Human Rights and SRI in North America: An Overview

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Executive Summary

Introduction

This paper provides an overview of human rights issues and the Socially Responsible Investment (SRI) community in North America. In particular, it focuses on social investors – those for whom environmental, social and governance (ESG) factors are integral to their investment decision-making – and the human rights-related due diligence that they apply to the companies in which they invest.

The paper examines who these investors are, why they matter to business and human rights, which human rights issues they focus on, and how they do their work, touching also on the question of fiduciary duty and human rights. It concludes with a brief look at recent developments and trends and provides a few recommendations, including how the work of the UN Special Representative for Business and Human Rights (SRSG) can help advance SRI's own work on human rights. Research for the paper was based in part on a short survey of representatives of the Canadian and US SRI communities.

Human rights have long been a fixture among social investors' concerns. However, in comparison with environmental and corporate governance issues, progress within the private sector on most human rights issues has been slower. Reasons for this include the fact that a business case for human rights is not always possible or appropriate; the relative difficulty of measuring and reporting on human rights; and the particular sensitivities that surround many human rights issues.

One can argue, however, that now is a particularly good time for social investors to push for progress on companies' performance in the area of human rights. The emerging global framework for business and human rights spearheaded by the SRSG, the political shift occurring in the United States, and the triggering of debates about regulation and corporate ethics due to the financial crisis could provide a window of opportunity for social investors.

SRI and Human Rights

Human rights issues that have been the subject of shareholder engagement over the years include supply chain labor standards, human rights policies, discrimination in the workplace, indigenous

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people's rights, and human rights in certain countries, such as Sudan, Burma, and China. Social investors have also been active around industry-specific human rights concerns, such as access to medicines (pharmaceuticals) and Internet freedom of expression (ICT industry).

With regard to fiduciary duty, social investors seem to understand investor responsibilities vis-à-vis human rights to be linked to fiduciary obligations, risk assessment and avoiding complicity, but also to have ethical underpinnings.
The paper discusses two aspects of SRI due diligence around human rights. The first aspect relates to what social investors expect of companies on human rights. SRI expectations in this area generally encompass those discussed in the SRSG's report of 2008, such as human rights policies, company consideration of human rights risks according to country context and relationships to business partners, and tracking of performance with regard to policies and systems. They also often expect robust reporting on corporate-related human rights issues; independent monitoring of policies and systems; candid acknowledgement of human rights risks that the company faces; and remediation and grievance mechanisms. Notably, social investors expect companies to go "beyond compliance," and increasingly look for companies to make explicit references to international standards in their human rights policies.

The second aspect is how social investors hold companies accountable for upholding human rights. The methods social investors employ can include shareholder engagement; shareholder proposals and proxy voting; asset selection; internal guidelines and ratings frameworks that continue to evolve to reflect emerging issues and developments; research and analysis based on a wide range of sources (company documents, direct dialogue with companies, interviews with NGOs, unions, government officials and other stakeholders, press coverage and, occasionally, site visits) and public policy and advocacy.

Lack of corporate transparency and poor information around human rights issues pose tough challenges to this work. Social investors have made efforts to address this, for example through shareholder proposals, endorsement of reporting standards, public advocacy campaigns pressing for more company disclosure, and participation in the debate around mandatory social and environmental reporting. The work of the SRSG could be helpful in this regard, in pushing for improved transparency and disclosure on human rights policies and systems as well as on their implementation, which is an essential element of corporate human rights performance but often the one on which there is the weakest disclosure.

Recent Trends

Despite the challenges social investors face in holding companies accountable for human rights, a number of recent trends are promising. The paper outlines a few of these:

- *policy involvement and advocacy*: SRI involvement in public policy has increased recently, though mostly around environment and corporate governance. There are, however, some interesting examples of social investor activism around human rights concerns. There is room for much more work in the policy sphere, which carries the potential for increasing awareness of - and leverage on - social issues.

- *multistakeholder initiatives and creative alliances*: recent examples of collaboration among social investors, NGOs, unions and others carry the potential for increased leverage on human rights issues, but there is also room for improvement in this area.

- *bigger picture thinking*: social investors are stepping back to look at sectors and industries, and working amongst themselves and with others to seek out and address the root causes of human rights violations that could be linked to entire business models. SRI must strengthen its work in this area, and find a balance between company-level analysis and evaluation of the larger context in which companies operate.

Select Recommendations

Respondents noted that the SRSG's work could be helpful to their own efforts around human rights in several ways, including:

- Advancing the discussion of how capital markets affect human rights
- Clarifying company obligations in relation to international law
- Keeping the issue of human rights on national government agendas
- Practical guidance on best practice, including by industry and through case studies
- Concrete guidelines on what social investors can realistically ask of companies

The Human Rights Council has asked the SRSG to operationalize the framework of "protect, respect and remedy". The SRSG's preliminary workplan for 2008-2011 provides some details on how he will do this, and notes specifically that this will include developing a set of "guiding principles" on corporate responsibility to respect.[2] These principles will not necessarily provide answers to some of the more detailed questions above, though they could clarify the process by which companies themselves can determine the answers in relation to their own operations and activities.

Social investors, the SRSG and others also must anticipate emerging human rights issues in a timely fashion, so as to ensure corporate human rights due diligence in a way that prevents human rights violations from happening in the first place. Finally, an open question for social investors, the SRSG and others working in the field of business and human rights is how to create, as one respondent puts it, a "human rights consciousness and culture" within corporations.[3] This is a question that reveals the scale and the nature of the task of establishing corporate responsibility to respect human rights. Social investors are well-placed to contribute to this debate, and they can and must be among the players who will help to break the back of this challenge.

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[2] "Preliminary Work Plan, Mandate of the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises", 1 September 2008 – 30 June 2001, available at http://www.business-humanrights.org/Updates/Archive/SpecialRepresentativeMandate

[3] Email correspondence from Reverend David Schilling, Director of Global Corporate Accountability, Interfaith Center on Corporate Responsibility, December 19, 2008.

I. Introduction

This paper provides an overview of human rights issues and the Socially Responsible Investment (SRI) community in North America. In particular, it focuses on social investors – those for whom environmental, social and governance (ESG) factors are integral to their investment decision-making – and the human rights-related due diligence that they apply to the companies in which they invest.

The paper looks at who these investors are, why they matter to business and human rights, which human rights issues they focus on, and how they do their work, touching as well on SRI views on fiduciary duty and human rights. It takes a brief look at recent trends and future prospects, and concludes with a few recommendations centering on how the work of the UN Special Representative for Business and Human Rights (SRSG) can help advance SRI's own work on human rights.

Research for the paper included a short survey of selected representatives of the Canadian and US SRI communities, including social investment firms, investor coordinating bodies, and SRI research providers that conduct ESG research on public companies for institutional investors.

II. Background

Human rights have long figured prominently among social investors' key concerns. Shareholder resolutions on human rights policies and supply chain labor rights are fixtures on annual proxies. For years, SRI firms have maintained direct dialogues with companies regarding human rights issues, from workplace discrimination to company operations in countries with poor human rights records. Social investors were an important part of the anti-apartheid movement, and they have continued to join civil society groups and others at the forefront of human rights issues, such as access to medicines, prevention of genocide in Sudan, and, most recently, Internet freedom of expression.

However, in comparison with environmental and corporate governance issues, progress within the private sector on most human rights issues has been slower. To take two examples, the recent concern that insurance companies have expressed about climate change, and the interest that venture capital firms have shown for "green investing" have not found counterparts in the realm of human rights. There have been few, if any, human rights equivalents of investor-led coalitions such as the International Corporate Governance Network, the Investor Network on Climate Risk, or the Institutional Investors Group on Climate Change.

Although companies, social investors and certain mainstream investors increasingly understand the importance of human rights "risks and opportunities" (legal, reputational, and financial) in relation to corporate operations, part of the challenge is that it is not always possible, or appropriate, to make a business case for human rights.[4] Further, quantification of human rights impacts is considered more difficult than for many other issues of concern to social investors, and in general there is less agreement about human rights indicators than there is for environmental or corporate governance issues. Corporate disclosure on human rights often lags that of other areas,[5] in part because of these difficulties, as well as the particular sensitivities that surround human rights issues.

However, one might argue that now is a particularly opportune time for social investors to push for progress on companies' performance in the area of human rights. Among other factors:

- *A new global framework is emerging*: the UN Special Representative on Business and Human Rights (SRSG), John Ruggie, has recently presented a report, "Protect, Respect, and Remedy: a Framework for Business and Human Rights", in which he outlines a three-part conceptual and policy framework for moving the business and human rights debate forward; comprising the state duty to protect against human rights abuse by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies for victims of human rights violations.[6] The SRSG's mandate and his work have focused global attention on the issue of business and human rights, and the UN Human Rights Council has accepted the framework and renewed the mandate for another three years.[7]
- *A shifting political climate is evident*: just after the November 2008 presidential elections in the U.S., Business for Social Responsibility (BSR) conducted a survey of 424 corporate responsibility professionals who were participants at its annual conference. The questions focused on attitudes toward US leadership, the global financial crisis and the future of corporate social responsibility (CSR). Among the results, BSR found that 86% of respondents felt President-Elect Obama would help advance corporate responsibility, and 94% expected government regulation of corporate responsibility-related issues to increase.[8] Social investors are among those who see the possibility of increased openness at the policy level to issues that have long been of concern to them, including environmental sustainability and corporate governance. It is not clear to what extent this shift might also spur progress on human rights goals.

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[4] See, for example, Christoph Butz, Stephen Barber and Jean Laville, 'Time for a Rethink on Responsible Investing', *Financial Times* , November 13, 2006, and Sir Geoffrey Chandler, 'Corporate Liability: Human Rights and the Modern Business,' keynote address to conference organized by JUSTICE and Sweet & Maxwell, London, June 12, 2006. Chandler notes that there is "often an equally compelling 'business case' for doing wrong in a market which measures only short-term financial gains".

[5] See, for example, EIRIS, "2008 State of Responsible Business: Implications for SRI Signatories", October 2008. In 2008, the Global Reporting Initiative, the UN Global Compact and Realizing Rights launched an initiative aimed at improving human rights reporting to address some of these challenges.

[6] "Protect, Respect and Remedy: a Framework for Business and Human Rights", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises", John Ruggie, April 2008, UN Human Rights Council, A/HRC/8/5.

[7] In June 2008, forty social investors wrote to the Human Rights Council in support of the SRSG's report, and requesting that the Council extend his mandate. See "Statement by Socially Responsible Investors to the Eighth Session of the Human Rights Council on the Third Report of the Special Representative of the UN Secretary-General on Business and Human Rights", June 3, 2008, available at http://www.business-humanrights.org/Documents/RuggieHRC2008

[8] Business for Social Responsibility, "BSR/Cone 2008 Corporate Responsibility in a New World Survey", Fact Sheet, November 5, 2008. Available online at www.bsr.org/files/BSR_Cone_2008_Survey.pdf

- *The financial crisis is focusing the mind*: many experts have asserted that the crisis will provide an opportunity to rethink ethics and corporate behavior, in light of shareholder and general public anger about the impacts of deregulation and the lack of transparency in the running of business.

III. Who, Why and What

Who are social investors, why do they matter to business and human rights, and what kinds of human rights issues do they focus on?

As stated at the outset, social investors are those who seek to integrate social and environmental criteria into their investment strategies. SRI focuses on both financial return and the impact of investments on society. Social investors aim, through their investment practices, to increase corporate accountability.[9] They include individuals as well as institutional investors (such as pension funds, mutual funds, and foundations), though the focus of this paper is on the latter.

Social investors are an important set of actors for business and human rights because of the leverage they bring. Among the groups with potential influence on corporations around human rights issues are civil society organizations, who bring issues to the fore and pressure companies to uphold international standards; lawmakers and regulators, who can enforce those standards as well as create and enforce national laws; and consumers, who have boycott and buying power.

One does not always think of investors in this equation, but they can be an important source of leverage on corporations. As owners, they speak to companies with a different voice than others do, and they have a high stake in making sure "their" companies do not violate human rights. Social investors in particular, because of their beliefs and approach to investing, are key players in the debates around business and human rights.

Constituency:
In the U.S., religious investors have a particularly strong record of engaging on human rights issues, as do a number of SRI and labor funds, and certain public pension funds. Mainstream investors are becoming more active on human rights, and the Sudan divestment movement draws from a wide constituency.[10]
In Canada, no single investor group leads on human rights issues, though as in the U.S., religious investors and a number of SRI mutual funds are active in this area. One respondent notes that certain large, public pension funds in Canada have begun to focus on human rights issues, particularly on Burma and Sudan, though "only a few Canadian public funds actively engage with companies on human rights issues". She points out that two public sector funds, British Columbia Investment Management Corporation (BCIMC) and Canada Pension Plan Investment

[9] See http://www.kld.com/about/index.html and http://www.socialinvest.org/resources/sriguide/srifacts.cfm
[10] Email correspondence from Adam Kanzer, Esq., Managing Director and General Counsel, Domini Social Investments LLC, December 9, 2008; Rev. David Schilling, Director of Global Corporate Accountability, Interfaith Center on Corporate Responsibility, December 19, 2008; and Dawn Wolfe, Social Research/Shareholder Advocacy, Boston Common Asset Management, December 1, 2008.

Board (CPPIB), have shown leadership on human rights, though "many others have been hesitant to engage with companies about human rights." In addition, a few Canadian NGOs have started to adopt capital strategies.[11]

Those active on human rights issues in both countries include not only SRI firms themselves but SRI research providers and coordinating bodies for social investors, such as the Shareholder Association for Research and Education (SHARE), in Canada, and the Interfaith Center on Corporate Responsibility (ICCR), whose members are from the U.S., Canada and elsewhere. Ceres, a US-based, national network of investors, environmental organizations and public interest groups, is also noteworthy as a coalition that works with companies on sustainability issues (most notably climate change, but also human rights).

Issues:
With regard to the kinds of human rights issues on which these investors focus, a glance at shareholder resolutions filed in the past five years shows that the human rights issues that rise to the top for social investors include supply chain labor standards (sweatshops, forced labor, child labor), the adoption and integration of corporate-wide human rights policies, and (in the U.S.) non-discrimination in the workplace: specifically, resolutions calling for corporate policies on non-discrimination based on sexual orientation.[12]

Canadian social investors put a strong emphasis on indigenous people's rights (e.g. land and resource use; free, prior and informed consent). US social investors also file resolutions in this area, although generally in smaller numbers than for certain other human rights issues such as global labor standards, and, not surprisingly, resolutions on indigenous people's rights are directed primarily at a handful of industries (e.g. extractives, utilities).

In recent years, human rights-related shareholder proposals in North America have also included country-specific resolutions, such as those around human rights violations in China, Burma, Sudan, Indonesia, Mexico, Tibet and India.[13] Proposals around the MacBride Principles, a code of fair employment principles for US companies doing business in Northern Ireland, have appeared consistently on US corporate proxies in recent years.

Industry-specific human rights issues that have been the subject of recent shareholder resolutions include Internet censorship and surveillance (ICT companies), child exploitation (primarily the tourism and travel industries), and HIV/AIDS reporting (pharmaceuticals and extractives).

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[11] Email correspondence from Ashley Hamilton, Research Analyst, SHARE, December 2, 2008.

[12] For a good discussion of human rights shareholder proposals, see Adam M. Kanzer, "Putting Human Rights on the Agenda: The Use of Shareholder Proposals to Address Corporate Human Rights Performance", in *Finance for a Better World: The Shift Toward Sustainability*, eds. Henri-Claude de Bettignies and François Lépineux, Palgrave Macmillan (UK), forthcoming. See also "Trends in the Use of Corporate Law and Shareholder Activism to Increase Corporate Responsibility and Accountability for Human Rights", a memo prepared for the SRSG in December 2007 by the law firm Fried, Frank, Harris, Shriver & Jacobson LLP, available at http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers

[13] In particular, for several years social investors have filed a resolution asking Dow Chemical Company to report to shareholders on how it is handling outstanding issues around the Bhopal chemical disaster of 1984.

These examples are not meant as a comprehensive accounting of human rights-related shareholder resolutions. Rather, they give a sense of the issues that have long been on SRI radar screens as well as those that have begun to emerge. There are also shareholder proposals aimed at certain industries that might not appear at first to be human rights-related. To take one case, in recent years US shareholders have asked pharmaceutical companies to report on their political contributions, in an effort to shed light on these companies' level of political involvement. This is not simply a corporate governance issue: it is part of social investors' efforts to address the pharmaceutical industry's influence on global policies and pricing that have direct impacts on human rights issues such as access to medicines.

The issues that figure among SRI shareholder resolutions demonstrate both consistency, with several themes showing up annually, and change, as the SRI community responds to emerging issues and investor concerns, which in turn can be influenced by factors such as world events, the work of rights groups on the ground, and media coverage of human rights violations.

As with shareholder proposals, social investor dialogue with corporations reflects both long-standing human rights concerns and newly emerging issues. For example, many SRI groups have maintained long-term dialogues with corporations on supply chain labor standards. More recently, social investors have taken up the issue of human rights impact assessments (HRIA) with corporations by writing letters to a cross-section of companies, asking them to undertake HRIAs. In April 2008, a coalition of Canadian and Swedish shareholders withdrew their shareholder resolution with Goldcorp Inc. after the company agreed to commission a third party to carry out an HRIA of its operations in Guatemala.[14]

Although in the past, social investors sometimes viewed human rights as applicable primarily to populations overseas (with the exception of indigenous peoples in North America), this view has broadened somewhat. However, an issue such as discrimination in the (domestic) workplace is often categorized as "employee relations" as opposed to "human rights", although such discrimination is a violation of international human rights standards. [15]

Human rights issues can also overlap with other areas of social investor concern regarding corporate performance. For example, products such as computer routers, whose dual use could be associated with human rights violations (for example, where the routers are programmed to allow censorship), might fall under "Product" and "Human Rights". Landfills that have a disproportionately negative effect on poor communities could, as an environmental justice issue, fall under both "Environment" and "Human Rights".

The human rights issues covered by SRI research and screening generally include labor rights (supply chain labor standards, conditions in the workplace, union relations), indigenous people's rights, community relations (the rights of local populations affected by company operations), and

[14] PSAC Staff Pension Fund, The Ethical Funds Company, Ethical Council, SHARE, and GES Investment Services, "Investors Spur Goldcorp to Address Human Rights in Guatemala", joint press release, April 24, 2008. Available at http://www.share.ca/files/Joint_release_on_Goldcorp_final_080424.pdf

[15] For some social investors, union relations are categorized as employee relations, and treated separately from human rights. Likewise, supply chain labor rights might be given their own category or be incorporated into either human rights or employee relations. These are largely preferences of categorization, as there is a broad recognition that labor rights are human rights.

certain consumer rights (privacy, freedom of expression). Some social investors also have specific research and screening criteria around certain countries, such as Burma and Sudan (see section V).

IV. Fiduciary Duty

In a recent essay on shareholder proposals and corporate human rights performance, Kanzer writes:

> Institutional investors – including mutual funds, investment advisers, and public and private pension funds – have a fiduciary duty to vote their proxies in the best interests of their clients or beneficiaries. Fiduciaries, therefore, have a legal obligation to carefully consider any and all human rights issues presented to them on corporate proxy statements. An increasing number of institutional investors view human rights and other social and environmental issues as 'material' to their investment decisions, and are therefore willing to support shareholder proposals addressing these issues.[16]

A canvassing of representatives of North American social investors and research providers bears this out. Some respondents note that taking account of human rights risks is not only consistent with investors' fiduciary duties, but not doing so might be a breach of such duties.[17] In this vein, one respondent points out that the SRSG could advance the work of SRI on human rights by "clarifying for investors and corporations that taking human rights risks into consideration is an extension of fiduciary duty and not a violation of it".[18]

One SRI research provider states, "human rights analysis helps determine the exposure and risk a company faces, which is not typically identified through traditional financial analysis. In circumstances where an investor has significant involvement or control of a company that commits human rights abuses, that investor could also be considered complicit in such abuses."[19] Another respondent points out that "although this is certainly not clear in the law of fiduciary duty, investors should have an obligation to avoid complicity in human rights violations through their investment practices. Domini has a legal obligation to apply its social and environmental standards through its prospectus".[20]

In addition to considerations of risk and opportunity, one SRI firm points out that "some clients do not want their investments to indirectly support human rights abuses for *moral reasons*."[21] Another SRI asset manager states that "beyond avoiding complicity, we seek to promote social

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[16] Kanzer, "Putting Human Rights on the Agenda", op. cit., p. 3.
[17] The law firm Freshfields Bruckhaus Deringer established this position in its report, "A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment", UNEP-Finance Initiative, October 2005, p. 13.
[18] Email correspondence from Shelley Alpern, Director of Social Research and Advocacy, Trillium Asset Management, December 11, 2008.
[19] Email correspondence from Gillian Stein, Research Analyst, Jantzi Research, Inc., December 18, 2008.
[20] Email correspondence from Kanzer, op.cit.
[21] Email correspondence from Wolfe, op. cit., emphasis added.

and economic justice".[22] A representative of an SRI coalition similarly underscores faith-based investors' focus on "responsibilities related to moral action of companies" to respect human rights, and observes that "there is not a bright line between the moral case and the business case for human rights, but a blending of approaches that address immediate and long-term risks to company reputation and brand value and respecting the dignity of every human being and fair and just treatment that follows from that principle".[23]

In short, social investors seem to understand investor responsibilities vis-à-vis human rights to be linked to fiduciary obligations, risk assessment and avoiding complicity, but also to have ethical underpinnings. It is not always clear how these different facets interact. One area for future discussion in the context of business and human rights might be the gray area between moral considerations and fiduciary duties.

V. Human Rights Due Diligence of SRIs

This section begins with a brief look at how the SRSG's report treats due diligence. It then examines the human rights-related due diligence that SRIs expect of companies, and some of the ways in which they try to hold companies accountable in this area.

The SRSG's Explanation of Due Diligence

The SRSG speaks of due diligence as part of the corporate responsibility to respect human rights. As stated above, the responsibility to respect is one of three complementary principles that the SRSG presents as a policy and conceptual framework for moving forward on business and human rights. His 2008 report explains that to fulfill the responsibility to respect, corporations must act with due diligence, "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it."[24]

The SRSG outlines three aspects of corporate due diligence around human rights. First, its *scope*: companies should consider (i) the "country contexts" where they are operating, (ii) the possible human rights impacts of their activities, and (iii) their possible contribution to human rights abuses through their relationships (business partners, joint ventures, etc.). Second, for the *substantive content* of corporate due diligence, companies should refer, "at a minimum", to the international bill of human rights and the ILO core conventions as widely accepted benchmarks. Third, the *process* of corporate due diligence should include human rights policies, human rights impact assessments, integration of policies (including human rights training of employees and "leadership from the top"), and tracking of performance (including monitoring, auditing, and participation in multi-stakeholder initiatives such as those that promote standardized metrics).[25] The 2008 report also emphasizes that putting in place an effective grievance mechanism is part of the corporate responsibility to respect.[26]

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[22] Email correspondence from Alpern, op. cit.
[23] Email correspondence from Schilling, op.cit.
[24] See p. 9 of "Protect, Respect and Remedy", op. cit.
[25] This brief description is drawn from pp. 17-19 of "Protect, Respect and Remedy", op. cit.
[26] See p. 22 of *Ibid.*

The SRSG has noted that he is the midst of further clarifying the nature of corporate human rights due diligence, so the above factors should not be considered exhaustive.

SRI's Human Rights Expectations of Corporations

SRI expectations of corporations regarding their responsibility to respect human rights generally encompass all of the above elements. They also go beyond these points in that they expect not only corporate tracking but also robust human rights reporting, independent monitoring and, in general, improved corporate transparency and candor in discussing the human rights challenges they face. They may also seek from corporations a "willingness to change procedures, policies and project plans" where there are human rights concerns.[27]

Regarding human rights policies, social investors often expect these to refer explicitly to international human rights instruments or standards. For companies in sectors such as extractives, SRIs might also seek policies that make specific reference to the use of security forces, on which extractive companies often rely to protect their operations, and which have been associated with egregious human rights violations in a number of instances. One respondent from an SRI research firm specifies that a best practice criterion for companies in industries and countries at high risk for human rights violations is a policy with a clause "addressing the use of security personnel", both private and government forces, "that is consistent with internationally accepted human rights norms, such as the UN Code of Conduct for Law Enforcement Officials" or the Voluntary Principles on Security and Human Rights.[28]

Social investors commonly call on corporations to make their human rights policies publicly available, and they look for evidence that the company applies its policies to its business partners, such as suppliers. Some social investors expect a company's board to adopt its human rights policy, its upper management to be in charge of the policy's implementation, and, ideally, that this implementation be part of the company's incentive structure (e.g. through performance reviews and compensation).[29] Social investors have begun to ask companies to undertake human rights impact assessments, though these are a relatively new aspect of due diligence.

Further, SRIs look for corporations to have systems for remediation of non-compliance with human rights policies or codes, as well as grievance mechanisms for workers and communities.[30] They may search for evidence that a company has made, or is making, efforts to prevent the use of its goods and services to commit human rights violations (so-called "dual use").[31]

SRIs do not always expect the same level of due diligence from all companies in all industries. Some respondents mention that the due diligence they ask of companies varies according to factors such as industry and geographical location. Weak performance in a particular area, such

[27] Email correspondence from Hamilton, op. cit.
[28] Email correspondence from Eric Fernald, Director of Research, KLD Research & Analytics, December 3, 2008.
[29] Email correspondence from Schilling, op. cit.
[30] Ibid.
[31] Email correspondence from Fernald, op. cit.

as human rights monitoring, does not necessarily lead an SRI firm to remove a company from investment consideration. In such cases, SRI researchers will search for signs of whether the company has made efforts to address the weakness and acknowledge human rights challenges where it operates.[32]

Social investors express an expectation that companies will go "beyond compliance." That is, it is a given that companies will comply with the national laws of the country in which they are operating. But there is also an expectation, for example, that companies will avoid doing business with "non-sanctioned" regimes that have a record of known human rights violations.[33] Where social investors themselves have a country-specific focus, they might choose to avoid investing in companies in strategic industries (e.g. extractives or tourism in Burma), as opposed to having a formal policy of total non-investment in those places.[34] In other cases, they have publicly available, stated policies in relation to certain countries. For example, Domini Social Investments has an investment policy in relation to Sudan that states the following:

> We seek to avoid investing in companies that do business in Sudan in cases where Domini has determined that the company's activities provide certain direct benefits to the government of Sudan, particularly in the areas of oil, mining, electricity infrastructure and military or where, in our view, the company is otherwise complicit in human rights abuses in Sudan. For these companies, our analysis will focus on each company's degree of involvement with the Sudanese government, and its response to the crisis in Darfur. [35]

Social investors also aspire to invest in companies with a *positive* human rights performance, as well as companies that show evidence of trying proactively to address and prevent potential human rights problems in relation to their operations.

Respondents note that investors are often interested in whether companies are signatories to collective, voluntary initiatives, including at the international and industry levels. However, some respondents state that they view certain initiatives, including the Global Compact, with skepticism, particularly if they lack strong enforcement or oversight mechanisms.[36] Members of the SRI community have been involved in several of these efforts, and they recognize their potential benefits to participating companies (e.g. as learning fora). There is a concern, though, that investor education has been "an area of weakness, which can undermine the value and effectiveness of these initiatives." The lack of follow-up on getting long-term investor

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[32] Email correspondence from Kanzer, op. cit.
[33] Email correspondence from Alpern, op.cit. Along these lines, in "Protect, Respect and Remedy", op. cit., the SRSG writes that companies must have a due diligence process "whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it." (p. 9).
[34] Telephone communication with Alya Kayal, Esq., Vice President, Social Research, Calvert Investments, December 5, 2008. Calvert does state on its website, "Calvert Funds do not invest in companies that materially contribute to sustaining the Khartoum regime and the abuses in Darfur, including certain natural resource extraction firms." See http://www.calvertgroup.com/sri_IBHumanRights.html Calvert and others also have criteria around investment in Burma.
[35] The policy is available on Domini's website: http://www.domini.com/GlobInvStd/Darfur-Cri/InvestmentPolicy.doc_cvt.htm
[36] In fact, institutional investors were behind an effort in 2008 to push Global Compact signatories to live up to the Compact's reporting requirements.

commitment can thus weaken the causes around which the initiatives are sometimes launched "with great fanfare".[37]

Tools for Holding Companies Accountable

It is an enormous challenge for social investors to hold companies accountable on human rights, and the rest of this section attempts to shed some light on their efforts to do so. With few exceptions, SRIs themselves cannot verify a corporation's implementation of its human rights policy or systems on the ground.

SRI's tools for holding companies accountable include shareholder engagement (such as direct dialogue), resolutions and proxy voting, touched on earlier; divestment (usually a last resort); asset selection; and research and analysis, discussed below.[38] There is even a recent case of investors – the Service Employees International Union (SEIU) – filing a shareholder derivative lawsuit against Chiquita in connection with its illegal payments to paramilitary organizations in Colombia. In a public statement, the SEIU said, "It is unacceptable for a corporation to turn a blind eye to widespread international labor and other human rights abuses in the name of 'serving' shareholders well. A fundamental shift is needed in the way business is done; the end game cannot be turning the highest profit at any cost."[39] Section VI discusses other tools such as policy advocacy and participation in multi-stakeholder initiatives around human rights issues.

SRIs generally do not have internal policies of the kind that call for formal guidelines or protocols on asking companies to report on their human rights activities. However, SRI researchers have developed internal guidelines on how to rate or score companies consistently on human rights (as on other issues). Over the years, these guidelines often become more detailed and rigorous, and may be updated on a regular basis to accommodate emerging issues as well as new knowledge about existing human rights problems or evolving theories on complex areas such as supply chain labor rights. Some SRIs list their ratings framework publicly, including the human rights standards or criteria they expect of companies, though the level of transparency around ratings or index criteria varies from one SRI research firm to another.[40] Company profiles are frequently fully reviewed on an annual basis and updated on a more frequent or even real-time basis. SRI ratings (particularly poor ratings) may attract a company's attention, and can thus be another way to hold them accountable.

As with SRI research on environment and corporate governance, research on human rights issues generally focuses on policies, systems, performance (implementation of these systems, or lack thereof), impact and reporting. One SRI fund manager conducts what it calls "Management Breach Investigations" when a company is involved in a specific human rights-related

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[37] Email correspondence from Stein, op.cit., December 16, 2008.

[38] Obviously firms that are strictly SRI research providers (and that do not hold shares) cannot vote proxies. However, they may participate in direct dialogue with corporate management and utilize other tools described here that do not involve ownership.

[39] Service Employees International Union, « SEIU Files Shareholder Derivative Lawsuit Against Chiquita, Calls for Fundamental Shift in 'Profit at Any Costs' Business Model", press release, December 13, 2007. No updates were available at the time of writing.

[40] See, for example, http://www.kld.com/research/ratings_indicators.html

controversy. Its proprietary research methodology is customized by sector and level of exposure to ESG risk.[41]

Social investors conduct their research and gain access to corporate human rights information through several methods: public documents from corporations such as CSR reports, websites or regulatory filings; subscription-based research providers; direct dialogue with corporations; surveys of companies;[42] government databases; NGO reports; press coverage and other media (Lexis-Nexis); and interviews with civil society organizations, labor unions, community groups, government officials, academic experts and other stakeholders. They might also look to resources such as those of the US State Department, Amnesty International and Freedom House to determine the level of industry and country exposure to human rights violations.

An interesting example of SRI research being used to hold companies accountable comes from Domini Social Investments. In 2006, Domini discovered, through its research, that Toyota Motor's trading partner, Toyota Tsusho, was involved in substantive business dealings with the Burmese military regime. Domini shared its research with others, and in 2007 it joined another social investment firm, Trillium Asset Management, in pressing Toyota Motors to consider the human rights implications of its trading partner's dealings in Burma. Although at first denying any control over Toyota Tsusho, Toyota Motors more recently told Domini it was discussing the issue "at the highest levels of Toyota Tsusho," and it agreed to keep Domini informed of progress in these discussions.[43]

Some SRI firms, using their own research or that of research providers, construct indexes that investment managers use for investment decision-making. The indexes generally consist of companies that have passed certain ESG criteria, including human rights. Index maintenance requires the consistent application of standards to constituent (or prospective constituent) companies. The addition or deletion of a company to or from an index can produce a demonstration effect (or draw a company into dialogue), as it can call attention to both positive and negative human rights impacts associated with the company in question. Indexes are thus both a tool to hold companies accountable and a form of SRI internal due diligence.

In addition, SRI research firms sometimes provide proxy voting guidelines to their clients based on their research on various issues and the positions they take on these issues.

SRI due diligence on human rights can also include site visits, meetings with representatives of victims of human rights abuses and inviting these representatives to attend corporate annual general meetings to speak on behalf of their communities.[44]

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[41] Email correspondence from Robert Walker, Vice President, Sustainability, The Ethical Funds Company, January 6, 2009.

[42] Calvert has noted that it conducts no surveys of corporations, and thus stresses the need for corporate public disclosure. Telephone conversation with Kayal, op. cit.

[43] See http://www.domini.com/common/pdf/2008_Q2_Web.pdf

[44] Kanzer, "Putting Human Rights on the Agenda", op. cit., p. 7. In 2004, Trillium Asset Management and other investors traveled to Ecuador to undertake a fact-finding mission on Chevron-Texaco's former oil operations in that country. Later that year, the investors filed a shareholder proposal with the company in relation to oil-related pollution in Ecuador's Amazon region.

SRI Internal Due Diligence

Finally, separate from how they do due diligence on other companies, some SRIs – as companies themselves – have internal policies on diversity and employment equity vis-à-vis their own employees. At least one SRI firm interviewed has ethical sourcing policies, which make reference to human rights-related issues, for its own supplier relationships.[45] Further, one SRI firm produces its own CSR report, and for each of its funds, its board must approve all criteria, including those for human rights. So, for example, in the company's new Global Water Fund, the human right to water is a criterion for constituent companies.[46]

Challenges in Holding Companies Accountable

As noted earlier in this section, SRI faces significant challenges in its human rights work. This is due, in part, to the lack of consistent and high-quality disclosure of corporations' human rights systems and their implementation. When asked, companies naturally claim that they respect human rights, but as the SRSG points out in his 2008 report, most companies lack the systems that would allow them (or anyone else) to know whether they actually do respect human rights.[47]

SRI researchers must rely for the most part on information in the public domain to make judgments about corporate performance, and this is especially true of human rights, for which there are often even fewer reporting requirements at the national level than there are for other areas of interest to social investors. There is no human rights equivalent, for example, of the Toxics Release Inventory, and companies do not have to make securities filings on human rights issues the way they do for key corporate governance issues such as executive pay and board director interrelationships.

Further, even in cases where corporations with human rights policies and systems in place provide clear and consistent information on these, having policies and systems is not the same as implementing them, which is a key element of corporate human rights performance.

Social investors have played a role in trying to address some of these challenges. In 2007, faith-based investors filed a shareholder proposal asking Newmont Mining Corporation to produce a report addressing community-based opposition to its operations globally. The vote received 92%, with the filers noting that this was the first time a US mining company had ever asked shareholders to vote for a social resolution.[48] And as Kanzer points out, social investors have been an important source of pressure for high-profile brand companies on supply chain reporting.[49] Social investors have publicly endorsed the Global Reporting Initiative (GRI) and participated in creating GRI's G3 guidelines on corporate reporting.

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[45] Email correspondence from Walker, op. cit.
[46] Telephone conversation with Kayal, op. cit.
[47] Ruggie, « Protect, Respect and Remedy", op. cit., p. 9.
[48] See Kanzer, « Putting Human Rights on the Agenda", op. cit., p. 17, which cites a press release by Christian Brothers Investment Services, "91.6 Percent of Newmont Shareholders Support Resolution for Mining Company to Report on Its Impacts on Local Communities", April 24, 2007, at http://www.cbisonline.com/page.asp?id=873
[49] Kanzer, *Ibid*., p. 16.

In 2008, SRI researchers began an advocacy campaign to push companies in developing countries to improve their ESG disclosure. And in December 2008, social investors in the U.S. published a report calling attention to environmental and social reporting requirements mandated in several countries (including France and Malaysia), as well as the lack of progress in this area in the U.S.[50]

Along these lines, some of the respondents noted that one way in which the SRSG could help SRI practitioners to improve their own due diligence toward companies is to push for improved transparency and disclosure on human rights policies and systems, as well as on their implementation, on which disclosure is often weakest. Mandatory disclosure and ESG listing standards, ideally leading to better – and regulated – reporting, are among the policy instruments that have been discussed as a way to make human rights due diligence more effective.

VI. Recent Trends and Looking Forward

Holding corporations accountable for their impact on human rights remains particularly challenging for SRI for the reasons already outlined. However, some recent trends and developments point to ways in which social investors could make progress in their work on human rights.

Policy involvement and advocacy:
Recent years have seen increased SRI involvement at the policy level. For the moment, this is more evident for environmental and corporate governance issues than for human rights.[51]

There are exceptions. As of 2008, social investors were working with human rights groups, including the International Labor Rights Forum (ILRF), to demand that Uzbekistan stop using child labor for the harvesting of cotton.[52] In April 2008, the ICCR wrote to Senator Tom Harkin in support of a voluntary certification program aimed at reducing the likelihood that child or forced labor would be used to produce agricultural commodities.[53] In September 2008, Domini Social Investments provided testimony to the Congressional Human Rights Caucus on the measures investors and others could take to address genocide and other egregious human rights violations.[54] Notably, Domini called on the SEC to "consider requiring issuers to disclose certain aspects of their human rights performance, with a particular focus on genocide and other crimes against humanity."[55]

[50] The report, "Innovations in Social and Environmental Disclosure Outside the United States", released in December 2008 by Domini Social Investments LLC and the US Social Investment Forum, is available at http://www.domini.com/common/pdf/Innovations_in_Disclosure.pdf
[51] An example of social investor involvement in public policy has been the Investor Network on Climate Risk's push for the SEC to consider ESG reporting as part of its 21st Century Disclosure Initiative. See Robert Kropp, "Institutional Investors Call on SEC to Require Climate Change Disclosure", SocialFunds.com, November 5, 2008. Social investors have pushed on the SEC for several years regarding disclosure.
[52] See http://www.laborrights.org/stop-child-labor/cotton-campaign/1662
[53] See http://www.iccr.org/news/press_releases/2008/pr_harkinletter04.01.08.htm
[54] Domini's testimony is available at http://www.domini.com/GlobInvStd/Darfur-Cri/DominiResponds.doc_cvt.htm
[55] Testimony cited at *Ibid*, at p. 8.

There is room for much more work in the policy sphere, which carries the potential for increasing awareness of - and leverage on - social issues.

Multi-stakeholder initiatives and creative alliances:
In a recent paper, Lydenberg notes that "social investors' efforts take place within the context of broader movements for change."[56] Members of the SRI community have been increasingly active participants in a number of multi-stakeholder initiatives (MSIs) around social and environmental issues, and have begun to work in creative alliance with others who share their concerns. The following are recent examples involving human rights issues:

- Social investors have joined with NGOs, companies, and academic experts to launch the Global Network Initiative (GNI), which seeks to provide guidance to companies in the information and communications technology industry on protecting privacy and freedom of expression.[57]
- Social investors have participated in industry-led initiatives around ESG issues, such as the Electronics Industry Citizenship Coalition (EICC); while the EICC's membership is open only to companies, SRIs have provided feedback as external observers.
- Amnesty International-USA and the New York City Pension Funds have worked together to press Dow Chemical on the human rights legacy of the Bhopal disaster of 1984.[58] In 2007, AI-USA and the NYCPF co-filed a resolution asking Dow to report on how it was addressing the needs of Bhopal survivors. They also asked the SEC to look into whether Dow had failed to disclose to shareholders its potential liabilities from the Bhopal case.[59]
- US and UK unions and investors (including New York-based Domini Social Investments and UK-based Cooperative Insurance Society) co-filed a shareholder resolution in 2006 and 2007 with the UK transportation company, FirstGroup Plc, about alleged anti-union behavior at FirstGroup's US subsidiary.[60]

Again, social investors can do much more in this regard, for example by seeking out alliances with groups on the ground that might be best-placed to provide data on corporate impact on human rights, or allying with other shareholders who might not ordinarily take up social issues.

Bigger picture thinking:
It is possible to lose the forest for the trees – to get caught up in company-level analysis and lose sight of the root causes of human rights violations. In recognition of this, social investors have

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[56] Steven Lydenberg, "Long-Term Investing: A Proposal for How to Define and Implement Long-Term Investing". Paper presented at the 2007 Summit on the Future of the Corporation, Boston, November 2008, p. 56.
[57] See http://www.globalnetworkinitiative.org/
[58] Dow Chemical bought Union Carbide in 2001.
[59] For recent articles on the Bhopal legacy, including Dow Chemical's reaction to AI-USA's and shareholders' requests and AI-USA's response to Dow, see the Business and Human Rights Resource Centre, http://www.business-humanrights.org/Search/SearchResults?SearchableText=Bhopal&x=0&y=0&&batch_start=21
[60] See http://www.domini.com/shareholder-advocacy/index.htm and Elizabeth Umlas, "Investing in the Work Force: Social Investors and International Labor Standards", working paper for the International Labor Organization, forthcoming 2009.

begun to take an increasingly sectoral approach, both to human rights and to other issues, sometimes in collaboration with civil society organizations and others. Social investors' involvement in some of the multi-stakeholder initiatives mentioned above can be viewed in this light. There are examples of this approach within the SRI community as well. One ICCR working group has been exploring the issue of purchasing practices in certain industries and how these can be a root cause of persistent violations of international labor standards in supply chains.

What social investors are trying to achieve through initiatives both internal and external is not simply a more effective platform for holding individual companies accountable for their human rights performance, but also to push for an examination – and a rethink – of *entire business models* and sectors that might drive or exacerbate human rights violations. The SRI community must strengthen its work in this area, and the SRSG's framework and approach could be helpful in this regard, as it has focused attention on the structural causes of continued human rights violations, emanating from both the state and corporate spheres.

VII. Select Recommendations

Earlier sections touched on two areas where the SRSG's work could aid social investors' efforts around human rights: that of disclosure and reporting, and that of fiduciary duty. In addition to these, in response to the question of how the SRSG's mandate can be helpful, social investors' answers ranged from the structural, or more "macro" level, to the more operational or "micro" level. The macro level includes:

- Advancing the discussion of how capital markets affect human rights, as well as "clarifying the responsibilities of investors, companies and other capital market actors" including stock exchanges;[61] and "clarifying for financiers what their legal and extra-legal obligations are when considering underwriting and investment with actors and governments that may be violating human rights".[62]
- Clarifying company obligations in relation to international law[63]
- Clarifying for companies "how far down the supply chain they have legal responsibilities/liabilities"[64]
- Clarifying "core principles" around corporate responsibility to respect human rights[65]
- Clarifying what is voluntary and what should be mandated. Can the UN mandate anything? What are the prospects for an international system that checks implementation? Is it possible to add teeth to voluntary initiatives?[66]
- Keeping the issue of human rights on national government agendas[67]
- Continuing to make a strong business case for the protection of human rights[68]

[61] Email correspondence from Kanzer, op. cit.
[62] Email correspondence from Alpern, op. cit.
[63] Email correspondence from Hamilton, op. cit.
[64] Email correspondence from Alpern, op. cit.
[65] Email correspondence from Schilling, op. cit.
[66] Telephone conversation with Kayal, op. cit.
[67] Email correspondence from Hamilton, op. cit.
[68] Email correspondence from Wolfe, op. cit.

At the more micro level, SRI respondents call on the SRSG to provide:

- Concrete guidelines on what social investors can realistically ask of companies[69]
- Practical guidance on best practice, including by industry and through case studies. For example, should risk assessments be done by geographical location? Does the HRIA process differ by industry? By zone? Is it audited or reported on annually?[70] Is there a way, at this early stage, to prevent human rights impact assessments from becoming tick-box exercises that lack substance?

The Human Rights Council has asked the SRSG to operationalize the framework of "protect, respect and remedy". The SRSG's preliminary workplan for 2008-2011 provides some details on how he will do this, and notes specifically that this will include developing a set of "guiding principles" on corporate responsibility to respect.[71] These principles will not necessarily provide answers to some of the more detailed questions above, though they could clarify the process by which companies themselves can determine the answers in relation to their own operations and activities.

Beyond the above points, a recommendation for both social investors and the SRSG is that they continue to anticipate emerging human rights issues in a timely fashion. Social investors, sometimes working with civil society counterparts, often call attention to the societal implications of human rights issues that others in the private sector might either view as simply a financial risk to be "minimized," or pass over altogether. For example, when the China toy recall scandal rocked the US in 2007, and all eyes were focused on consumer product safety, social investors were among the few voices pointing to the health and safety implications for Chinese workers producing those toys. Canadian social investors have focused on labor practices in the commercial property industry[72] and on the human rights implications of investment in Tibet, a topic that receives very little coverage outside of the human rights NGOs who work in this area.

There are other issues – lithium mining in Bolivia, for example – that should be on the radar screens of both the SRSG and social investors because of the human rights implications of private sector involvement in these areas. The objective in such cases, particularly those that are just beginning to emerge, must be to ensure corporate human rights due diligence in a way that prevents human rights violations from happening in the first place.
Finally, an open question for social investors, the SRSG and others working in the field of business and human rights is how to create, as one respondent puts it, a "human rights consciousness and culture" within corporations.[73] This is a question that reveals the scale and the nature of the task of establishing corporate responsibility to respect human rights. Social investors are well-placed to contribute to this debate, and they can and must be among the players who will help to break the back of this challenge.

[69] Telephone conversation with Kayal, op. cit.
[70] *Ibid.*
[71] "Preliminary Work Plan, Mandate of the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises", 1 September 2008 – 30 June 2001, available at http://www.business-humanrights.org/Updates/Archive/SpecialRepresentativeMandate
[72] See www.share.ca for example
[73] Email correspondence from Schilling, op. cit.