹

While it is encouraging to see treatment of Indigenous peoples recognized as a global standard of corporate responsibility, the criteria in SRI indexes seem too shallow to serve as a meaningful guide to appropriate behaviour. Nonetheless, some companies have been de-listed for failure to meet standards; the FTSE4Good Index removed the mining giant Freeport in 2005, citing concerns with environmental impacts of its Indonesian operations.¹³² According to the FTSE4Good Index annual review, “Global resource companies have improved considerably on policies for [I]ndigenous peoples rights.”¹³³ Unlike the DJSI, the FTSE4Good Index provider has a policy to actively engage with companies, to improve their behaviour, rather than merely to passively monitor their social and environmental performance.¹³⁴

Criteria and rules that govern inclusion of a company in each index help to improve the integrity of the SRI market and thus its capacity to influence companies in their dealings with Indigenous peoples. Responsible investors may rely on such indexes as a means of picking companies that comply with the investor’s policies on treatment of Indigenous peoples. According to the FTSE, its SRI indexes help “investors to navigate through the plethora of corporate social responsibility (“CSR”) codes and standards around the world.”¹³⁵ Further, the ultimate membership selections of SRI indexes constitute an instrument of market ordering. Companies seeking competitive advantages from association with a prestigious index are disciplined to adhere to the criteria for membership. A 2004 study of the impact of the FTSE4Good on corporate behaviour suggested it had had some impact on internal operations of listed companies, especially on their reporting, policy decisions and management systems.¹³⁶

131. Dow Jones Sustainability Indexes, *World Indexes Guide* (Zurich: DJSI, August 2006) at 14.

132. FTSE, *Semi-Annual Review of the FTSE4Good Indices* (London: FTSE, Sept. 2005) at 2.

133. FTSE, *Criteria Development and Company Engagement Programme* (London: FTSE, 2005) at 1.

134. Personal communication, Ethical Investment Research Service (22 February 2007), London, U.K.

135. FTSE, “FTSE4Good Index Series Factsheet” (London: FTSE, 2006).

136. G. Cobb, *et al.*, “FTSE4Good: Perceptions and Performance” (Paper presented to the Seventh Alternative Perspectives on Finance Conference, Stockholm University, 8-10 August 2004).

National Laws for SRI

Recently, there has arisen a modicum of legal reforms to promote SRI nationally. Governments have favoured informational and economic incentive policy instruments.¹³⁷ While none of these legal mechanisms address Indigenous peoples specifically, broad references to human rights or environmental policy can include them.

Pension fund legislation in the U.K. and several other European countries, and Australia, obliges fund administrators to disclose whether they invest with regard to social and environmental standards.¹³⁸ However, disclosure regulations neither define what constitutes SRI nor do they require pension funds to disclose *how* they implement policies if enacted. Surveys of the implementation of the SRI disclosure regulation found a large increase in SRI policies among pension funds on paper, but often accepted perfunctorily.¹³⁹ Anecdotal evidence suggests some funds' policies make reference to Indigenous peoples. For instance, in Australia, the Catholic Super and Retirement Fund discloses that it excludes investment in companies that "do not appropriately consult on [N]ative title issues."¹⁴⁰ The policy however sheds no light on how this standard is implemented.

For banks, two legal mechanisms may promote SRI. Imposing joint liability on lenders for the social and environmental harms of their borrowers can have a very sobering effect, encouraging more cautious lending. The higher rates of interest passed on to borrowers can encourage them to reduce their environmental and social impacts. In the U.S., banks' behaviour was profoundly influenced by the *Comprehensive Environmental Response, Compensation and Liability Act* ("CERCLA"),¹⁴¹ which potentially made lenders vicariously liable for cleanup of lands contaminated by firms they financed.¹⁴² Indian tribes have used CERCLA to obtain compensation for

137. B.J. Richardson, "Diffusing Environmental Regulation through the Financial Services Sector: Reforms in the EU and other Jurisdictions" (2003) 10:3 Maastricht J. of European and Comp. L. 1; B.J. Richardson, "Financing Environmental Sustainability: A New Role for the Law" in S. Benn & D. Dunphy, eds., *Corporate Governance and Sustainability: Challenges for Theory and Practice* (London: Routledge, 2006) 122.

138. B.J. Richardson, "Pensions Law Reform and Environmental Policy: A New Role for Institutional Investors?" (2002) 3:5 J. Int'l Fin. Markets: Law and Regulation 159.

139. D. Wheeler & J. Thomson, *Comparative Study of U.K. and Canadian Pension Fund Transparency Practices* (Ottawa: NRTEE, 2004); C. Berger, *Disclosure of Ethical Considerations in Investment Product Disclosure Statements: A Review of Current Practice in Australia* (Melbourne: Australian Conservation Foundation, 2004).

140. Catholic Super and Retirement Fund ("CSFR"), *Allocated Pension Fund Product Disclosure Statement* (Burwood: CSFR, 2006) at 14.

141. Pub. L. No. 96-510, 94 Stat. 2767 (11 December 1980), codified at 42 U.S.C. § 9601.

142. D.R. Berz, "Lender Liability under CERCLA: In Search of a New Deep Pocket" (1991) 108 Banking L.J. 1.

cleanup of contaminated tribal lands.¹⁴³ Lender environmental liability has also been of concern, albeit to a lesser extent, in some other jurisdictions.¹⁴⁴

Another legal mechanism to encourage more responsible banking is community financing legislation, whereby lenders must help meet the financial needs of the local communities in which they are chartered. A notable U.S. example is the *Community Reinvestment Act of 1977*.¹⁴⁵ It aims to improve the credit services of low-income and minority communities, and to ensure the availability of low-cost banking services for low-income households and small businesses.¹⁴⁶ The *Act* also requires that banks, whose annual turnover exceeds a certain threshold, to reinvest into registered community programs. The U.S. *Community Development Financial Institutions Act of 1994*¹⁴⁷ is another community financing instrument, designed to provide government support to businesses that can revitalize distressed communities. Both pieces of community financing legislation have helped Indigenous communities to finance economic development.¹⁴⁸ Governments have also encouraged private lending to Indigenous peoples by providing financial guarantees, thereby eliminating the risks for banks, and hence their willingness to provide services.¹⁴⁹

Economic incentives are another policy mechanism to promote SRI. Taxation concessions and similar subsidies for socially and environmentally friendly investments provide tangible monetary incentives for SRI. The Netherlands has provided taxation concessions since 1995 through its Green Investment Directive.¹⁵⁰ The tax breaks are offered to funds that invest at

143. *E.g., Berrey v. Asarco Inc.*, 2006 W.L. 401822 (10th Cir. 2006). CERCLA actually treats Indian tribes as states, thereby giving tribes the opportunity to assume primary enforcement responsibility of this legislation on tribal lands. J.V. Royster, "Environmental Protection and Native American Rights: Controlling Land Use through Environmental Regulation" (1991) 1 Kan. J.L. & Pub. Pol'y 89 at 94.

144. J. Lipton, "Project Financing and the Environment: Lender Liability for Environmental Damage in Australia" (1996) 11 J.I.B.L. 7; H. Thompson, "The Impact of Environmental Law on the Lending Industry in Canada", in G. Thompson, M. McConnell & L. Huestis, eds., *Environmental Law and Business in Canada* (Aurora: Canada Law Books, 1993) at 409-453.

145. Pub. L. No. 95-128; 91 Stat. 1147 (12 October 1977), codified at 12 U.S.C. § 2901.

146. J.T. Campen, "Banks, Communities and Public Policy" in G.A. Dymski, *et al.*, eds., *Transforming the U.S. Financial System: Equity and Efficiency for the 21st Century* (ME Sharpe, 1993), 221.

147. Pub. L. No. 103-325, 108 Stat. 2160 (1994), codified at 12 U.S.C. § 4701.

148. McDonnell & Westbury, *supra* note 81 at 19-20.

149. For instance, Canada's Department of Indian Affairs provides loan guarantees to help finance housing on Indian reservations: see online: Indian and Northern Affairs Canada <www.ainc-inac.gc.ca/ps/hsg/cih/hs/amm_e.html>. There are more extensive loan guarantee programs in the U.S.: M. Fogarty, "Bankers See Commercial Loan Opportunity on Reservations" *Indian Country Today* (25 July 2006), online: <www.indiancountry.com/content.cfm?id=1096413355>.

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

least 70 per cent of their assets in government-approved projects. Research vindicates the Dutch scheme in generating more SRI; a study by KPMG found that between 1996 and 2002, the scheme had resulted in Euro 2.8 billion of investment in over 2,100 projects.¹⁵¹ While none of these projects dealt with Indigenous peoples, there is no reason why this precedent could not be adapted to provide tax incentives for investments in projects of benefit to Aboriginal communities.

Ethical investors also need reliable and timely information about how companies treat Indigenous peoples if they are to make such behaviour a criterion of investment. Banks can use contract law mechanisms to demand such information from borrowers. But equity investors must rely on public reporting pursuant to company and securities legislation, which usually does not require disclosure of a firm's social or environmental performance unless considered financially "material."¹⁵² Legislation is gradually requiring businesses to be more open about their social and environmental activities, and mandatory reporting for this purpose has been instituted in France, the Netherlands, Sweden and Denmark, for instance.¹⁵³ While corporate non-financial reporting laws cannot be expected to be so detailed as to specifically refer to Indigenous peoples, current examples are sufficiently broadly cast to arguably include issues affecting Indigenous peoples.

Reform of corporate governance, to enable more active shareholder participation in corporate decision-making, is also helpful to SRI. Shareholder proposals sponsored by institutional investors are a key means by which financiers can influence company policy.¹⁵⁴ As discussed earlier, some resolutions have dealt with the treatment of Indigenous peoples. But in some jurisdictions, significant barriers to shareholder activism persist, such as proxy context rules and election of boards of directors.¹⁵⁵ Company law reforms in some jurisdictions are gradually helping to improve the prospects for shareholder activism. Another regulatory approach targets institutional investment managers themselves, requiring them to be more accountable in their exercise of voting and other shareholding rights. For instance,

151. KPMG, *Sustainable Profit: An Overview of the Environmental Benefits Generated by the Green Funds Scheme* (London: KPMG, 2002) at 6.

152. E.I.A.G. Geltman, "Disclosure of Contingent Environmental Liabilities by Public Companies under the Federal Securities Laws" (1992) 16 *Harv. Envtl. L. Rev.* 129 at 144.

153. KPMG, *International Survey of Corporate Responsibility Reporting* (London: KPMG, 2005) at 40-42.

154. See D. Del Guercio & J. Hawkins, "The Motivation and Impact of Pension Fund Activism" (1999) 52 *J. Financial Economics* 293.

155. For instance, before 2003, shareholders in Canadian companies could not file resolutions "promoting general economic, political, racial, religious, social or similar causes": *Canada Business Corporations Act, 1975*, s. 137.

Canadian and U.S. law requires mutual funds to publicly disclose their proxy votes and voting policies.¹⁵⁶

The final notable area of regulation conducive to SRI places obligations on investment managers to actually take social and environmental impacts into account as part of their fiduciary investment duties. This has only occurred for public sector pension and social security funds. The Swedish, Norwegian, New Zealand and French national pension schemes are statutorily required to invest responsibly.¹⁵⁷ As mentioned earlier, it was pursuant to such legislative standards that the Norwegian pension fund divested from Freeport, citing concerns about the impact of its mine on an environment inhabited by Indigenous peoples.¹⁵⁸ As progressive as mandatory SRI might seem, it would be too politically controversial for governments to extend such requirements to private sector financiers for now.

VI CONCLUSION

This article advocates a new approach to the protection of Indigenous peoples by targeting the business community, in particular investment institutions whose responsibility derives from the way they sponsor and profit from economic development. Traditional legal measures to address the plight of Indigenous peoples, such as land rights and self-government are likely to be insufficient in a world where economic development is controlled substantially by the private sector. Encouragingly, the SRI movement is starting to champion Indigenous peoples and their rights. Yet, because the market for SRI remains small, and voluntary mechanisms of SRI governance such as the Equator Principles may lack legitimacy and influence, some supplementary public regulation of financiers to promote SRI seems inevitably necessary.

While we likely need more public governance for SRI, it entails a very different role for the state than that traditionally associated with law pertaining to Indigenous peoples. Land rights, self-government agreements, protection of traditional knowledge, and other familiar measures will always

156. *Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies*, 17 C.F.R. Parts 239, 249, 270, and 274 (31 January 2003); Canadian Securities Administrators, National Instrument 81-106, *Investment Fund Continuous Disclosure* (May 2004).

157. B.J. Richardson, "Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?" (2007) 22:2 B.F.L.R. 145 at 195-96.

158. *Supra* note 67.

be central in furthering the interests of Indigenous peoples. But their effectiveness can be enhanced with a likeminded financial sector.

Financiers can help protect Indigenous peoples by ceasing to fund developments that harm their environment and culture, and by improving access to capital resources for First Nations to allow them to pursue their own economic development priorities and to reduce their dependency on government. Financiers are starting to behave more responsibly towards Indigenous peoples through pressure from NGOs, First Nations themselves and ethical investors.

But governments themselves must be challenged to make the financial sector more accountable. Some policies and laws are already in place, such as informational and incentive mechanisms to encourage responsible financing. But they leave too much discretion to financiers. For example, rather than merely require investment institutions to disclose whether they have an SRI policy, governments should require public disclosure of how such policies are implemented. Lenders could also be required to consult with potentially affected Indigenous communities and to withhold finance until all social and environmental impact studies have been completed and concerns addressed. The state itself can set a better example by requiring public financial institutions such as national pension plans to consider the interests of Indigenous peoples in their investment decisions. And, critically, governments must work with First Nations to ensure that international law sets rigorous standards for the financial sector in its dealings with Indigenous peoples.