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Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets

Larry Catá Backer

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SOVEREIGN INVESTING AND MARKETS- BASED TRANSNATIONAL RULE OF LAW BUILDING: THE NORWEGIAN SOVEREIGN WEALTH FUND IN GLOBAL MARKETS

LARRY CATÁ BACKER*

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I. INTRODUCTION

Sovereign investing has become an important element in emerging patterns of governance in this century.¹ It represents efforts by states to manage and project their authority in accordance with changing

1. See, e.g., Gordon L. Clark et al., *Symposium: Sovereign Fund Capitalism*, 42 ENV'T & PLAN. A 2271, 2272 (2010), available at <http://www.envplan.com/epa/fulltext/a42/a43313.pdf>; Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345 (2008), available at <http://www.stanfordlawreview.org/sites/default/files/articles/GilsonMilhaupt.pdf>.

realities of power and governance forms in a world defined by the logic of economic globalization. Sovereign Wealth Funds (“SWFs”) also provide host states with an important source of revenue for undertaking projects these states may no longer be able to afford, “[c]reditors are also beginning to govern outright.”² Sovereign investing takes a number of forms. Two of the most innovative and dynamic are those of the People’s Republic of China³ and the Kingdom of Norway.⁴ Both have changed fundamental assumptions about the ways states regulate internally and project power externally.⁵ Each seeks to use the logic of globalization, and its markets, as a means of extending its authority beyond its borders and engaging in development of international normative standards for public and private conduct under hard and soft law frameworks. Of the two, the Chinese approach is more creative in its use of market-oriented transformation, which focuses on state participation in

2. Matt Stoller, *The Housing Crash and the End of American Citizenship*, 39 *FORDHAM URB. L.J.* 1183, 1207–17 (2012) (observing the encouragement from the White House and leaders from both parties for foreign SWFs to invest in a variety of U.S. industries); *see also*, Mark E. Plotkin, *Foreign Direct Investment by Sovereign Wealth Funds: Using the Market and the Committee on Foreign Investment in the United States Together to Make the United States More Secure*, 118 *YALE L.J. POCKET PART* 88 (2008) (explaining how sovereign investing can be used as a political weapon because some countries invest for geostrategic goals instead of political gains); Michael S. Knoll, *Taxation and the Competitiveness of Sovereign Wealth Funds: Do Taxes Encourage Sovereign Wealth Funds to Invest in the United States?*, 82 *S. CAL. L. REV.* 703 (2009), available at <http://weblaw.usc.edu/why/students/orgs/lawreview/documents/KnollforWebsite.pdf> (noting that SWFs benefit host states by decreasing their domestic cost of capital and giving them the primary right to tax investors).

3. *See generally* Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience*, 19 *TRANSNAT’L L. & CONTEMP. PROBS.* 3 (2010) [hereinafter Backer, *Sovereign Investing in Times of Crisis*] (explaining how China integrates important aspects of sovereign investing to achieve both commercial and political aims to maximize the welfare of the Chinese state).

4. *See generally* Larry Catá Backer, *Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 *GEO. J. INT’L L.* 425 (2010) [hereinafter Backer, *Sovereign Wealth Funds as Regulatory Chameleons*].

5. *See* Steve Schifferes, *Lifting the Lid on Sovereign Wealth Funds*, *BBC NEWS*, June 13, 2013, <http://news.bbc.co.uk/2/hi/business/7430641.stm> (noting that China is a more passive investor, seeking only good financial returns, while Norway has followed a more political course for private market interventions by embracing a responsibility to avoid human rights violations).

private market activities.⁶ In contrast, the Norwegian approach is more aggressive and political in its blending of national and international governance as well as public and private governance mechanisms through interventions in private markets.⁷ Sovereign investing thus points to a form of cooperative governance that has been emerging in the global regulation of markets and finance primarily over the last half-decade.⁸ But it remains a controversial practice, even as its allure remains powerful.⁹ Recent work on the emerging “law” of SWFs¹⁰ increasingly describes the way that these instruments “replicate the collisions between two tectonic forces that are grinding their way to a new normative framework of governance and power.”¹¹ SWFs constitute a new form of private organization operating in global space beyond the state while simultaneously involved in activities within the territories of several states. At the same time, SWFs remain very much instruments of the state and tightly bound up in the formal structures of the state and legal

6. See, e.g., Willy Kraus, *Political Power and the Power of Market-Dynamics in China*, in THE STUDY OF MODERN CHINA 93 (Eberhard Sandschneider ed., Tobia Schumacher & Petra Dreiser trans., 1999) (discussing the importance of legal regulatory framework in China’s state-participation-focused market transformation).

7. See, e.g., Simon Chesterman, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of Norway’s Sovereign Wealth Fund*, 23 AM. U. INT’L L. REV. 577, 594–605 (2008); Gordon L. Clark & Ashby H. B. Monk, *The Legitimacy and Governance of Norway’s Sovereign Wealth Fund: The Ethics of Global Investment*, 42 ENV’T & PLANNING A 1723, 1735–37 (2010), available at <http://www.envplan.com/epa/fulltext/a42/a42441.pdf>.

8. See, e.g., Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751, 755 (2011), available at http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1006&context=fac_works [hereinafter Backer, *Private Actors and Public Governance*].

9. See, e.g., Vivienne Bath, *Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China*, 34 SYDNEY L. REV. 5 (2012), available at http://sydney.edu.au/law/slr/slr_34/slr34_1/SLRv34no1Bath.pdf (explaining how Australian public perception recently influenced the rejection of a proposed corporate takeover that would have increased Australia’s governance in the foreign entity).

10. See, e.g., FABIO BASSAN, THE LAW OF SOVEREIGN WEALTH FUNDS 55 (2011).

11. See Larry Catá Backer, *Review Essay: Taking a Step Toward a Law for Sovereign Wealth Funds* 101, 103 (Consortium for Peace and Ethics, Working Paper No. 2012-9/1, 2012).

systems grounded in respect for territorial borders.¹²

This collision is possible only as a result of the structural changes resulting from globalization, and specifically, its role in producing porous national borders.¹³ The most important consequence of this collision is governance fracture and, as a result, the diffusion of regulatory authority between public and private bodies within and between states.¹⁴ The more these forces work toward harmonization, the more relentlessly they illuminate the resulting fracture of governance. Yet they also point to the possibility of creating a framework for understanding the way in which SWFs are governed and can be managed through regulation.¹⁵

This study, then, does not consider the way in which SWFs ought to be governed;¹⁶ rather *it focuses on the emergence of governance systems through which SWFs can themselves govern*. For that purpose, it considers in some detail a critical aspect of the organization of the sovereign investing project of Norway.¹⁷ Undertaken through its SWF, the Government Pension Fund-Global (for the purposes of this study the “NSWF”),¹⁸ Norway seeks not

12. *Id.*

13. See, e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1005–06 (2004), available at <http://www.jura.uni-frankfurt.de/42852885/regimecollisions.pdf>.

14. Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 TILBURG L. REV. 177, 182–84 (2012), available at http://www.backerinlaw.com/Site/wp-content/uploads/2013/05/TILR_017_02_Backer_art05.pdf [hereinafter Backer, *The Structural Characteristics of Global Law*].

15. BASSAN, *supra* note 10, at 39–40.

16. For a discussion of this topic, see *id.*; see also Yvonne C.L. Lee, *The Governance of Contemporary Sovereign Wealth Funds*, 6 HASTINGS BUS. L.J. 197 (2010); Efraim Chalamish, *Global Investment Regulation and Sovereign Wealth Funds*, 13 THEORETICAL INQ. L. 645 (2012).

17. See, e.g., Benjamin J. Richardson, *Sovereign Wealth Funds and the Quest for Sustainability: Insights from Norway and New Zealand*, NORDIC J. COM. L. 1 (2011), available at http://www.njcl.utu.fi/2_2011/benjamin_j_richardson.pdf (explaining how the Norwegian SWF has been imitated by others, despite the fact that it is not an “industry leader”); see also, Milken Institute, *Structuring Israel’s Sovereign Investment Fund*, 17 (Dec. 2011), <https://www.milkeninstitute.org/pdf/FILIsraelSWF.pdf> (acknowledging the success and effectiveness of Norway’s SWF structure and legal framework and noting that the Israeli investment fund may borrow some structures from the NSWF).

18. See *The Management of the Government Pension Fund in 2011*,

merely to project public wealth into private global markets, but attempts to construct a complex rule-of-law-centered framework that blends the imperatives of a state-based public policy with a rule-based governance system that incorporates both domestic and international norms. To this framework, Norway adds a policy-oriented use of traditional shareholder power to affect the behavior and governance of companies in which the NSWF has invested. The object is not merely to maximize the welfare of the fund's ultimate investors, the people of Norway, but also to use the fund to advance Norwegian public policy in both the international sphere and the domestic legal systems of other states to achieve a measure of horizontal harmonization of corporate governance.¹⁹

Norway has developed a toolbox to effectuate its policy-centered investment strategy, which consists of both the traditional forms of regulatory governance and a policy-centered invocation of shareholder power. The shareholder power operates both within the corporation and, for a large investor, as an advocate for change within those foreign states where those companies are domiciled. In effect, Norway acknowledges three intertwined but autonomous governance realms.²⁰ The first is the traditional territory-based state. The second is the governance sphere of the corporation—affecting not only relationships within the corporation's operations but also the rules that reflect the choices it makes when interacting with others. The third is the international governance sphere, where common traditions are developed that have a direct and indirect effect on both domestic legal orders and corporate behavior choices. Norway has sought to operate within and between these three governance realms, and to some extent affect their content, through the investment strategies of the NSWF. This intertwining suggests a unique inter-systemic governance project.²¹

NORWEGIAN MINISTRY OF FIN. 9 (2012), available at http://www.regjeringen.no/pages/37868600/PDFS/STM201120120017000EN_PDFS.pdf (explaining the composition of the Government Pension Fund, which encompasses the Government Pension Fund Global and Government Pension Fund Norway, which are managed by the Norges Bank under the auspices of the Ministry of Finance).

19. See discussion *infra* Part II.

20. See discussion *infra* Part II.B.

21. Larry Catá Backer, *Inter-Systemic Harmonization and Its Challenges for the Legal-State*, in *THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW* 427, 428–31 (Sam Muller et al. eds., 2011) [hereinafter Backer, *Inter-Systemic*

Understood generally within the rubric of “responsible investing,”²² the NSWF takes part in global financial markets as both a participant and as a regulatory stakeholder. First, as a regulatory stakeholder, the NSWF determines the range of enterprises in which it may invest: its investment universe. That determination is based on the NSWF’s governing documents. The most important of these is a set of Ethical Guidelines, in which the NSWF investment program is grounded.²³ These Ethical Guidelines, adopted by the Norwegian legislature and enforced through an Ethics Council,²⁴ reflect Norwegian public policy that itself blends domestic and international law as interpreted by the Norwegian state. The Ethics Council is then charged with determining whether a company should be excluded from investment by the NSWF through the “active ownership” strategy²⁵ utilized by the Fund Manager in harmony with responsible investment principles. These principles are also grounded in Norwegian domestic law, international law, and norms selected by the Norwegian Ministry of Finance.²⁶ Second, the NSWF’s “active

Harmonization].

22. *Management of the Government Pension Fund in 2011*, *supra* note 18, at 98; *New Guidelines for Responsible Investment Practices in the Government Pension Fund Global (GPF)*, NORWEGIAN MINISTRY OF FIN. (Mar. 2, 2010), <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2010/New-guidelines-for-responsible-investment-practices-in-the-Government-Pension-Fund-Global-GPFG.html?id=594246> [hereinafter *New Guidelines*].

23. Guidelines for the Observation and Exclusion of Companies from the Government Pension Fund Global’s Investment Universe, (adopted by the Ministry of Finance on Mar. 1, 2010 pursuant to Act no. 123 of Dec. 21, 2005), STYRER, RÅD OG UTVALG [Norwegian Boards, Councils, and Committees], *available at* http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277 [hereinafter *Ethics Guidelines*].

24. *Id.*

25. *See The State Will Be an Active Owner*, NORWEGIAN MINISTRY OF TRADE AND INDUS. (Apr. 4, 2011), <http://www.regjeringen.no/en/dep/nhd/press-centre/Press-releases/2011/the-state-will-be-an-active-owner.html?id=637657>; *Active Ownership—Norwegian State Ownership in a Global Economy*, NORWEGIAN MINISTRY OF TRADE AND INDUS. (2011), http://www.regjeringen.no/pages/36076278/PDFS/STM201020110013000EN_PDFS.pdf.

26. *On the Management of the Government Pension Fund in 2008*, NORWEGIAN MINISTRY OF FIN. 109 (2008–2009), http://www.regjeringen.no/pages/2185603/PDFS/STM200820090020000EN_PDFS.pdf (explaining that fund management must take into account national norms “precluding the Fund from having investments that conflict with Norway’s obligations under international law”).

shareholding” or “active ownership” policy²⁷ also has a private regulatory dimension. Active ownership commits the NSWF to attempt to use its position as a shareholder to change individual corporate behavior to conform to Norwegian policy touching on corporate governance and conduct.²⁸ Active ownership obligations can be applied by the Fund manager but may also be invoked through application of the Ethics Guidelines observation powers.

Investment activity with legislative effect, undertaken through the framework of responsible investing, provides the foundation for the thesis of this study: SWFs embody a new and important form of cooperative governance, one that (1) bridges public and private government spheres, (2) blends law, custom, contract, and non-state governance regimes, and (3) mediates between the national and international systems. The functionally-directed governance activities of the NSWF do not serve as a convergence of law project undertaken by Norway. Rather, its objective is to position Norway as a nexus for the mediation of governance polycentricity inherent in globalization. As a consequence, the state assumes the role of a chameleon,²⁹ adopting actions and objectives in line with the role it plays in each governance system.

This two-fold set of techniques for state intervention in private markets, with the purpose of securing both economic and regulatory return on investment, represents the most innovative part of the NSWF framework.³⁰ Norway’s SWF project may provide a window into governance frameworks for the coming century. It embraces a set of governing parameters incompatible with traditional assumptions of the operation of the law-state system from the last century;³¹ here, neither the state nor the law occupies the central

27. *Management of the Government Pension Fund in 2011*, *supra* note 18, at 95–98.

28. *Id.* (asserting that active ownership then becomes a method of ensuring the compliance with the NSWF’s ethics guidelines).

29. Backer, *Sovereign Investing in Times of Crisis*, *supra* note 3.

30. See generally GRALF-PATER CALLIESS & PEWER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010) (theorizing the way in which regulation through state intervention in private markets has become a variant on the emerging mechanics of law).

31. See Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems*, in *BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN*

position. The NSWF governance regime acknowledges three simultaneously operating governance regimes: the law-state system, the social-norm system of private actors, and the international law-custom system of the community of states (and their partner-constructs). It seeks to both navigate between these governance systems and to actively participate within and impact them. The NSWF is created and operated as an instrumentality of the state, a fund controlled through the Norse Ministry of Finance. As a state instrumentality, it is used to generate income for Norway; yet its income production also produces governance effects through the use of shareholder power to effectuate Norwegian public policy in the enterprises in which the NSWF owns shares. The public policy that is reflected in the NSWF investment activity as a shareholder and investor in turn reflects the internalization of international law and governance within the Norwegian domestic legal order. These ideas contribute to the development of international law and custom that are then applied to the law or social-norm systems of the other two governance regimes.

The distinctions between law and norm, between public and private spheres, between hierarchy and polycentricity, thus collapse within the operational universe of the NSWF. I am reminded of the vision of the future of governance suggested by Michel Foucault nearly a generation ago: “A right of sovereignty and a mechanics of discipline. It is, I think, between these two limits that power is exercised. The two limits are, however, of such a kind and so heterogeneous that we can never reduce one to the other.”³² The Norwegian experiment, like that of its Chinese counterpart, represents contemporary efforts to institutionalize a sustainable

AGE OF GLOBALIZATION (Günther Handl, Joachim Zekoll, Peer Zumbansen, eds., 2012) [hereinafter Backer, *Governance Without Government*] (discussing the law-state system, and noting that “law-state” refers to the conventional early twenty-first century understanding of the state as a territorial unit with its own domestic legal order regulated by a constitution; the constitution is in turn constrained by an international system created by consensus among the community of states and in which there is a strict divide between public law, legitimated by democratic and rule of law principles and the social norms of non-state actors in markets and other communities).

32. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE 1975–1976, 37 (Mauro Bertani et al. eds., David Macey trans., 2003).

'normalizing society' that is compatible with emerging global power systems. It is in this sense that the NSWF can be understood as a regulatory chameleon, balancing conventional economic profit maximization with long-term strategic political and policy goals.³³

Part II will briefly examine the legal and regulatory framework within which the NSWF is organized, introducing the principal institutional actors and the regulatory framework within which they operate. Parts III and IV then turn to consider responsible investing. Part III considers the private market interventions of the NSWF through its active ownership framework. Part IV then turns to the more public aspects of NSWF governance by considering the structures and operation of NSWF investment universe rules. The NSWF governance framework tends to frame the rules for companies' access to capital and is grounded in the application of the Ethics Guidelines as the gateway to that portion of the capital markets in which the NSWF will participate. These access rules, though only applicable to NSWF investment decisions, are expected to pressure companies into conforming to access NSWF investment. This Part first examines the substantive provisions framing investment exclusion, centering on the NSWF Ethical Guidelines, and the structure and operations of the Ethics Council itself.³⁴ Part V then turns to the decisions of the Ethics Council, organized around substantive issues, the purpose of which is to discuss the way juridification of exclusion decisions has brought a very public element into economic investment decisions of the NSWF. Part VI suggests a generalizable analytical framework for setting up the market as both a space for regulatory interventions and as an economic transaction space. This article will explore this framework and its consequences, especially for its implications for emerging inter-systemicity of governance, principally in the context of financial regulation of markets.

The article concludes that the state has returned as a center of

33. Backer, *Sovereign Wealth Funds as Regulatory Chameleons*, *supra* note 4, 494–500 (2010); *accord* Richardson, *supra* note 17, at 22–23 (asserting the Norwegian and New Zealand SWFs resemble institutional chameleons because they are similar to private investment instruments in that they maximize shareholder value, but are also tasked with the public responsibility to realize their states' ethical policies).

34. *See infra* Part IV.

transnational regulation, but it is doing so in part through global private markets. That return to the market is transforming both the market as a center of lawmaking and the state as a stakeholder in regulatory governance beyond its borders. Market power now substitutes for public legislative power, and the techniques of market behavior now serve as the vehicle for the implementation of law and norms. The distinctions between public and private—i.e. between public regulation and market behavior—distinctions that are grounded in a well developed formal system of state and market, give way to the rise of a system best characterized as functional and hybrid. This hybrid system will substantially impact international regulations, the regulatory context of SWFs, the development of transnational standards for corporate social responsibility, and the emergence of substantive standards for corporate behavior consonant with emerging human rights standards.

II. THE OPERATION OF THE NORWEGIAN SOVEREIGN WEALTH FUND: PRIVATE ACTOR, INTERNATIONAL ACTOR, AND SOVEREIGN

The NSWF is a peculiar commercial creature of the state. Its principal objective is to protect the income generated from Norway's exploitation of its petroleum reserves.³⁵ Norway meets this objective by seeking to maximize the wealth-generating potential of the fund in ways that reflect the law and public policy of the Norwegian kingdom. It accomplishes that objective, in turn, by participating in private markets for real estate and securities. Norway undertakes that participation in a manner similar to that undertaken by private investment firms but constrained by the need to conform to its public policy. That public policy is codified in statute and regulation and implemented by the NSWF's fund managers and those governmental entities charged with the management of the NSWF.

This section introduces the formal organization of the NSWF. Part A examines the legal and organizational structures of the NSWF and

35. See, e.g., *Investment Strategy of the GPF*, NORWEGIAN MINISTRY OF FIN., <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/government-pension-fund-global-gpfg/investment-strategy.html?id=696849> (last visited Sept. 2, 2013) (describing the investment strategy of the GPF, or NSWF, as being centered on achieving the highest possible return over time).

its investment management, focusing on the Ministry of Finance, the Norges Bank, and the Norges Bank Investment Management (“NBIM”). Parts B and C then focus on the framework within which the operating universe of NSWF investment is constrained, focusing on the Ethics Guidelines and the structure and operation of the Ethics Council.

A. ORGANIZATION OF THE NSWF: FINANCE MINISTRY, THE NORGES BANK, AND NBIM

The fund that is now the NSWF was established in 1990 as the Petroleum Fund.³⁶ It was established “as a fiscal policy tool to support a long-term management of the petroleum revenues.”³⁷ The NSWF was established in its present form in 2006 as one of two investment funds operated by the Norwegian state.³⁸ The object of this study is formally known as the Government Pension Fund Global, which is a continuation of the Petroleum Fund. The other is the more domestically focused Government Pension Fund Norway. Both domestic and international parts of the Pension Fund have two principal objectives. The first is to support programs of government savings directed to the financing of the Norwegian National Insurance Scheme’s pension expenditures. The second, and more interesting from the perspective of transnational governance, is to “support . . . long-term considerations in the application of petroleum revenues.”³⁹

The Petroleum Fund began investing in equities in 1998. In 2000, it enlarged its investment pool to include securities from five identified emerging markets. Bonds were added in 2002 and ethical

36. *Norway Government Pension Fund Global*, SWF INSTITUTE, <http://www.swfinstitute.org/swfs/norway-government-pension-fund-global/> (last visited July 5, 2013).

37. *Government Pension Fund Global*, NORWEGIAN MINISTRY OF FIN. (Mar. 2010), www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/PFG_summary_march2010.pdf.

38. See *The Management of the Government Pension Fund in 2012*, NORWEGIAN MINISTRY OF FIN. 74 (2012–2013), available at http://www.regjeringen.no/pages/38359835/PDFS/STM201220130027000EN_PDFS.pdf.

39. *Provisions on the Management of the Government Pension Fund – Global*, NORWEGIAN MINISTRY OF FIN. § 1 (Dec. 20, 2005), http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/Management_of_the_government_pension_fund.pdf [hereinafter *Provisions on the Management*].

investment principles were introduced in 2004.⁴⁰ By 2009 the successor NSWF was reported to own about 1% of global stocks⁴¹ and 2.25% of every listed European company.⁴² The NSWF reached a milestone of three trillion kroner (over \$500 billion) in assets in October 2010.⁴³ Beyond its revenues and market power, the NSWF has become influential in regulating markets and establishing norms in investment and corporate governance. The NSWF has not been shy about projecting its power to affect governance issues within private markets outside the territory of the Norwegian State. In 2009, for instance, it “launched an initiative aimed at fostering dialogue on environmental issues with firms in its portfolio, a blueprint for green activism by often passive institutional investors.”⁴⁴ Neither the Petroleum Fund nor the current NSWF was organized as a conventional separate juridical corporate entity, either under the Norwegian corporations law or under special legislation. Rather, the Fund is structured as a governmental entity operating autonomously but not incorporated as either a private or public corporate entity.⁴⁵ As a technical matter, the NSWF exists only in the form of a record of deposits and investments deposited in and invested through the Norges Bank,⁴⁶ but “[t]he investment portfolio of the [NSWF] accounts for most of Norges Bank’s assets under management.”⁴⁷ The managers of the NSWF are either autonomous state

40. *Government Pension Fund Global*, *supra* note 37.

41. *Norway Oil Fund Surges, Owns 1 Pct Global Stocks*, REUTERS, Aug. 14, 2009, available at <http://www.reuters.com/article/2009/08/14/norway-oilfund-idUSLE34057520090814> [hereinafter *Norway Oil Fund Surges*].

42. Richard Milne, *Investment: Norway’s Nest Egg*, FIN. TIMES ANALYSIS, Aug. 19, 2012, <http://www.ft.com/intl/cms/s/0/b6e0e756-e87c-11e1-8397-00144feab49a.html>.

43. *SWFs Finally Reach \$4 Trillion in Assets, Extra Boost from Norway GPF*, SWF INSTITUTE, <http://www.swfinstitute.org/swf-news/swfs-finally-reach-4-trillion-in-assets-extra-boost-from-norway-gpfg/> (last visited Sept. 20, 2013).

44. *Norway Oil Fund Surges*, *supra* note 41.

45. *See id.* “The Government Pension Fund Global is deposited in an account at the Norges Bank. The countervalue is managed under rules laid down by the Ministry, see section 7.” The Government Pension Fund Act of 2005, no. 123 (Dec. 21, 2005) § 2, available at <http://www.regjeringen.no/pages/1719656/governmentPensionFundact.pdf>.

46. *See About Norges Bank*, NORGES BANK, <http://www.norges-bank.no/en/about/> (last visited June 13, 2013) (discussing how the Norges Bank manages Norway’s foreign exchange reserves and the GPF).

47. *Annual Report of the Executive Board 2011*, NORGES BANK 11 (2011), http://www.norges-bank.no/pages/88282/en/executive_board.pdf.

instrumentalities or other separately constituted entities. This structure is similar to the organization of some SWFs, but is also in distinct contrast to the organization of other important SWFs; for example, China's SWF is organized under Chinese corporate law principles.⁴⁸ Indeed, the law establishing the management of the NSWF makes quite clear that the NSWF is to be treated as an instrumentality of state, with "no rights or obligations vis-a-vis private sector entities or public authorities and [with no right to] institute legal proceedings or be subjected to legal proceedings."⁴⁹ Those limitations are effective, at least in Norway under Norwegian law.

As an instrumentality of the state, the NSWF falls under the control of the Ministry of Finance.⁵⁰ The Ministry of Finance manages the funds deposited under its promulgated regulations and is empowered to adopt supplementary regulations to implement the Act that established the NSWF.⁵¹ NSWF funds are deposited with and managed from the Norges Bank (domestic funds are managed through the domestic SWF, the Folketrygdfondet).⁵² The Storting, Norway's Parliament, allocates funds for the NSWF from the net cash flow from petroleum activities whenever such funds may be transferred from the central government's budget. The term "net cash flow from petroleum activities" is derived from several listed sources of gross revenue less listed categories of expenses.⁵³ These include (1) tax revenues⁵⁴ (2) revenues from taxes relating to environmental emissions⁵⁵ and (3) income from Norway's interest in petroleum and petroleum-related activities.⁵⁶ These revenues are taken net of certain

48. See Backer, *Sovereign Investing in Times of Crisis*, *supra* note 3, at 107–16.

49. *Provisions on the Management*, *supra* note 39, § 6.

50. *Id.* § 2.

51. *Id.* § 7.

52. *Id.* § 2.

53. See *id.* § 3.

54. *Id.* (including total tax revenues and royalties deriving from petroleum activities collected pursuant to the Petroleum Taxation Act (no. 35 of June 13, 1975) and the Petroleum Activities Act (no. 72 of Nov. 29, 1996)).

55. *Id.*

56. *Id.* (indicating that operating income and other revenues deriving from the State's direct financial interest in petroleum activities include state revenues from net surplus agreements associated with certain production licenses, dividends from Statoil ASA, government revenues deriving from the removal or alternative use of

expenses.⁵⁷

The NSWF may also fund its operations from “the net results of financial transactions associated with petroleum activities,”⁵⁸ which takes the following definition: gross revenues from government sale of shares in Statoil ASA less government purchase of shares in Statoil ASA, defined as the market price paid by the government for the shares, and less government capital contributions to Statoil ASA and companies attending to government interests in petroleum activities, as well as financial transactions connected to companies in the petroleum sector in which the government has ownership.⁵⁹ Beyond that, the establishing provisions define NSWF income as the return of capital under management and vest the Storting with the power, by resolution, to transfer the NSWF’s capital.⁶⁰

The Ministry of Finance regulates but does not actively manage the NSWF. Until recently, the regulatory matrix that defined the relationship between the Ministry of Finance and the Norges Bank was complex. In 2010, after a period of regulatory review, the Ministry of Finance announced a substantially revised framework.⁶¹ Part of the objective of the revision was to reframe the division of authority between the Finance Ministry and the Norges Bank. Another was to change risk management parameters. The changes also broadened the mandate, with the Minister of Finance emphasizing that “the regulation of the GPFG should continue to be framework-based, so that Norges Bank must fill out the general framework and principles with more detailed internal regulations for the operational management Micromanagement by the Ministry

installations on the continental shelf, and any government sale of stakes representing the State’s direct financial interest in petroleum activities).

57. *See id.* These expenses include Norway’s direct investment in petroleum activities, operating costs relating to those activities, the cost to Norway of certain continental shelf activities and Norway’s purchase of stakes “as part of the State’s direct financial interest in petroleum activities.” *Id.*

58. *Id.*

59. *See id.*; *infra* Part III.

60. *Provisions on the Management*, *supra* note 39, §§ 4–5.

61. *New Mandate for Management of Government Pension Fund Global*, NORWEGIAN MINISTRY OF FIN. (Nov. 10, 2010), <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2010/new-mandate-for-management-of-government.html?id=623478>.

is neither possible nor desirable.”⁶²

The current regulatory framework came into force January 1, 2011.⁶³ It replaced and refined the original set of regulatory documents and state contracts under which the Fund operated.⁶⁴ The new framework includes two sets of regulations,⁶⁵ two sets of guidelines,⁶⁶ and a management agreement.⁶⁷ It also vests both physical custody of the Fund and management of the assets represented by the Fund in the Norges Bank.⁶⁸ The Norges Bank is charged not merely with the management of the Fund, but with a specific set of obligations that define its relationship with the Finance Ministry. These include a duty to inform the Finance Ministry of its strategic plan, significant changes in the value of the Fund or in the management of the Fund by the Bank, or any incidents that trigger a duty to inform.⁶⁹ The Norges Bank is also obligated to provide the Ministry of Finance with “any information the Ministry requests.”⁷⁰ The Norges Bank is required to meet with the Ministry formally at least once per quarter to discuss agendas set by the Ministry. Additionally, like other governmental instrumentalities, the Bank is required to produce a series of public reports on its management of the Fund, the contents of which are specified by

62. *Id.*

63. *Id.*

64. *See Provisions on the Management*, *supra* note 39 (highlighting the structure and characteristics of the regulatory framework in place prior to January 1, 2011).

65. *See Management Mandate for the Government Pension Fund Global*, NORWEGIAN MINISTRY OF FIN., 25–26 (Nov. 8, 2010), available at http://www.regjeringen.no/Upload/FIN/Statens%20pensjonsfond/mandat_spu_eng.pdf [hereinafter *Management Mandate*] (including regulation no. 1725 of December 22, 2005 on the management of the Government Pension Fund Global and regulations of February 24, 2010 concerning management of the real estate portfolio in the Government Pension Fund Global).

66. *Id.* at 4 (explaining that the two guidelines are: (1) the guidelines for management of the Government Pension Fund Global (supplementary provisions pursuant to the Government Pension Fund Act and the regulations on the management of the Government Pension Fund Global), and (2) the guidelines of March 1, 2010 for the Norges Bank’s work on responsible management and active ownership of Government Pension Fund Global).

67. *Id.* at 25–26.

68. *See id.*

69. *Id.* at 24.

70. *Id.*

regulation with some specificity.⁷¹ Other information is also made public, including regulatory and governance rules developed by the Norges Bank.⁷²

The Norges Bank manages the NSWF through its asset management unit, the Norges Bank Investment Management (“NBIM”).⁷³ A seven-member Executive Board appointed by the King in Council oversees the work of NBIM.⁷⁴ NBIM’s governance model differs from other parts of the Norges Bank. NBIM’s Executive Director has the responsibility and authority of CEO. “He reports directly to the Executive Board and is subject to continuous oversight by the Governor on behalf of the board.”⁷⁵ NBIM uses external managers to handle parts of the Government Pension Fund Global and vests oversight of NBIM in a supervisory council.⁷⁶ The object, in part, is to generate value added to the NSWF through “active management” of the NSWF,⁷⁷ an investment strategy for maximizing returns quite distinct from the policy strategy of active ownership, which governs the relationship between the NSWF as shareholder and the companies in which it has invested. A 2009 study concluded that NBIM provides two services to “the people and future generations of Norway. First, it offers ‘passive’ returns based on the benchmark from the Ministry of Finance.”⁷⁸ Second, “NBIM offers active management that seeks to add positive, risk-adjusted return over the benchmark net of active fee. NBIM pursues this goal through a combination of internal and external management, and a

71. *Id.* at 22–23.

72. *Id.* at 23.

73. *Id.*

74. *Executive Board*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/About-us/governance-model/Executive-Board/> (last visited June 13, 2013) (noting that NBIM, established in 1998, is an integrated global organization with about 340 employees from twenty-seven nations, with English as its working language, and with offices in Oslo, London, New York, Shanghai, and Singapore).

75. *Id.*

76. *Id.* (discussing the composition and purpose of the Supervisory Council: fifteen members appointed by parliament who supervise the Norges Bank’s operations and compliance).

77. See Andrew Ang et al., *Evaluation of Active Management of the Norwegian Government Pension Fund – Global*, NORWEGIAN MINISTRY OF FIN. 13 (Dec. 14, 2009), <http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/rapporter/AGS%20Report.pdf> (distinguishing active management from responsible investment and the control of the NSWF’s investment universe).

78. *Id.* at 70.

philosophy of outsourcing many aspects of its back-office operations.”⁷⁹ But the report noted that active management has had little effect on investment.⁸⁰ This is a view rejected by the Norwegians.⁸¹

B. THE NSWF ETHICAL GUIDELINES

Among the most important guidelines developed for the operationalization of the responsible investment objectives of the NSWF are the Fund’s Ethics Guidelines.⁸² The Ethics Guidelines came into effect on March 1, 2010 and replaced the Ethics Guidelines for the Government Pension Fund Global, which had been adopted in 2004.⁸³

The Guidelines were originally created as a separate enforcement mechanism to supplement the work of the Norges Bank.⁸⁴ Since then, they have undergone changes⁸⁵ and have been reviewed by a number of experts, including an American consulting group.⁸⁶

79. *Id.* at 68.

80. *See id.* at 16 (recognizing that much of the Fund that includes active return comes from certain “well-recognized systematic factors,” contributing in only a very small way to the part of the return that is “genuinely idiosyncratic”).

81. *See* Milne, *supra* note 42 (explaining how the NBIM adamantly considers itself to be an active investor).

82. Ethics Guidelines, *supra* note 23.

83. *Id.*; *Annual Report 2009*, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND GLOBAL (2009), http://www.regjeringen.no/pages/1957930/Etikkradet_E2009.pdf.

84. *See On the Management of the Government Pension Fund in 2008*, *supra* note 26, at 22–24 (explaining that an evaluation of the Ethics Guidelines revealed that they could be expanded and altered to maintain the Government Pension Fund as a responsible investor).

85. *The Management of the Government Pension Fund in 2012*, *supra* note 38, at 70 (“In 2008 and 2009, the Ministry evaluated the ethical guidelines for the GPF. The evaluation resulted in the introduction of new measures and tools to strengthen the Fund.”).

86. Norway hired former U.S. Secretary of State, Madeleine Albright’s consulting group “to help it review the ethical investment policy of the €250bn (\$366bn) government pension fund.” The then-named Albright Group worked with Simon Chesterman, of New York University School of Law’s Singapore program “to examine issues including the effectiveness of the Norwegian fund’s high-profile divestment strategy and its engagement procedures with the 7000 companies it invests in.” Hugh Wheelen, *Ex US Secretary of State Albright Hired for Norway Fund Ethics Review*, RESPONSIBLE INVESTOR (Jan. 17, 2008), http://www.responsible-investor.com/home/article/ex_us_secretary_of_state_albright_hired_by_norway_for_ethics_review/; *cf.* Simon Chesterman, *Laws*,

Despite the fairly widespread concerns among legal academics about the substitution for soft law or quasi-judicial systems for the traditional positive law mechanics of the law-state, the Ethics Guidelines have now become part of an integrated system of responsible investing that is meant to serve as a set of legal qualitative and policy standards governing the sorts of investments that the Fund can make.

The Ethics Guidelines form an important component of the responsible investing framework of NSWF operations, which is grounded in the policy of the Ministry of Finance that links corporate social responsibility to ethics and suggests that active ownership principles and determinations about which companies should form the investment universe of the NSWF are linked by a unified set of principles derived from public law.⁸⁷ Those policies also suggest the link between responsible investing, national law, and the extraterritorial application of national law standards grounded in international standards. “The ethical aspects of [corporate social responsibility] have become more apparent as a result of globalization The ethical basis for [corporate social responsibility] derives from the inviolability of human dignity.”⁸⁸ The Ethics Guidelines also proceed from a set of political considerations that are based on the premise that private actors have public obligations and that the public obligations of public actors do not diminish because these actors are engaged in private market activities. It follows from these premises that the NSWF may

Standards or Voluntary Guidelines?, NORWEGIAN MINISTRY OF FIN., <http://www.regjeringen.no/en/dep/fin/kampanjer/investing-for-the-future/laws-standards-or-voluntary-guidelines.html?id=495027> (last visited Oct. 18, 2013) (“The turn to ethics as a means of improving behaviour of multinational corporations offers an opportunity but also an opportunity cost: ethics can be a means of generating legal norms, through changing the reference points of the market and providing a language for the articulation of rights; yet they can also be a substitute for generating those norms.”).

87. *The Management of the Government Pension Fund in 2012*, *supra* note 38, at 10 (describing the Ministry’s view that the best and longest term returns depend on “economic, environmental and social terms, and on well-functioning, efficient and legitimate markets”).

88. *Corporate Social Responsibility in a Global Economy*, NORWEGIAN MINISTRY OF FOREIGN AFFAIRS 6 (2009), available at http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN_PDF_S.pdf [hereinafter *Corporate Social Responsibility*].

legitimately extend public power through its participation in private markets, that is, that the NSWF may only invest as a sovereign in private markets.⁸⁹ The Committee on State Ownership concluded that the state's "legitimacy could be weakened, for example, as legislator and on matters concerning foreign policy, if in its role as owner, it failed to comply with high standards in this area."⁹⁰ This sovereign investing, grounded in notions of ethical investing, necessarily conflates public and private activities in ways that privilege the state and its choices and suggests that such choices should legitimately be extended to the limits of the actual ability of the state to control activity, either directly through legislation or indirectly through ownership. "Just as politics is not an end in itself, but a means of promoting social change for the benefit of the people and the environment, a company's profits or activities are not goals that can be viewed in isolation from other considerations."⁹¹

The Ethical Guidelines are based on two premises. The first is that the Fund must be managed to extract a "sound return in the long term."⁹² The second premise is that the first objective is contingent on a number of policy factors, including "sustainable development in the economic, environmental and social sense."⁹³ The policy nature of these contingencies is clearly articulated as well. The Fund is to be used not merely to protect and increase the value of the Fund itself, but to influence behaviors among the pool of potential targets of investment.

The Ethical Guidelines are implemented in three ways—through the exercise of ownership rights, the negative screening of companies, and the exclusion of companies from the investment

89. This notion extends ideas that were developed in the European Union about the nature of state action under the EU treaties. *See generally* Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801 (2007–2008) [hereinafter Backer, *The Private Law of Public Law*].

90. *Corporate Social Responsibility*, *supra* note 88, at 17.

91. *See id.* at 6 (arguing that companies have a social responsibility to aid the countries in which they operate because of the impact their financial activities have on development).

92. *See On the Management of the Government Pension Fund in 2008*, *supra* note 26, at 203.

93. *Id.*

pool.⁹⁴ First, the Ethics Guidelines bind the Ministry of Finance, the Council on Ethics, and the Norges Bank to investments in the NSWF's equity and fixed income portfolio, as well as to instruments in the Fund's real estate portfolio issued by companies listed in a regulated market.⁹⁵ Second, the Ethics Guidelines forbid investment in companies that engage in certain economic activity, some of which is legal where they are undertaken and some of which is not. For example, the NSWF assets may not be invested (directly or indirectly) in companies that produce weapons "that violate fundamental humanitarian principles through their normal use" or in companies that produce tobacco or sell weapons or other military goods.⁹⁶

Finally, the Finance Ministry has discretionary power to exclude another group of companies from the Fund's investment universe.⁹⁷ The Ministry may not exercise this power unless there is an authoritative determination that "there is an unacceptable risk that the company contributes to or is responsible for any one of five specified categories of human rights and corporate governance norms."⁹⁸ In making this discretionary assessment, the Ministry of Finance must consider the severity of the violation, the likelihood that it may be repeated, the connection between the entity committing the violation and the company in which the NSWF invests, the extent of mitigation or remediation, the company's corporate social responsibility architecture, and the scope of the company's positive contribution to those affected by the company's activities.⁹⁹

The Ministry of Finance may not exercise discretionary power

94. *Id.*

95. Ethics Guidelines, *supra* note 23, § 1.

96. *Id.* § 2.1(a).

97. *See Annual Report 2009, supra* note 83.

98. Ethics Guidelines, *supra* note 23, § 2(3) (stating the five categories of activities or conditions that would trigger this power include (a) serious or systematic human rights violations such as murder, torture, deprivation of liberty, forced labor, the worst forms of child labor, and other child exploitation; (b) serious violations of the rights of individuals in situations of war or conflict; (c) severe environmental damage; (d) gross corruption; and (e) other particularly serious violations of fundamental ethical norms).

99. *Id.* § 2(4).

unless it determines that it has obtained sufficient information.¹⁰⁰ The Ministry is required to consider whether other measures may be more suitable for the purpose of reducing the risk of continued norm violations.¹⁰¹ Tying the active ownership principles of the management guidelines to the exclusion power under the Ethics Guidelines, the Ministry of Finance has authority to determine whether it should seek to change the behavior of the offending corporation through assertion of active ownership principles rather than exclusion of the company from the investment universe.¹⁰² The Ministry may also put a corporation under observation, rather than take more definitive action.¹⁰³ This is an important structural principle that appears to provide the Ministry with an important public policy tool even where a company may otherwise merit exclusion.

Accordingly, the NSWF rule structures create a power in the Ministry of Finance to coordinate its authority to regulate corporate behavior in a way that effectively blends public and private governance.¹⁰⁴ That coordination allows the Finance Ministry to balance its investment universe exclusion rules, its active shareholder principles, and its authority to seek information from companies to determine particular forms of regulatory dialogue with specific companies irrespective of the regulatory home of that enterprise. This blends public and private power in new ways. Consider the way that the Norwegian Parliament can, like any other state, issue regulations that affect either corporations it licenses or the conduct of corporations whose operations have effects within the national territory of Norway. Simultaneously, through active ownership principles, the state recognizes that it can project regulatory power externally through the successful invocation of the authority of shareholders to modify and direct corporate behavior. The effect is to extend Norwegian public policy to enterprises over which Norway

100. *Id.*

101. *Id.*

102. *See id.*

103. Ethics Guidelines, *supra* note 23, § 3.

104. This is the essence of the operationalization of responsible investing. *See The Management of the Government Pension Fund in 2012, supra* note 38, at 60 (discussing the interaction between the responsible investment and active ownership, including traditional international investment principals and the use of shareholder rights to promote social and environmental considerations).

has no legislative power. In effect, the state is using private power to affect public governance objectives. By inverting its role, it can regulate more effectively as a private shareholder than as a state. This is especially potent when the state has no authority to regulate directly—for example, where a state like Norway seeks to regulate the behavior of corporations chartered and operating outside of Norway. The power invoked is substantial and shows how globalization has transformed both the power of states and the forms by which state power is asserted across borders.

Alternatively, Norway may avoid seeking to use its private shareholder power and instead invoke its power to manage its market presence by excluding an enterprise from its investment universe because the enterprise violated Norwegian law or policies on appropriate conduct. But exclusion is an extreme action and effectively makes it difficult for Norway to exert any influence over an excluded enterprise. Exclusion does have a public purpose. It can signal official disapproval of corporate activity on public policy grounds, which can have an effect on other states and perhaps other market actors; other states are potentially able to assert direct regulatory authority, while other market actors are perhaps able to decrease corporate access to capital markets. But excluding an enterprise from the investment universe reduces Norway's ability to influence the company.

Rather than invoke the power to exclude a corporation, the Ministry of Finance has the authority to “put a company under observation.”¹⁰⁵ The Ministry may choose to put a corporation under observation if there is doubt as to whether the conditions for exclusion have been fulfilled, uncertainty about how the situation will develop, or if observation is deemed appropriate for other reasons. The Ministry usually combines the authority to observe with a regime of monitoring. The Ministry is required to regularly assess whether the company should remain under observation.¹⁰⁶ Those assessments are fueled by information. Yet, this policy choice is left intentionally opaque; decisions to put companies under observation are not disclosed to the public. But for enterprises that Norway seeks to influence, observation combined with monitoring provides a way

105. Ethics Guidelines, *supra* note 23, § 3.

106. *Id.*

of blending public policy goals (conformity to Norwegian corporate governance standards) with private market activity (effectively a conditional agreement to hold shares in a company).

Thus, the Ministry of Finance's decisions on observation or exclusion of companies from the investment universe are, in the final analysis, political decisions. The Ethics Guidelines, however, specify a *legal framework* regarding the process for determining eligibility of exclusion and how such determinations are to be made. But a legal framework requires a governmental institution to play a quasi-judicial role in the application of Norwegian investment policy to NSWF investment decisions and to the form and scope of active shareholder obligations; this is a role reserved for the Ethics Council.¹⁰⁷ We turn next to the form and powers of the Ethics Council and its process for exclusion.

C. OPERATIONALIZING THE ETHICS GUIDELINES—THE STRUCTURE AND FUNCTIONS OF THE NSWF COUNCIL ON ETHICS

We have seen how the Norwegian state has developed a legal framework for sovereign investing, serving as a variant of moves toward sovereign investing that other powerful sovereign participants have attempted in private globalized capital markets.¹⁰⁸ The grounding norm for state investment is the notion of responsible investing, which serves as the critical filter through which the economic objectives of the Fund, to achieve the highest possible return, are understood. Responsible investing consists of several inter-related parts: qualitative policy elements that must be incorporated into considerations of investment under the highest achievable return standard; incorporation of international standards within domestic law structures for the governance of corporate conduct; active participation in the development and implementation of international standards by public and private actors; active ownership principles; and ethical guidelines.¹⁰⁹ The substance of the Ethics Guidelines were explored as a standard of normative conduct and as a system of regulation connected to the structures of

107. *Id.* §§ 2(2), 4–5.

108. *See supra* note 3 and accompanying text.

109. *See The Management of the Government Pension Fund in 2012, supra* note 38, at 70–84.

responsible investment.¹¹⁰ While the Ministry of Finance and its Fund manager, the Norges Bank—through its NBIM establishment—are principally responsible for operationalizing the active management and investment strategies portions of Fund operations, the Ethics Guidelines themselves establish a separate and autonomous apparatus for the operationalization of the guidelines, the Council on Ethics for the Government Pension Fund Global (the “Ethics Council”). Though the regulations create a structure for coordination of operation and information sharing,¹¹¹ each operates from a significantly different regulatory perspective within the responsible investment standard. This section provides a brief overview of the structure and operations of the Ethics Council.

The Ethics Guidelines give the Ministry of Finance the authority to appoint the Ethics Council, which consists of five members, mostly drawn from academia and related areas.¹¹² The Council is provided its own secretariat financed by the Ministry to ensure autonomy.¹¹³ Both the size of the Ethics Council and the availability of a well-staffed secretariat are instrumental to shaping both the character and authority of the Ethics Council.¹¹⁴ The Ethics Council apparatus appears to be well funded, though its strain on both time and finances is acknowledged. “It costs money to have us do the work that we are doing, even though it is not a huge amount. And it causes a lot of extra work for others as well, for the Central Bank, for the Minister of Finance. It requires a big effort.”¹¹⁵

The Ethics Council is vested with four principle functions described in Sections 4(2)–(5) of the Ethics Guidelines. The Council is to “monitor the Fund’s portfolio with the aim of identifying

110. *Id.*

111. Ethics Guidelines, *supra* note 23, § 6(1).

112. *Id.* § 4(1); *Council on Ethics*, STYRER, RÅD OG UTVALG [Norwegian Boards, Councils, and Committees], http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council.html?id=434879 (last visited Sept. 2, 2013) [hereinafter *Council on Ethics*] (displaying a number of prominent people who have served on the Ethics Council to date).

113. Ethics Guidelines, *supra* note 23, § 4(1).

114. Sibylle van der Walt, *Bringing Human Rights into Pension Finance: Interview with Gro Nystuen, Norway Govt Pension Fund*, RESPONSIBLE INVESTOR (Apr. 21, 2009), http://www.responsible-investor.com/home/article/gro_nystuen_no/.

115. *Id.*

companies that are contributing to or responsible for unethical behaviour or production.”¹¹⁶ The Council also advises the Finance Ministry “on the extent to which an investment may be in violation of Norway’s obligations under international law”¹¹⁷ and on exclusion from the Fund.¹¹⁸ Lastly, the Ethics Council can invoke the Norges Bank’s active shareholder function by giving advice on whether a company should be put under observation.¹¹⁹ Only one of the Ethics Council’s functions is expressly mandatory: the obligation to monitor companies in the Fund’s portfolio for compliance with the normative ethics standards set out in Section 2 (products-based exclusion and conduct-based exclusion). The rest of its obligations are, to some extent, either triggered on request or discretionary. The Council must give legal advice on the extent to which an investment may violate international law at the request of the Ministry of Finance; however, this obligation may be exercised upon a request from the Ministry of Finance or on its own initiative.¹²⁰

In addition, a company can be put under observation at the discretion of the Finance Ministry. Such a determination may be made when the Ethics Council decides to exclude or observe a company.¹²¹ Observation avoids exclusion but subjects the company to a periodic assessment by the Ethics Council.¹²² A company can be taken off the observation “watch-list” when the Ethics Council makes a determination that is then approved by the Finance Ministry that the risk of norm violations has been sufficiently reduced; conversely, failure to make progress may move a company from observation to exclusion.¹²³

One principal operational function of the Ethics Council is the harvesting of information. The Council has broad, though unspecified, authority to “obtain the information it deems necessary and ensure that the case has been properly investigated before giving

116. Ethics Guidelines, *supra* note 23, § 4(2).

117. *Id.* § 4(3).

118. *Id.* § 4(4).

119. *Id.* § 4(5).

120. *Id.* § 5(1).

121. *Annual Report 2009*, *supra* note 83, at 14.

122. *Id.*

123. *Id.*

advice on exclusion from the investment universe.”¹²⁴ The obligation to harvest information extends not only through the process of determining exclusion from the investment universe but continues thereafter: “The Council shall routinely assess whether the basis for exclusion still exists and may, in light of new information, recommend that the Ministry of Finance reverse a ruling on exclusion.”¹²⁵ The nature of the Ethics Council’s charge appears to have affected its approach to its duties in a particular way:

The biggest difference between us and anybody else is the amount of resources we use and the level of distrust we have when we screen companies. We do not just rely on service providers who claim they can make sure that our portfolio is ethical. We think that nobody actually can do this better than ourselves. So although we use initial information from screening companies, we always check the quality of the information ourselves.¹²⁶

The Ethics Guidelines set out a rudimentary system of procedural protection applicable to the process of determining the appropriateness of an exclusion from the NSWf. The system necessitates a determination of qualitative minimum protections of the rights of those affected by Ethics Council determinations balanced with the needs of the Ministry of Finance for efficiency in the operation of the system.¹²⁷ Companies subject to Ethics Council investigations are given a general opportunity to present information and arguments to the Council “at an early stage of the process.”¹²⁸ The Council is also under an obligation to clarify the basis on which it is proceeding with the exclusion investigation, including presenting any exclusion recommendation to the affected company for comment.¹²⁹

The Ethics Council’s standard for conduct-based exclusion under the Ethics Guidelines is whether a company, by its conduct, could expose the Fund to an unacceptable risk of contributing to grossly

124. Ethics Guidelines, *supra* note 23, § 5(2).

125. *Id.* § 5(5).

126. van der Walt, *supra* note 114.

127. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 341–49 (1976) (establishing a three-part balancing test to determine if a citizen has been afforded due process in administrative proceedings).

128. Ethics Guidelines, *supra* note 23, § 5(3).

129. *Id.* § 5(3).

unethical practices.¹³⁰ The Ethics Council has listed some of the factors it weighs in reaching its decision under this standard, which include the nature of the violation, its connection to the activities of the company, the character of the violation (isolated or likely to be repeated), the seriousness of the violation and the extent of the damage it causes, the extent of evidence of the violation, and the mitigation efforts of the company.¹³¹

Once it has reached a decision, the Ethics Council is required to produce a written opinion in which it describes the grounds for its recommendations.¹³² The specification for the assessment of the basis for exclusion makes clear the quasi-judicial character of the process: “The assessment of the specific basis for exclusion shall state relevant factual and legal sources and the aspects that the Council believes ought to be accorded weight.”¹³³ The Ethics Council has some latitude in the character of the information used in its proceedings; its only regulatory standard is the “verifiable” standard of Ethics Guidelines Section 5(4).

The Ethics Council bases its decisions and recommendations on a series of different sources. The main rule is that the information taken into account must be verifiable.¹³⁴ Moreover, the Ethics Council has chosen to limit the citation of its information sources

130. *See id.* § 2(3) (listing examples of proscribed conduct including human rights violations, environmental disasters, and significant corruption).

131. *Id.*

132. *Id.* § 5(4). These grounds shall include a presentation of the case, the Council’s assessment of the specific basis for exclusion and any comments on the case from the company. The description of the actual circumstances of the case shall, insofar as possible, be based on material that can be verified, and the sources shall be stated in the recommendation unless special circumstances indicate otherwise. *Id.*

133. *Id.* § 5(4).

134. *Frequently Asked Questions, STYRER, RÅD OG UTVALG* [Norwegian Boards, Councils, and Committees], http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/frequently-asked-questions.html?id=605599 (last visited June 26, 2013) (describing procedures used to verify information, including maintaining contact “with special interest groups, local and national authorities, international organizations, local and international experts and the company itself”). The Council may look at “documentation such as research and scientific reports, legal sources, environmental impact assessments, reports from non-governmental organizations, the company’s own documents, etc.” *Id.* The Council may also conduct field studies if necessary to document the violations. *Id.*

under certain circumstances.¹³⁵ The internal routines for managing proceedings to reverse exclusion, described as “cases” in the English translation of the Ethical Guidelines, are to be available to the public and the affected companies.¹³⁶ The Ministry of Finance is also required to publish Ethics Council recommendations “after the securities have been sold, or after the Ministry has made a final decision not to follow the Council on Ethics’ recommendation.”¹³⁷ The transparency does have limits, however, to protect both the companies and the state.¹³⁸

The Ethics Guidelines frame the structure of cooperation between the Norges Bank, the Ministry of Finance, and the Ethics Council on the responsible investment norm.¹³⁹ The three entities meet regularly to exchange information, focusing on the Norges Bank’s active ownership functions and the Ethics Council’s portfolio monitoring function.¹⁴⁰ Procedures for coordinating communication with companies are required.¹⁴¹ Both the Norges Bank and Ethics Council must consult with each other about their respective obligations.¹⁴²

Upon the determination by the Ministry of Finance that a company is to be excluded from the investment universe of the NSWF, the Norges Bank receives a formal notification and has two calendar months to divest its holdings.¹⁴³ The Norges Bank may notify the excluded company, but only at the Finance Ministry’s request.¹⁴⁴ In all cases, companies and others may view Finance Ministry actions through a periodically updated list of excluded companies (or

135. *Id.* (allowing for omission “to protect personal safety”).

136. Ethics Guidelines, *supra* note 23, § 5(6).

137. *Id.* § 5(7).

138. van der Walt, *supra* note 114 (noting potential for problems that arise through uncertainty of companies’ actions and inability to produce conclusive documentation).

139. Ethics Guidelines, *supra* note 23, § 6.

140. *Id.* § 6(1).

141. *Id.* § 6(2).

142. *Id.* § 6(3) (commenting that in these consultations, the Council can ask the Norges Bank for information about specific companies’ ownership or can ask the Norges Bank to comment on other circumstances concerning these companies, while the Norges Bank may ask the Council for its assessments of individual companies).

143. *Id.* § 7(1).

144. *Id.* § 7(2).

companies put under observation) published by the Ministry.¹⁴⁵

What emerges from this review is a body organized and operated much like an administrative court with a broad political mandate. Its members, some but not all of whom are lawyers, understand their role as essentially political. Members are chosen for their representative value (and to that extent, can be understood as the embodiment of essentialist abstraction in the service of the state) and their personal achievements and status. However, the forms used to exercise authority are quasi-judicial, rather than administrative or legislative, in character. The Ethics Council produces information—principally of use to the Ministry of Finance and the Norges Bank. But more importantly, the principal authoritative product of the Ethics Council is its determinations of company compliance and conduct-based exclusion rules specified in the Ethics Guidelines. These determinations are not merely specific instances of the application of the Ethics Guidelines, however. By suggesting and developing a set of approaches to such determinations, standards for applying the Ethics Guidelines, and rules for determining conformity, the Ethics Council begins to develop a jurisprudence that has significant value as a governance tool. In Part IV, this article will consider the work of the Ethics Council, its character, nature, meaning, and effect.

III. RESPONSIBLE INVESTING: THE STATE AS SHAREHOLDER AND “ACTIVE OWNER”

The management charge from the Finance Ministry consists of two parts: first, the obligation to achieve the highest possible return and second, the requirement that investment decisions be made independently of the Ministry.¹⁴⁶ The Norges Bank can

145. *Id.* § 8.

146. See *Investment Strategy of the GPF*, NORWEGIAN MINISTRY OF FIN. (June 13, 2013), <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/government-pension-fund-global-gpfg/investment-strategy.html?id=696849> (explaining how the Ministry of Finance and the Norges Bank, in their respective capacities as owner and manager of the Fund, have developed an investment strategy with the following characteristics: harvesting risk premiums over time; diversification of investments; exploitation of the Fund's long-term horizon; responsible investment practices; cost efficiency; a moderate degree of active management; and a clear governance structure). The investment strategy is based on the principle that taking risks gives a pay-off in the form of higher

undertake both requirements directly or, to some extent, through retained outside managers.¹⁴⁷ For example, the NBIM investment strategy incorporates external service providers for specialty investment.¹⁴⁸ Many of the external mandates are in market segments where the potential to generate an excess return is considerable. This particularly applies to small and medium-sized companies and emerging markets.¹⁴⁹ The “highest possible return” obligation is not left to the discretion of the Norges Bank but is defined in the regulation as a net of management costs “measured in the currency basket of the actual benchmark index.”¹⁵⁰ Management costs are regulated as well.¹⁵¹ The regulations specify the process for determining management costs and require a substantiated proposal for an upper limit on costs beneath which actual costs may be reimbursed.¹⁵² The Fund is to be maintained in a separate account to be invested in the name of the Norges Bank.¹⁵³ The Norges Bank is charged with developing, updating, and regularly evaluating a strategic plan.¹⁵⁴ Though the Norges Bank is expected to invest independently of the Finance Ministry, any decisions must be made in conformity with an investment strategy,¹⁵⁵ approved by the Ministry, and reflected in its “Management Mandate.” With respect to the strategy, the Norges Bank may advise the Ministry on its or the Finance Ministry’s initiative.¹⁵⁶

expected returns, or risk premium, over time. *Id.*

147. See *Management Mandate*, *supra* note 65, at 5; *Specialised External Mandates*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/Investments/external-mandates/> (last visited Aug. 23, 2013) [hereinafter *Specialised External Mandates*] (describing how the Fund had 145 billion kroner in assets under external management at the end of 2011, equaling 4.4% of the Fund’s total market value). Forty-five different organizations managed a total of fifty-two external mandates, fifty-one of which were equity mandates. NBIM has provided a list of external service providers as of December 31, 2012. See *External Service Providers*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/About-us/external-service-providers-/> (last visited Aug. 23, 2013) [hereinafter *External Service Providers*].

148. See *External Service Providers*, *supra* note 147.

149. See *Specialised External Mandates*, *supra* note 147.

150. *Management Mandate*, *supra* note 65, at 4.

151. *Id.* at 21–22.

152. *Id.*

153. *Id.* at 4.

154. *Id.* at 5.

155. *Id.* at 6.

156. *Id.* at 5–6.

The Ministry of Finance's macro investment strategy further refines the instruction of the Norges Bank to achieve the "highest possible return." The principal macro strategy is described as "responsible investing" grounded in "good corporate governance and environmental and social issues in investment activities."¹⁵⁷ By 2009, the concept had begun to take its current form and was framed to serve as a means of mediating between private and public interests as expressed in national and international norms and rules. "Responsible investment practice" soon grew into "a recognized and applied concept in the global investment community."¹⁵⁸ Responsible investment is also understood as touching on the "core of investment management: managing capital with the aim of achieving the highest possible financial return within an acceptable risk, in line with shareholders interests."¹⁵⁹

Responsible investing acknowledges the principal goal of "highest possible return" and then suggests that the term is embedded in the notion of a "good return in the long term." That, subsequently, is "dependent upon sustainable development in economic, environmental and social terms, as well as well-functioning, legitimate and effective markets."¹⁶⁰ The idea has sometimes been theorized as welfare-maximizing behavior central to universal ownership, which cannot sacrifice long-term market integrity and welfare maximization for short-term strategic behavior.¹⁶¹ For real estate investment, investments that the NSWF has been allowed to make since 2010, the Bank shall prioritize "energy efficiency, water

157. *Id.* at 6. The enactment of the Guidelines for the Norges Bank, which modified the Management Mandate, emphasized the importance of responsible management in the operation of the NSWF. *Guidelines for Norges Bank's Work on Responsible Management and Active Ownership of the Government Pension Fund Global (GPGF)* (Mar. 1, 2010), <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Guidelines-for-Norges-Banks-work-on-responsible-management-and-active-ownership-of-the-Government-Pension-Fund-Global-GPGF.html?id=594253> [hereinafter *Guidelines for Norges Bank's Work*].

158. *The Management of the Government Pension Fund in 2012*, *supra* note 38.

159. *See id.*

160. *See Management Mandate*, *supra* note 65, at 6.

161. *See* JAMES P. HAWLEY & ANDREW T. WILLIAMS, *THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC* (2000).

consumption and waste management.”¹⁶² Responsible investing is also affected by a legislated time horizon for evaluating investment decisions that prioritizes long-term investments.¹⁶³ In effect, the economic objective of highest return is made to depend on the conformity of investment with the policy objectives of the Norwegian state, now transformed into a set of investment criteria suitable for application for intervention in private markets.

One particularly important mandate is one to incorporate investment strategies grounded in advancing Norwegian principles of good corporate governance in the objects of investment. For this purpose, the Norges Bank is charged with the development of internal guidelines for “integrating considerations of good corporate governance and environmental and social issues in investment activities.”¹⁶⁴ The effect is interesting—the Ministry of Finance has created a regulatory environment in which the Norges Bank, as a fund manager, is required to incorporate state policy in investment decisions while achieving the highest possible return. But what rate of return is possible turns on compliance requirements with state policy, including the incorporation of international standards, not merely in investment decisions, but in the state’s relationship to enterprises in which it owns shares. The result converts hortatory notions of responsible investment into regulatory commands that, when effectuated in the form of market transactions, can affect corporate governance behaviors of foreign corporations, irrespective of the internally applicable law of the jurisdictions that have chartered them. Here, state policy intrudes on markets in both purchasing decisions and in the conduct of Norway as a shareholder affecting corporate, social, and operational norms. Core notions of responsible investing, as thus described, are to form the basis for the Norges Bank’s investment strategy and its otherwise autonomous investment decisions.

The “active ownership” rules of the Management Mandate memorializes the last effect.¹⁶⁵ Subject to the Bank’s principal

162. *Management Mandate*, *supra* note 65, at 6.

163. *Id.*

164. *Id.* (specifying that the guidelines should be constructed with internationally recognized responsible investment principles in mind).

165. *Id.*

obligation—to safeguard the NSWF’s financial interests¹⁶⁶—the Bank is required to incorporate a core set of international standards as the basis for the exercise of its ownership rights.¹⁶⁷ This set of key international soft law norms governing behavior expectations of enterprises includes the U.N. Global Compact, the Organization for Economic Cooperation and Development (“OECD”) Guidelines for Multinational Enterprises, and the OECD Principles of Corporate Governance.¹⁶⁸ These standards are not to be applied passively. In its application decision, the Bank must actively contribute to the development of “good international standards in the area of responsible investment and active ownership.”¹⁶⁹ It is also meant to be a political process, grounded in Norwegian policy.¹⁷⁰ Together, these provisions set parameters for domestic and international norms serving as the basis of investment decisions and investor conduct. These decisions are meant to contribute to the development of domestic and international norms as well. The market is meant to serve as the principal regulatory space for the application of domestic policy and international “soft” governance norms.

Active ownership constitutes an important transnational component of corporate governance.¹⁷¹ Part of the objective of corporate governance is to influence companies directly by changing how they engage in economic activity to accord with Norwegian public policy.¹⁷² Where an accord is not possible, “a broader industry

166. *Id.*

167. *Id.* at 7.

168. *Id.*

169. *Id.*

170. *See id.* (discussing that procedures for amendment to the Norges Bank’s priorities in active ownership require that the plan be published for public comment and that the Ministry have priority of comment before the final decision is made).

171. *See* Larry Catá Backer, *Transnational Corporate Constitutionalism?*, LAW AT THE END OF THE DAY BLOG (June 13, 2013), <http://lcbackerblog.blogspot.com/2009/09/transnational-corporate.html>.

172. *Management of the Government Pension Fund in 2009*, NORWEGIAN MINISTRY OF FIN. 135 (2010), http://www.regjeringen.no/pages/2500165/PDFS/STM200920100010000EN_PDFS.pdf (“An example of successful ownership work in this context is the GPF’s initiative in India which contributed to a new industry standard for combating child labour Work on climate change or regulation of the financial markets so that risk-taking is more in line with long-term interests are good examples of issues where global solutions are most appropriate.”).

approach may be relevant.”¹⁷³ But the ultimate aim of these shareholder engagements is regulatory, and the focus ultimately is on reshaping the domestic legal order of foreign states. In this case, the NSWF “will primarily be interested in influencing global authorities in the direction of integrating the external effects with the economy, either directly or in partnership with portfolio companies and other investors.”¹⁷⁴ Active ownership is tied to the NSWF’s notions of universal ownership.

This ultimately broader and conventionally political objective ties active ownership to the NSWF’s engagement with the work of the U.N. Principles for Responsible Investment on notions of universal ownership.¹⁷⁵ Universal ownership points to collaboration among investors to exercise ownership rights both with companies in which they invest and with the political institutions of the jurisdictions in which these companies are regulated.¹⁷⁶ Universal ownership principles thus suggest the ways in which the state can access non-law based avenues of regulation through its shareholder power.

The Fund is a universal owner by definition and should therefore have a concrete approach to what this means in practice. Such an approach should look at the need and possibilities for reducing the short- and long-term welfare losses by lifting the quality of the investment universe. It should also look at the dynamic need to adapt to the issues through

173. *Id.* at 136.

174. *Id.* at 135.

175. See Principles for Responsible Investment, *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors* 3 (2011), available at <http://d2m27378y09r06.cloudfront.net/viewer/?file=wp-content/uploads/UniversalOwner-Finallongreport.pdf> (arguing that “[l]arge institutional investors are, in effect, ‘Universal Owners’, as they often have highly-diversified and long-term portfolios that are representative of global capital markets”). The Finance Ministry has explained how these principles of universal ownership are both applicable to the NSWF and help shape its responsible ownership principles, supporting “the choice of climate and water management as priority areas for Norges Bank’s exercise of ownership rights.” *The Management of the Government Pension Fund in 2010*, NORWEGIAN MINISTRY OF FIN. 19 (2010–2011), http://www.regjeringen.no/pages/2500165/PDFS/STM200920100010000EN_PDFS.pdf.

176. Principles for Responsible Investment, *supra* note 175, at 5 (emphasis removed).

changes in the investment strategy.¹⁷⁷

Active ownership is not meant to be applied only internally to the constitution of corporations. It is also meant to have regulatory effects. But the Guidelines are not merely the imposition of passive transnational standards. “The Bank shall actively contribute to the development of good international standards in the area of responsible investment activities and active ownership.”¹⁷⁸ Thus for example, the Finance Ministry has pointed to its collaboration with the U.N. Global Compact, “where the goal is to develop a set of guidelines that provide guidance for responsible corporate and investment practice in conflict areas.”¹⁷⁹ The object is regulatory in a societally constitutive way, to “raise awareness and clarity about what is acceptable, responsible behaviour.”¹⁸⁰

Together, these incremental changes to the conventional Norwegian position remind us of the importance of public policy in the operation of the private investment activities of the NSWF. The NSWF provides a sophisticated mechanism for regulating extraterritorially—not through law, but through the governance mechanics of investment. It also serves as a reminder of the substantial irrelevance of international efforts to draw a strong connection between public and private investment in private markets through instruments like the Santiago Principles.¹⁸¹

Investment decisions and shareholder conduct, then, are formally

177. *Management of the Government Pension Fund in 2009*, *supra* note 172, at 134–36.

178. *See Guidelines for Norges Bank's Work*, *supra* note 157, § 3.

179. *Management of the Government Pension Fund in 2009*, *supra* note 172, § 10.3.

180. *Id.*

181. *See Sovereign Wealth Funds: Generally Accepted Principles and Practices: “Santiago Principles”*, INT’L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, 4–5 (Oct. 2008), <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf> [hereinafter *Santiago Principles*] (identifying the Santiago Principles as generally accepted principles and practices reflecting “appropriate governance and accountability arrangements as well as the conduct of investment practices by SWFs on a prudent and sound basis”). The purpose of the Santiago Principles “is to identify a framework of generally accepted principles and practices that properly reflect appropriate governance and accountability arrangements as well as the conduct of investment practices by SWFs on a prudent and sound basis.” *Id.* at 4. The Santiago Principles are meant to be voluntary, the implementation of which is subject to the legal and international context of the SWF home state. *Id.* at 5.

structured as active rather than passive, and active across the boundaries of domestic and international public law space and between law and private market activity for governance power assertions. This is the tone that is set for the sort of ownership role the Fund is to play as an economic stakeholder in foreign-chartered corporations in which it has invested. “Voting is [NBIM’s] main tool for influencing the boards of directors elected to supervise companies on their shareholders’ behalf.”¹⁸² Thus, the NSWF views itself as vested with responsibility as a “major shareholder in many companies to exercise our ownership rights appropriately.”¹⁸³ The objective of this responsibility is the deepening of good corporate governance, as it has been interpreted as a set of political and policy choices in Norway, and is discharged through dialogue with companies grounded in the NSWF’s knowledge of their operations and management cultures.¹⁸⁴ “In given situations, active ownership can help to bring the management of a company more into line with our intentions and so realise [sic] underlying value in the company which the fund can profit from through active management.”¹⁸⁵

Currently, the Norges Bank focuses broadly on issues of equal treatment of shareholders, shareholder influence and board accountability, standards for well functioning and efficient markets, children’s rights, climate change, and water management.¹⁸⁶ The Norges Bank has put in place an elaborate system meant to ensure that the Bank can vote at all general shareholder meetings of companies in which it owns stock and to do so to advance a set of

182. Vegard Torsnes, *Active Ownership and Corporate Governance as Means to Safeguarding Financial Wealth*, NORGES BANK INVESTMENT MGMT. (Apr. 15, 2009), <http://www.nbim.no/en/press-and-publications/feature-articles/2009/Active-ownership-and-corporate-governance-as-means-to-safeguarding-financial-wealth/>.

183. Letter from Svein Gjedrem, Former Cent. Bank Governor, Norges Bank to Norwegian Ministry of Fin. (Dec. 22, 2009) (on file with Norges Bank), *available at* <http://www.norges-bank.no/en/about/published/submissions/2009/submission-23-12-2009/>.

184. *Id.*

185. *Id.*

186. *Government Pension Fund Global: Responsible Investment*, NORWEGIAN MINISTRY OF FIN. 24 (June 13, 2013), *available at* http://www.regjeringen.no/upload/FIN/brosjyre/2010/spu/english_2010/SPU_hefte_eng_ebook.pdf [hereinafter *GPFGB Report*].

specific governance goals.¹⁸⁷ One way that the Norges Bank aims to influence issues such as equal treatment of shareholders, shareholder influence and board accountability, standards for well-functioning and efficient markets, children's rights, climate change, and water management is through voting at annual general meetings.¹⁸⁸ The voting principles, organized as a set of "Voting Guidelines,"¹⁸⁹ have produced a concerted and well-orchestrated strategy for voting Fund shares at annual shareholder meetings. The voting guidelines require voting against any proposal that fails to meet a minimum transparency threshold.¹⁹⁰ The Fund will vote in favor of all proposals that enhance transparency.¹⁹¹ Additionally, the Fund supports proposals that enhance shareholder democracy, such as the principle of one share–one vote;¹⁹² proposals to un-bundle agenda items, especially with respect to the election of directors;¹⁹³ proposals to require positive majority votes for director elections;¹⁹⁴ and proposals to permit the introduction of binding shareholder resolutions¹⁹⁵ that allow shareholders to call a special meeting¹⁹⁶ and that give shareholders the right to nominate candidates for the board.¹⁹⁷

The Voting Guidelines are particularly detailed with respect to proposals touching on the powers of the board of directors. The Fund

187. *Id.* ("Norges Bank has developed publicly available principles for voting. It is Norges Bank's aim to vote at all annual general meetings. Each year, Norges Bank votes at about 10,000 general meetings. The number of resolutions voted on every year now exceeds 85,000. Norges Bank votes on all issues, including those that fall outside the focus areas. The voting records are made public every year.").

188. *Id.*

189. *See NBIM's Corporate Governance Principles and Voting Guidelines*, NORGES BANK INV. MGMT. 7, <http://www.nbim.no/Global/Brochures/Principles%20and%20Voting.pdf> (last visited June 13, 2013) [hereinafter *Voting Guidelines*] (discussing NIBM's voting guidelines, which consider input from the board and shareholders, aim for total voting coverage and voting consistency, and avoid micromanagement).

190. *Id.* § 1.5.

191. *See id.* §§ 1.1–1.4 (describing the types of proposals supported by the fund).

192. *Id.* § 2.8.

193. *Id.* §§ 2.2–2.3.

194. *Id.* § 2.4.

195. *Id.* § 2.5.

196. *Id.* § 2.6.

197. *Id.* § 2.7.

uses its voting power to support proposals that ensure an independent board of directors,¹⁹⁸ and especially a “sufficiently independent chairman,¹⁹⁹ directors who respond to and treat all shareholder classes equally,²⁰⁰ and directors who own a meaningful number of shares²⁰¹ and are not otherwise overcommitted²⁰² or working to improve responsive governance.²⁰³ The Fund discourages anti-takeover measures as anti-competitive.²⁰⁴ The Fund discourages recapitalization and share issuances that dilute existing equity,²⁰⁵ and related party transactions that do not meet certain transparency thresholds.²⁰⁶ Consistent with its own philosophy of encouraging long-term investing, the Fund will vote for proposals that align management remuneration with long-term shareholder value creation²⁰⁷ and equity related incentives that further align management and shareholder interests.²⁰⁸ Lastly, the Fund will use its shareholder power to privatize the incorporation of economic, social, and environmental rights within the governance architecture of the company.²⁰⁹ These include proposals for greater transparency related to the social and environmental impacts of corporate activity with respect to general corporate policies,²¹⁰ corporate action on specific projects,²¹¹ and corporate interactions with policymakers and regulators.²¹² More importantly, and avoiding public lawmaking, the Fund encourages the adoption of private codes of corporate social

198. *Id.* §§ 3.2, 3.5, 3.7.

199. *Id.* §§ 3.4, 3.10.

200. *Id.* §§ 3.3, 3.8.

201. *Id.* § 3.6.

202. *Id.* §§ 3.11, 3.12.

203. *Id.* §§ 3.1, 3.9.

204. *Id.* § 4.

205. *Id.* §§ 5.4, 5.5.

206. *Id.* §§ 5.6, 5.7. NBIM will assess whether all shareholders are treated equally, there are unnecessary conflicts of interests, there is sufficient representation of independent directors on the board, and there is sufficient transparency of the transaction. *Id.* § 5.3.

207. *Id.* §§ 6.1, 6.2.

208. *Id.* §§ 6.3, 6.4.

209. *See generally* Larry Catá Backer, *Privatization, the Role of Enterprises and the Implementation of Social and Economic Rights: A Comparison Of Rights-Based and Administrative Approaches in India and China* (Consortium for Peace & Ethics, Working Paper No. 2013-1, 2013).

210. *Voting Guidelines*, *supra* note 189, § 7.1.

211. *Id.* § 7.2.

212. *Id.* § 7.5.

responsibility and diversity policies that are meant to incorporate within the internal “law” of the corporation, a set of external international norms and standards,²¹³ many of which are neither binding nor necessarily accepted by the home states of the corporations in which the Fund exercises shareholder power.²¹⁴

Shareholder activity is not limited to voting. The Norges Bank uses other instruments, including “[v]oting at annual general meetings, [s]hareholder proposals, [d]ialogue with companies, [l]egal steps, [c]ontact with regulatory authorities, [and c]ollaboration between investors.”²¹⁵ For example, in its 2011 Report, NBIM noted that it had filed shareholder proposals to separate the roles of chair of the board of directors and chief executive officer at four companies and six proposals for expanded shareholder access to proxies in connection with shareholder rights to nominate candidates for election to boards of directors.²¹⁶ It has filed actions against Porsche SE for potential *ultra vires* conduct in its acquisition of Volkswagen and, along with other institutional investors, filed an action against Countrywide Financial Corporation.²¹⁷ NBIM has joined with other institutional investors to influence corporations’ behavior with respect to their operations touching on children’s rights and climate change. These discussions have sometimes produced substantive changes in corporate behavior.²¹⁸

The effect of this shareholder activity is to provide the Fund with another avenue for extending its governance role to the corporations within its investment pools. More importantly, active shareholding

213. The language conflates law, policy, and economic welfare maximization: “based on human rights and international labour standards covering a company’s operations and supply chain . . . when the actions suggested in the proposals are considered to be reasonable with regard to what the company can be held accountable for and will benefit shareholders.” *Id.* § 8.1.

214. *Id.* §§ 7.3, 7.4.

215. *GPFB Report*, *supra* note 186, at 22.

216. *See Government Pension Fund Global: Annual Report 2011*, NORGES BANK INV. MGMT. 46–47 (2011), http://www.nbim.no/Global/Reports/2011/Annual%20report%202011/Arsrapport_11_ENG_web.pdf [hereinafter *Annual Report 2011*].

217. *See id.* at 47 (noting that NBIM has received \$16 million in class action claim payouts).

218. *See id.* at 48 (explaining how NBIM reported in 2011 that its discussion with five cocoa and chocolate companies resulted in concrete steps and policies aimed at combatting child labor).

provides a method for incorporating international law norms and standards, whether developed publicly or privately, within the internal law and operations of the corporation. Norway, in effect, is both privatizing and internationalizing governance one share at a time, effectively incorporating international standards into its own domestic legal and policy orders and then imposing those standards extraterritorially through its shareholding for the benefit of the Norwegian people and the maximization of the value of the Fund itself. This is conflation of the public and private at a very deep level.

The consequences are necessarily polycentric. The Fund can assert governance irrespective of the policy of the states in which those corporations are chartered, potentially creating governance dissonance within a corporation. It can also assert governance on the basis of the international instruments now incorporated into NSWF management regulation that may be significantly different from that of the home state. Again, the result is polycentric. Transparency is also usefully deployed. The NBIM has, for example, posted its voting record as a shareholder online and arranged its voting reports by the substantive areas of action that it seeks to reform.²¹⁹ For the corporation, it suggests simultaneous governance by the home state, the application of international law and norms as specified by the home state, and the possibility of deviance from those rules at the instance of its shareholders who insist on the application of the law and policy of another state, but only as a matter of private governance effectuated through market transactions and corporate internal governance.

The Norges Bank has the principal responsibility of effectuating this structure in Norwegian investment. For this purpose, “[t]he Bank shall have internal guidelines for its exercise of ownership rights that indicate how these principles are integrated.”²²⁰ The Norges Bank has been deliberately aggressive in meeting its obligation in this role.²²¹ The role includes lobbying as a shareholder for changes in the

219. See *Voting Records*, NORGES BANK INV. MGMT., <http://www.nbim.no/voting-lists> (last visited June 13, 2013); *Annual Report 2011*, *supra* note 216, at 46 (noting how voting records include equal treatment of shareholders, board accountability, well-functioning markets, children’s rights, climate change and water management).

220. *Management Mandate*, *supra* note 65, at 7.

221. See *Pension Funds Urge Chocolate Industry to End Child Labour*, NORGES

laws of host states, including the United States.²²² It also includes the development of shareholder strategies in concert with other investors and industry initiatives, which are then used to further governance behavior modification objectives.²²³ As a large shareholder, even with relatively small stakes, the NSWF is able to affect corporate governance behavior among those companies in which it has invested.²²⁴ While the process can be slow—one enterprise at a time—it can contribute to long-term changes in aggregate behavior and thus business culture (and the customary norms of business behavior expectations).

The Management Mandate for the Government Pension Fund Global incorporates these legislative objectives into the investment strategies of the Norges Bank. The objectives also contribute to the complex relationship between law and norm, between state regulatory policy and state projections of power through active participation in private markets, and between national legal structures and the internationalization of behavior standards. Responsible investing is not constructed merely to produce the highest achievable returns, but also to bend that objective to other Norwegian political objectives.²²⁵ It suggests the determination by

BANK INV. MGMT. (May 31, 2010), <http://www.nbim.no/en/press-and-publications/feature-articles/2010/pension-funds-urge-chocolate-industry-to-end-child-labour/> (reporting on a cocoa meeting in Utrecht that demonstrated how far companies have to go to fulfill their 2001 pledge to eliminate child labor and the NBIM position that the situation must be remedied).

222. See *The Management of the Government Pension Fund in 2011*, *supra* note 18, at 103 (discussing Norges Bank's decision to submit shareholder proposals in six U.S. companies, which call for amendments to articles to enshrine a right for shareholders to submit proposals for alternative board candidates for inclusion in the notice of general meeting).

223. *Id.* at 98.

224. See *id.* at 100 (discussing the Norges Bank's influence as a shareholder despite the small absolute size of its stake in many companies; the "views of the Bank with regard to company strategy, operations, risk, capital structure and management are therefore solicited to an increasing extent. Companies are particularly interested in how Norges Bank will vote in general meetings and how the Bank reacts to special situations that might arise during the course of the year").

225. See, e.g., *A Clear Division of Roles and Effective Controls*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/About-us/governance-model/> (last visited June 6, 2013) (displaying how the Norwegian government has emphasized the close and democratically legitimate connection between fund and state policy as reflecting the sovereign will of its people).

the Norwegian state that private power is critical to achieving global economic objectives, and that this private power ought to be managed through purely domestic law to be sure, but also through domestic law that itself consciously incorporates international norms. As such, the NSWF serves as both bridge and framework. It is a bridge between the public and private governance efforts of the state and a framework through which the law-state can project its power inward into private governance across borders and outward into the construction of governance norms at the international level. Norway means to stand at the center of this web, and the NSWF provides the vehicle through which such a complex and interactive system might be constructed. Consider in this regard the role of private enterprises in development, one of the elements of responsible investing:

Through knowledge, experience, presence and influence, the private sector can help to address many of the challenges facing developing countries However there is no automatic convergence of the interest of foreign companies and the real needs of the local population Norway is seeking to persuade developing countries to accede to international conventions and implement and enforce them nationally Norway is therefore actively participating in efforts to strengthen international guidelines for [corporate social responsibility].²²⁶

This assessment is not to suggest judgment, but the way in which indirect regulation can be extended extraterritorially through a well executed strategic program implemented through projections of financial power (and state policy) in private markets. This objective is made directly by the Finance Ministry, who wishes the Bank to “actively contribute to the development of good international standards in the area of responsible investment and active ownership.”²²⁷ This reflects a state policy determination that Norwegian law ought to reflect international standards, and that international standards ought to be incorporated into the governance framework of all entities touched by NSWF investment.

For the Ministry of Finance, of course, the notion is plain enough. The internationalization of its policy choices through the investment strategies of the NSWF serve as a defense of its policies—they are not extraterritorial in the sense of advancing the parochial policy

226. *Corporate Social Responsibility*, *supra* note 88, at 63.

227. *Management Mandate*, *supra* note 65, at 7.

goals of the Norwegian people. Rather, the responsible investing and active management principles reflect Norway's desire to implement international obligations that all states share. In this sense, Norwegian extraterritorial intervention does not serve the state, but the international community; in Norway's view, all states should be working toward the same ends. The materials that follow will test these notions. And these notions will be found wanting to some extent—both in the sense that Norway gives in too easily to national aspirations and policy preferences in its determinations of the meaning and form of the international rules it champions, and in the sense that Norway's strategic goals may sometimes trump its economic ones.²²⁸

The tension between state policy goals and the economic objectives of the fund (as well as the efforts of the state to harmonize them) is evident in the provisions for the management of the equity and fixed income portfolios, as well as risk management and performance valuation, articulated in conventional economic terms.²²⁹ On the one hand, the NSWF is free to invest in most traditional forms of tradable securities. Approved investment instruments include tradable debt and equity securities, derivatives, and the securities of unlisted companies “in which the board has expressed an intention to seek a listing on a regulated or recognised [sic] market place.”²³⁰ In addition, the Fund may own financial instruments and derivatives, but only when received as a result of corporate activity.²³¹ Similar rules apply to the management of the

228. *See id.* The Management Mandate requires the preparation of an annual report on the Norges Bank's work on active ownership and integration of good corporate governance and environmental and social issues, which requires the Norges Bank to specify the ways in which it has integrated basic corporate social responsibility principles into its management. *Id.* It also requires the Bank to specify how it has exported these corporate social responsibility issues in its role as shareholder/investor, mandating the reporting of the Bank's voting record as a shareholder. *Id.* Lastly, the report must include a discussion of the way in which the Bank has used its position to “contribute to the development of good international standards” for responsible investment in the form of active ownership. *Id.*

229. *Id.* at 10. *See Management of the Government Pension Fund in 2009, supra* note 172, § 2.1.1 (conceding that the twin goals of economic performance and responsible investment will not coincide).

230. *Management Mandate, supra* note 65, at 11.

231. *Id.*

real estate portfolio.²³² On the other hand, policy objectives constrain investment freedom, from a purely economic profit maximization perspective, in important ways. This is particularly apparent with respect to portfolio management restrictions.²³³ The Norges Bank may not acquire more than ten percent of the voting shares of an enterprise.²³⁴ Unlike other SWFs, the NSWF does not aspire to be a controlling shareholder, just an influential one. Additionally, the NSWF may not invest in domestic companies or in fixed income instruments issued by governments. Most importantly, the economic effects of responsible investing are carried out by a provision prohibiting investment in companies excluded from the NSWF investment universe, principally for failure to comply with the policy and behavior threshold built into the macro investment strategy of the NSWF.²³⁵ A later part of this article will discuss the mechanics of that exclusion, and the operationalization of the responsible investor strategy through ethics guidelines and the adjudicatory role of the Ethics Council.²³⁶

Taken together, the active ownership framework presents an interesting reconstruction of the projection of state power onto the territories and regulatory spaces of other states and non-state organizations. Private in form, active ownership provides a method for the transposition of national policy onto the operations of companies over which the Norwegian state has no legal claim to control. Additionally, this projection of public power through shareholding also appears to open a back channel to communication with other states. The NSWF does not merely lobby the companies in which it has an interest, it takes the position that its stakeholding gives it a means of lobbying states for changes in their legal regimes to conform to those that Norway prefers. Lastly, Norwegian preferences themselves seek to universalize the Norwegian legal order by seeking to incorporate (and transpose) international law and norms onto Norwegian regulatory space, and thus onto the domestic legal orders of foreign states (whether or not the foreign states have embraced those international norms). If responsible investing was

232. *Id.* at 14–18.

233. *Id.* at 12.

234. *Id.* at 7.

235. *Id.* at 7–21.

236. *See* discussion *infra* Part IV.

limited to active ownership, it would present a novel enough projection of hybrid public-private power through markets. But responsible investing includes a second component—one that is market-regulating to some extent. It is the role of responsible investing in shaping markets by developing a legal-judicial architecture for limiting company access to capital markets that this article considers next.

IV. RESPONSIBLE INVESTING: LEGALISM AND THE JURIDIFICATION OF ACCESS TO CAPITAL THROUGH ETHICAL INVESTMENT

The focus on responsible investing is not solely the province of the Norges Bank in its managerial and investment functions. The NSWF also exercises a measure of private regulatory power toward public governance through the creation of rules under which it limits the universe of enterprises in which it will invest. Those rules are meant to apply Norwegian policy on corporate responsibility and its incorporation of principles of Norwegian and international law to the investment decisions of the NSWF itself. The object is to affect access to capital markets by using conformity to corporate governance and conduct norms sourced in domesticated public international law and norms as a barrier to entry.²³⁷ Thus, the NSWF functionally seeks to manage markets by changing the legal frameworks within which private markets are regulated or, alternatively, the pricing of capital to firms based on conformity to legal expectations that codify internationalized domestic law. For the NSWF, the Ethics Guidelines provide that framework. The Ethics Council, in turn, administers the Ethics Guidelines under the ultimate authority of the Ministry of Finance.

237. As the Graver Committee put it in recommending the adoption of Ethics Guidelines,

The Petroleum Fund can also exert influence indirectly through the market. By explicitly communicating a decision not to buy a particular share, the Fund can send signals to company executives, other market participants, and a company's customers, particularly if the decision provides the market with information it did not have previously.

The Report from the Graver Committee, NORWEGIAN MINISTRY OF FIN. (Nov. 7, 2003), http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/graverutvalget/Report-on-ethical-guidelines.html?id=420232.

The division of authority between Ministry and Council ensures that the Ministry of Finance makes political decisions under the Ethics Guidelines after recommendation following a juridified process that the Ethics Council oversees.²³⁸ With the Council at the nexus of public, private, national, and international governance comes some of the juridification of the market and political economy of governance across national and international spaces.²³⁹ The Ethics Council provides a quasi-judicial architecture for determining whether the NSWF may include particular companies in its investment universe. For that purpose, it applies the policies enacted through its Ethics Guidelines.²⁴⁰ Those policies not only reflect Norwegian law and public policy but also domesticate international law and norms. These policies, in turn, are used not only as a means to exclude companies from the investment universe, but also as a trigger for the use by the NSWF manager of its powers as a shareholder to seek to change the behavior of targeted companies.²⁴¹ The resulting process effectively permits Norway to enforce soft law frameworks for corporate governance as well as international law and norms against non-state enterprises whose home states may reject those norms. Though that effect is limited to the private market behavior of Norway, it produces a sometimes substantial effect functionally similar to the legislative process traditionally used for this purpose.

A. JURIDIFICATION OF INVESTMENT DECISION-MAKING THROUGH ACCESS TO CAPITAL RULES

It is now commonplace that a trend toward juridification

238. See *Council on Ethics*, *supra* note 112; discussion *supra* Part III (analyzing the role of the Ethics Council in determining whether companies conform to the requirements of the ethical guidelines that constrain the NSWF's economic and investment activity).

239. See, e.g., Hans Lindhal, *A-Legality: Postnationalism and the Question of Legal Boundaries*, in *GLOBAL DEMOCRACY AND EXCLUSION* 117, 124–26 (Ronald Tinnevelt & Helder De Schutter eds., 2010) (describing spatiality as a critical concept of governance).

240. Ethics Guidelines, *supra* note 23.

241. See, e.g., *Active Ownership Pays Off*, NORWEGIAN MINISTRY OF FIN. (Sept. 9, 2008), <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2008/active-ownership-pays-off.html?id=526029> (observing the way in which Norway's active ownership caused a reduction in the use of child labor by a foreign company).

accompanies globalization of governance bodies. Lars Blichner and Anders Molander suggest five dimensions of juridification:

First, constitutive juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law comes to regulate an increasing number of different activities. Third, juridification is a process whereby conflicts increasingly are being solved by or with reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects.²⁴²

What is more novel is the transposition of the forms and practices of juridification in private markets rather than among public bodies.

Whether or not a conventionally denominated judicial body exercises it, juridification suggests the adoption of the traditional forms and methodologies of judicial decision-making. That is, juridification suggests governance through determination of the extent of regulation through a process of application of binding rules to fully developed controversies that then serve as a basis for extracting the character of the law through a process of deductive reasoning. The move toward juridification is well known, if still controversial, in the context of public governance. But the forms of juridification have also long extended to non-judicial bodies within states; in administrative law, the quasi-judicial function of bureaucracies is both well known and well established.²⁴³ The governance functions of commercial activities have also moved toward the adoption of judicial models and begun to shape the modes of private governance, especially those of corporate entities. Within governance models of hybrid public-private activities, especially those of SWFs, the move toward regulation of the investment

242. Lars Chr. Blichner & Anders Molander, *What Is Juridification?* 5 (Univ. of Oslo ARENA Ctr. for European Studies, Working Paper No. 14, 2005), available at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2005/wp05_14.pdf.

243. See, e.g., RAN HIRSCHL, *TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2007); EDOUARD LAMBERT, *LE GOUVERNEMENT DE JUGES ET LA LUTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS* (1924), available at <http://archive.org/stream/legouvernementde00lamb#page/n7/mode/2up>.

decisions of the fund through the application of an ethics code by a disinterested panel of experts provides a variant of the juridification model applied to the commercial activities of the state.

The juridification type that the NSWF Ethics Council Project represents is not grounded in dispute resolution, the traditional function of the courts. Rather, its role derives from its gatekeeper function at the center of a governance order, which blends private and public national and international objectives within a regulatory framework that requires application, from time to time, in the form of contextually-based decisions.²⁴⁴ It is meant to invoke the mechanics of the judge to determine qualification for entry into the community permitted to participate in the investment activities (the normative universe) of the NSWF. In that process, the Ethics Council is not merely making a decision about fitness for inclusion, but also developing a normative foundation for the idea of fitness itself. The process-normative construction function has marked the growth of power of other organizations that, though they lack the formal power of the state, have used their gatekeeper function to develop, or at least contribute to the development of, substantive values in law and governance. The United Nations provides an example—the transformation of the power of the United Nations to determine fitness for membership in accordance with the rules of the U.N. Charter has become a source of normative framework for defining the idea of the “state” itself.²⁴⁵

NSWF juridification grounds itself in the construction of a normative governance structure that extends the regulatory power of the state from a traditional focus on legal norms to the extraterritorial projection of social norms through internationalized national law. The framework for that effort is the regulation of responsible investment that forms a core of both the management of the NSWF’s economic activities in the market and the basis for its engagement in influencing governance rules of other states.²⁴⁶ More importantly,

244. *The Management of the Government Pension Fund in 2012*, *supra* note 38, at 70.

245. See JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, 109–83 (2006).

246. See Daniel Brooksbank, *NBIM Outlines Misgivings on UK Stewardship Code*, SUSTAINABLE INVESTMENT RESEARCH PLATFORM (Oct. 20, 2010), available at <http://www.sirp.se/web/page.aspx?refid=62&newsid=104344&page=45>

perhaps, it also serves as a gateway for the projection of state policy directly into the governance of the corporations making up the NSWF's investment pool, and indirectly affecting the general social norm framework within which corporate behavior is managed outside the state. As the Chair of the Ethics Council modestly suggested in 2009,

Capitalism is a function of the way the world is organized and structured financially and politically and so we are not thinking that we are civilizing capitalism. If we are really lucky, we might civilize a couple of companies or maybe more than a couple. And perhaps we may eventually have a positive influence that is more far-reaching than the impact we may have on those companies that we have dealt with concretely.²⁴⁷

The Ethics Council has begun to develop a coherent system of jurisprudence grounded in its application of the Ethical Guidelines to the investment decisions of the NSWF.

The work of the Ethics Council has produced the beginnings of a coherent jurisprudence of ethics for corporate investment, utilizing public power to influence private governance among enterprises. But that jurisprudence may contribute significantly to the development of transnational social norm standards, to the incorporation of international soft law standards into domestic law, to shaping the character of shareholder engagement with corporate governance, and to indirectly influencing both formal and informal corporate governance norms. The Ethics Council influences indirectly through the relationship between the development of corporate governance policies by the Ministry of Finance and the development of corporate behavior norms through the Ethics Council that serve as the basis for shareholder activity by the Fund manager. This, in turn, deploys private power toward public governance that may affect not only individual enterprises but also corporate governance norms through customs that may eventually be reflected in international or national laws or norms. Therefore, Norway has provided an architecture of governance that sits astride the borders of market and state, of public and private, and of national and international. Its efforts to institutionalize this border-riding governance provides a window into how cooperative and inter-systemic governance may play a greater

(discussing NBIM's doubt of the United Kingdom's Stewardship Code).

247. van der Walt, *supra* note 114.

role in shaping behavior in this century.

“Responsible investing,” in the form of the structures created for shaping the investment universe of the NSWF through the Ethics Council, may be producing a law of ethical investment that may influence not just the legal framework for investment in Norway and the transnational soft law framework for SWF governance generally, but also international customary standards for ethical behavior of corporations. These standards may become incorporated into instruments from the developing United Nations Protect-Respect-Remedy Framework, now elaborated in the U.N. Human Rights Council’s endorsed Guiding Principles for Business and Human Rights,²⁴⁸ to the soft law governance systems from the OECD’s Guidelines for Multinational Corporations²⁴⁹ and the ISO 26,000 standard.²⁵⁰ Norway is effectively leveraging its private investment power to project governance authority over global capital markets, influencing the rules through which access to capital is constructed. In this respect, the jurisprudence of the Ethics Council may play a significant role in a multi-prong effort by the Norwegian state to

248. See *Guiding Principles on Business and Human Rights*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS iv (2011), available at http://shiftproject.org/sites/default/files/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *U.N. Guiding Principles*] (setting forth the history of the U.N. Guiding Principles, which the Special Representative of the Secretary-General originally imagined to address the issues of human rights and transnational corporations). The U.N. Guiding Principles

were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development.

Id. at iv.

249. See *OECD Guidelines for Multinational Enterprises*, ORG. FOR ECON. COOPERATION AND DEV. 3 (2011), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf> [hereinafter *OECD Guidelines*] (stating the purpose and substance of the guidelines are recommendations from governments to multinational enterprises that “provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised [sic] standards”).

250. *ISO 26000 – Social Responsibility*, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/management-standards/iso26000.htm> (last visited June 16, 2013) (explaining that this ISO standard is unique because it does not provide requirements, but rather guidance on social responsibility, and therefore cannot be certified).

advance international public and private corporate governance and corporate social responsibility through its “responsible investment” regulatory framework.

Responsible investment principles let a state direct the choices of investment consistent with the general obligation of the NSWF to achieve the highest possible returns. The direction is meant to constrain the universe of potential investments from which the maximization of returns can be achieved. The object is to further the state’s advancement of its policy of corporate social responsibility, environmental sustainability, human rights, and economic development. For that purpose, the Norwegian state incorporates international soft law standards, prohibits investment in companies that engage in certain economic activity (product-based exclusion) or whose conduct violates substantive standards incorporated into law (conduct-based exclusion), and participates in the development of international standards that manage the universe of investments permitted by the NSWF.²⁵¹

Responsible investment also has a private regulatory aspect. Once the Fund has purchased shares in an approved company, principles of active ownership oblige the Norges Bank to use its position as a shareholder to advance Norway’s policies through shareholder action. The task of ensuring that only companies conforming to the responsible investment standards are included in the investment universe falls to the Ethics Council and the Ministry of Finance.²⁵² The Ethics Council makes recommendations on the exclusion of companies whose place within the investment universe is challenged, and forwards those recommendations to the Ministry of Finance for final determination. The determinations may, in the aggregate, contribute to the development of international standards, which are then reflected in the rules of responsible investment that constrains the Norges Bank in the choice of suitable investment.

The framework itself thus nicely evidences a self-referential system that is both complete and self-reinforcing. It offers a window into a possible approach to the resolution of the great issue of the twenty-first century—how to mediate the divide between public

251. See discussion *infra* Part IV.B (elaborating on the work of the Ethics Council).

252. Ethics Guidelines, *supra* note 23.

(law) and private (norm-contract) governance in which an integrated domestic-international system can manage states and private actors. Sovereign investment thus combines the private objective of economic wealth maximization with the public objective of promoting certain behaviors and privileging certain values. The NSWF is organized on the basis of the principle that good economic returns may be linked with the policy-driven structures of responsible investing, not just with respect to the effect on companies, but also for its role in promoting “well-functioning, legitimate and efficient markets and sustainable development in the broadest sense.”²⁵³ The NSWF’s self image as a “universal owner” reinforces this idea. Responsible investment, then, serves not only as a vehicle for the coordination of state policy toward economic behavior. It also serves as a means of projecting state power indirectly in areas of foreign policy in which the Norwegian state has not been able to play a direct role.

The Fund is not capable of safeguarding all the ethical commitments one nation has. Other political, regulatory, or financial instruments will often be better suited for this. The Fund has the greatest chance of exerting a positive influence if the focus and instruments are a natural consequence of the Fund’s role as a financial investor. The Fund’s objective is not to act as, for example, a development aid or foreign policy instrument.²⁵⁴

In this sense, responsible investment in general and the work of the Ethics Council in particular serves as a means of leveraging the public power of Norway through private markets.²⁵⁵ Norway, then, seeks to retain the traditional goal of wealth maximization. The NSWF starts with an investment universe built on traditional financial assessment measures. It then narrows that

253. *Management of the Government Pension Fund in 2009*, *supra* note 172, at 14 (noting that universal owners, or investors who are geographically diversified, have many different types of investments, and benefit from safeguarding good corporate governance, environmental, and social issues).

254. *Id.* (expressing the Fund’s objective as “ensuring a good financial return”).

255. *See, e.g.*, Anthea Pitt, *Oil Funds Give Israeli Outfits the Boot*, UPSTREAM, Aug. 23, 2010, <http://www.upstreamonline.com/live/article227134.ece> (explaining where Norway excluded two Israeli companies from the NSWF while citing its reason on the grounds of public policy considerations, including its effort to enforce, through its financial conduct, what it perceived as an Israeli breach of the 4th Geneva Convention).

universe by applying public policy criteria that reflect the political preferences of the state and that derive from regulation that itself is a product of the ethical values used to determine the universe of investments and governance of corporations in which investment is made. All of this forms part of a larger strategy for the projection of Norwegian power abroad. This practice is a variant of the Chinese model of sovereign investing—but where China constrains its investment universe by determinations of strategic needs of the Chinese state, Norway bases its model on its project of internationalizing law.²⁵⁶

The work of the Ethics Council plays a key role in this regulatory system. First, the Ethics Council makes determinations of exclusion in individual cases. For that purpose, the Ethical Guidelines serve as the regulatory framework that the Ethics Council applies the same way that a court applies statutes and regulations. The Ethics Council may be required both to fill in gaps and to develop interpretive standards that it applies uniformly to companies with similar characteristics. These interpretations may also bridge conceptual and implementation gaps between product cases and conduct cases. These standards may both shape and advance the development of the “rules” set forth in the Ethics Guidelines. In the aggregate, it may have an effect well beyond the narrow application to the particular company involved in a determination of exclusion. It may be possible to understand this as the beginning of a jurisprudence of responsible investment. Second, the aggregate of Ethics Council decisions, when generalized into a set of interrelated standards, will themselves contribute to the development of international standards of corporate social responsibility and corporate governance. That development will then make its way back into Norway in the form of law, as the developing standards of international law are incorporated into Norwegian domestic law and are applied by the Norges Bank to help determine its investment choices.²⁵⁷

256. *See supra* note 3 and accompanying text.

257. *Management of the Government Pension Fund in 2011*, *supra* note 18, at 101 (describing an investor declaration supporting the U.N. Guiding Principles for Business and Human Rights signed by the Norges Bank in 2011 and endorsed by the U.N. Human Rights Council).

B. THE CASES AND ACCESS TO NSWF CAPITAL

We now understand the comprehensive and self-reinforcing construction of “responsible investment” under the Norwegian regulatory framework, which strives to follow the U.N. Principles for Responsible Investment and “integrate considerations of good corporate governance and environmental and social issues into more aspects of . . . investment strategy and management.”²⁵⁸ The idea behind the U.N. Principles is to provide a principled basis for the participation of investors in the governance of the entities in which they invest as well as to provide a framework for valuing choices in investment.

This section moves the analysis from its contextual base to the operationalization of a juridified, rules-based system for constructing a universe of responsible corporations that meet the ethical requirements necessary to qualify for investment under Norwegian and international law standards. The consequences are telling—such a universe suggests not just those enterprises in which the NSWF may invest, but also those enterprises that, by their exclusion, are deemed to operate in violation of international law and norms. This section’s principal purpose is to identify the decisions that form the current jurisprudential universe of the Ethics Council. It also identifies the categorical distinctions that the Ethics Council has made in framing approaches to exclusion in both product and conduct cases. The Ethics Council itself has suggested the structure of its own jurisprudence, which this section will take as a starting point for analysis.

This structure suggests the way in which the substantive jurisprudence has been organized but not the evolution of procedural mechanics that help shape the decision mechanics. Principles of *legality* (all regulations must be clear, ascertainable, and non-retrospective), *legal certainty* (legal rules must be clear and precise), *proportionality* (sanctions should be in proportion to the severity of the act punished), *margin of appreciation* (range of interpretive discretion should be a function of strength of consensus among legal actors), and *predictability* (similar facts should produce similar results) are legal concepts essential to a legitimate jurisprudence. We

258. *GPFB Report*, *supra* note 186.

will see if these principles emerge as applied in the decisions rendered by the Ethics Council. The sub-sections that follow will consider these decisions in more detail, individually and collectively. First, the decisions will be presented in summary form.

1. Products, Weapons Production, Land Mines

There are two principle determinations, one from the predecessor body, the Petroleum Fund Advisory Commission on International Law (“PFACIL”),²⁵⁹ and the other by the Ethics Council.²⁶⁰ Both opinions focus on the liability of the Norwegian state for the production of goods that might violate international law directly applicable to Norway. From a jurisprudential perspective, the most important portion of the cases was the adoption of precedent for questions of law—in this case, that investments in companies that produce landmines can constitute a violation of international law. Procedurally, the Ethics Council adopted a functionally binding precedent rule, taking the determination of the PFACIL as authoritative for its own determination of a similar question.²⁶¹ The critical test for the authority of a prior determination was acceptance of the recommendation made in the prior case by the Finance Ministry.

The determination to exclude Singapore Technologies from the investment universe considered a number of questions of law and the interpretation of the meaning of treaties. The focus of the analysis was on the interpretation of the relevant treaty text, the 1997

259. See *Question of Whether Investments in Singapore Technologies Engineering Can Imply a Violation of Norway’s International Obligations*, NORWEGIAN MINISTRY OF FIN., Mar. 22, 2002, <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Advisory-Commission-Documents/Advisory-Commission.html?id=413581> (examining Singapore Technology Engineering’s involvement with the production of anti-personnel landmines).

260. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation Concerning Whether the Weapons Systems Spider and Intelligent Munition System (IMS) Might Be Contrary to International Law*, NORWEGIAN MINISTRY OF FIN. (Sept. 20, 2005), <http://www.regjeringen.no/pages/1662930/Tilr%C3%A5dning%20Spider%20IMS%20%20English%2020.pdf> [hereinafter *IMS Contrary to International Law*] (examining Spider and Intelligent Munitions System’s involvement with the production of anti-personnel landmines).

261. *Id.*

Ottawa Treaty.²⁶² The Ethics Council adopted a broad interpretation of the prohibitions that it inferred from the broad language of the treaty text. Singapore Technologies' production of land mines was not deemed prohibited under international law, as Singapore was not a treaty party; however, the Ethics Council read the Treaty as including broad complicity provisions. Applying its interpretation of the complicity provisions to the state and its use of the NSWf, the Ethics Council determined that Norway, as a Treaty signatory, had distinct obligations that extended to its decisions to make investments through private markets—investment in companies producing such mines could render the NSWf indirectly complicit. The determination essentially disregarded the nature of the transactions—private market transactions in legally-operating corporations—and treated the investment as an act of state to which the public obligations of Norway applied. This mirrors the approach of the European Court of Justice when interpreting the legal obligations of Member States under the European Union/Communities Treaties.²⁶³

The *Spider & Intelligent Munitions* case consolidated consideration of exclusion of three companies in similar circumstances—General Dynamic Corp., Alliant Techsystems, and Textron Inc.²⁶⁴ The Ethics Council found no violation in investment because only a human observer could detonate the land mines in these cases. Typically, land mines go off due to the pressure of a person or vehicle, but the weapon systems that General Dynamics, Alliant, and Textron produce require an opposing force to physically detonate from a distance. The Council noted that if this system was modified or eliminated and detonation would no longer require the attention of a person, then these companies would be excluded on the grounds of anti-personnel land mines.²⁶⁵ The Council also said that it

262. Stuart Casey Maslen, *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, U.N. AUDIOVISUAL LIBRARY OF INT'L LAW (2010), http://untreaty.un.org/cod/avl/pdf/ha/cpusptam/cpusptam_e.pdf (focusing on the history, interpretation, implementation, and influence of the Convention).

263. See Backer, *The Private Law of Public Law*, *supra* note 89 (concluding that where a state's assertion of rights as a private actor amount to regulation, public law will apply).

264. *IMS Contrary to International Law*, *supra* note 260, at 1.

265. *Id.* at 4 (“According to the producers, both these weapons systems will be

expects the only companies to be excluded from the fund to originate from states that have not ratified the Ottawa Convention (e.g., the United States) if that state constructs non-Ottawa-Convention-compliant weapons.²⁶⁶ Critical to the determination was the responsible investor foundation of the Ethics Guidelines. In this case, therefore, the Council interpreted international law to require Norway to deny access to financial markets to entities and other states that might seek to breach the Convention's terms; complicity, in a sense, includes a financial markets dimension, obligating investors to complete heightened due diligence before investing and to ensure that their funds are not used to indirectly finance proscribed activity.²⁶⁷

2. *Products, Weapons Production, Cluster Munitions*

There are four principle determinations in this area of the Ethics Council's work.²⁶⁸ Exclusion from the Fund based on cluster

produced with the 'man-in-the-loop' feature, so that the ammunition is detonated by an operator and not by the victim. A weapons system that can only operate in this manner falls outside the definition of an antipersonnel landmine.”).

266. *Id.* at 4–5.

267. *Id.* at 2 (quoting the Advisory Commission on International Law, which answered this question in the affirmative, in its memo to the Ministry of Finance dated March 11, 2002). “Because the Mine Ban Convention goes far in prohibiting any form of assistance, encouragement or inducement to production in violation of the convention, it is presumed that even a modest investment could be regarded as a violation of the article 1(1) (c) cf. (b).” *Id.*

268. See Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation on Exclusion of Cluster Weapons from the Government Petroleum Fund*, NORWEGIAN MINISTRY OF FIN. (Sept. 2, 2005), <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/recommendation-on-exclusion-of-cluster-w.html?id=419583> [hereinafter *Recommendation on Exclusion of Cluster Weapons*]; *A Further Eight Companies Excluded from the Petroleum Fund*, NORWEGIAN MINISTRY OF FIN., Sept. 2, 2005, <http://www.regjeringen.no/templates/Pressemelding.aspx?id=256695&epslanguage=EN-GB>; *South Korean Producer of Cluster Munitions Excluded from the Government Pension Fund – Global*, NORWEGIAN MINISTRY OF FIN., Dec. 6, 2006, <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2006/South-Korean-producer-of-cluster-munitio.html?id=437729>; *Mining Company Excluded from the Investment Universe of the Norwegian Government Pension Fund – Global*, NORWEGIAN MINISTRY OF FIN., Apr. 11, 2007, <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2007/Mining-company-excluded-from-the-investm.html?id=462551>; *Cluster Weapons Manufacturer Excluded from the Government Pension Fund – Global*,

munitions is possibly the most changed exclusion over time. The first companies were excluded in June 2005 under the guidelines created by the Council, followed by later assessments made in September 2009, but the Council now has a different set of criteria of exclusion to conform to the Convention on Cluster Munitions—the Oslo Convention.²⁶⁹ Before the ratification of the Oslo Convention, the principle source of law was the Ethics Council’s interpretation of the Storting’s approach to the application of international law principles with respect to violations of “fundamental humanitarian principles” with legal effect in Norway, a vague and incomplete reasoning process.²⁷⁰ Following the ratification of the treaty, the Ethics Council applied international law ratified directly by Norway.²⁷¹ In doing so, it developed and applied its own reading of the Convention, its applicability to the investments of the Fund, and the legal basis in the Convention as grounds for exclusion. The Ethics Council also expressly declared that it would use the Convention for examining any future recommendations.

In the first case of exclusion based on the production of cluster munitions from June 16, 2005, seven companies were excluded

NORWEGIAN MINISTRY OF FIN., Jan. 30, 2009, <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/cluster-weapons-manufacturer-excluded-fr.html?id=543105>.

269. Convention on Cluster Munitions, *opened for signature* Dec. 3, 2008, CCM/77 (entered into force Aug. 1, 2010), *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&lang=en. Not every large state that is home to important publicly traded multinational enterprises has acceded to this Treaty, including the United States and the People’s Republic of China.

270. The reasoning was that “although cluster weapons are not subject to specific restrictions under international law, it can nevertheless be seen as unethical to use such weapons as this may constitute a violation of ‘fundamental humanitarian principles.’” *Recommendation on Exclusion of Cluster Weapons*, *supra* note 268.

271. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation on the Exclusion of the Company Textron, Inc.*, NORWEGIAN MINISTRY OF FIN. (Aug. 26, 2008), <http://www.regjeringen.no/upload/FIN/etikk/textron.pdf> [hereinafter *Recommendation on the Exclusion of Textron*] (“In 2008, an international convention to ban cluster munitions has been negotiated. The convention’s technical definition of what constitutes cluster munitions is largely in line with the criteria the Council applied in 2005, but in some areas it is more stringent The Council on Ethics finds it appropriate to base future recommendations of exclusion on the definitions provided in the cluster munitions convention.”).

because the weapons they produced closely matched what the Council considered to be cluster munitions.²⁷² The Council set criteria for what cluster munitions are, but it was careful to note that its recommendations are not exhaustive, are open to direct possibilities of weapons systems, and that all systems should be taken into account on a case-by-case basis. For the first seven companies that were excluded, the main rationale for exclusion was based on each system's type of armament, including the number of anticipated duds, the accuracy rate of hitting military versus civilian targets, and, through their normal use, whether the weapons violate fundamental human rights.²⁷³

In 2008 and 2009, the Council based its determination on its interpretation of international law binding on Norway, in this case the Oslo Convention (2008), as grounds for exclusion.²⁷⁴ The key difference in the use of the Convention deals with the number and size of the "bomblettes" in munitions as well as the previously mentioned accuracy and dud rate. For example, though Thales SA (France) was initially excluded, the exclusion determination was revoked after the company acted just prior to France's signature as a party to the Convention.²⁷⁵ Since the ratification of the Oslo Convention, there have been few cases of exclusion; however, for states that have neither ratified nor implemented the Convention into their domestic law, like the United States,²⁷⁶ the public obligations of the state applied within its territory and the legal obligations of corporations operating in global space are distinct.²⁷⁷

272. *Recommendation on Exclusion of Cluster Weapons*, *supra* note 268.

273. *Id.*

274. *See, e.g., Recommendation on the Exclusion of Textron*, *supra* note 271 .

275. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation to Reverse the Exclusion of Thales SA*, (Feb. 13, 2009), http://www.regjeringen.no/pages/2236625/Thales_2009eng.pdf.

276. *See, e.g.,* Steven Groves & Theodore R. Bromund, *The United States Should Not Join the Convention on Cluster Munitions*, HERITAGE FOUNDATION, Apr. 28, 2011, <http://www.heritage.org/research/reports/2011/04/the-united-states-should-not-join-the-convention-on-cluster-munitions>.

277. This has arisen recently in the context of applying the Guidelines for Multinational Corporations (2'11) of the OECD. *See* Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, ORG. FOR ECON. CO-OPERATION & DEV. (OECD) (Sept. 29, 2009), *available at* <http://www.oecd.org/investment/mne/43884129.pdf>. In that proceeding, the corporation was faced with conflicting obligations under international law and

3. *Products, Weapons Production, Nuclear Arms*

There is one principal and relatively straightforward exclusion determination in this area of the case law.²⁷⁸ Little formal law exists directly relating to the control of nuclear weapons outside of the Nuclear Non-Proliferation Treaty of 1970²⁷⁹ and the International Atomic Energy Agency architecture.²⁸⁰ The Council states that all companies involved in manufacturing weapons or articles that are only used in nuclear weapons shall be excluded regardless of the nation or origin. During the first group of exclusions in September 2005, the Council listed specific criteria that must be met, similar to its method for environmental damages, which give a non-exhaustive list and framework for the Council to reference.²⁸¹ Further, the Council noted that while these companies operate in complete domestic and international compliance, they are still producing weapons that violate fundamental human rights through their massive destruction when detonated. The Council also references the Graver Commission Report of 2003, disseminated by the Norwegian parliament.²⁸²

While the standard for exclusion is relatively straightforward, its

Indian law. *Id.* ¶ 56.

278. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation on Exclusion*, NORWEGIAN MINISTRY OF FIN., Jan. 5, 2006, <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation-on-exclusion.html?id=419589>; *Exclusions from the Government Pension Fund – Global*, NORWEGIAN MINISTRY OF FIN., Jan. 5, 2006, <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2006/Exclusions-from-the-Government-Pension-F.html?id=419804>.

279. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1969, 729 U.N.T.S. 10485 (entered into force Mar. 5, 1970), *available at* <http://www.un.org/disarmament/WMD/Nuclear/NPTtext.shtml>.

280. *About Us*, INT'L ATOMIC ENERGY AGENCY, <http://www.iaea.org/About/> (last visited June 26, 2013).

281. *See Companies Excluded from the Investment Universe*, NORWEGIAN MINISTRY OF FIN., <http://www.regjeringen.no/templates/RedaksjonellArtikkel.aspx?id=447122&epslanguage=EN-GB> (last visited Sept. 4, 2013) (listing the following companies, inter alia, as excluded from the investment universe: Safran SA (Dec. 31, 2005); Northrop Grumman Corp. (Dec. 31, 2005); Honeywell International Corp. (Dec. 31, 2005); EADS Finance BV (Dec. 31, 2005); EADS Co. (Dec. 31, 2005); and Boeing Co. (Dec. 31, 2005)).

282. *See The Report from the Graver Committee*, *supra* note 237 (laying down the foundation for the Ethics Guidelines system).

application by the Ethics Council suggests that the Council might use its discretion to apply the standard selectively to “high value” targets of Norwegian foreign policy. Thus far, the Council has only excluded companies in the United Kingdom, France, Italy, and the United States, leaving questions as to why they have not excluded companies based in other nuclear states—Russia, China, India, or Pakistan—or states working toward or which might have nuclear arms capacity—Iran and Israel. Nor has the Ethics Council sought to exclude based on participation in the supply chain of nuclear arms production or the maintenance of nuclear weapons systems. This political use of discretion appears to contradict a more robust enforcement contemplated in the Norwegian Government’s whitepaper on ethical guidelines²⁸³ and the subsequent discussions of the guidelines in Parliament, which decided that the Fund shall not invest in companies that “develop and produce key components to nuclear weapons.”²⁸⁴ This contradiction suggests that, while this determination is clothed in the language and forms of law and produced through a quasi-judicial process, the choice of companies is made through political discretion in the service of the foreign policy (and perhaps even the internal political objectives) of the government.

4. *Products, Weapons Sales to States, Burma*

There are two principle determinations of exclusion in this category.²⁸⁵ The Burma exclusion determinations show the Ethics Council at its most ambiguous and inconsistent. The touchstone of

283. *Id.*

284. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation on Exclusion*, NORWEGIAN MINISTRY OF FIN. (Sept. 19, 2005), <http://www.regjeringen.no/pages/1661428/Tilr%C3%A5dning%20kjernev%C3%A5pen%20engelsk%2019%20sept%202005.pdf>.

285. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 14 November 2005*, NORWEGIAN MINISTRY OF FIN. (May 1, 2003), http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/tilradninger-og-brev-fra-etikkradet/Recommendation-of-14-November-2005.html?id=419590 [hereinafter *Recommendation of 14 November 2005*]; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of Nov 14th, 2008*, STYRER, RÅD OG UTVALG [Norwegian Boards, Councils, and Committees] (Nov. 14, 2008), <http://www.regjeringen.no/pages/2162512/tilr%C3%A5dning%20Dongfeng%20English.pdf> [hereinafter *Recommendation on Exclusion of Dongfeng*].

the Ethics Council determination is the application of a high threshold complicity standard.²⁸⁶ Yet the only company to be directly excluded from the Fund is Dongfeng, based in South Korea.²⁸⁷ In this case, the exclusion was based on the Ethics Council adopting, as part of the Ethics Guidelines, the embargo on sale of “arms and military equipment” to Burma imposed by the United States and the European Union. The Ethics Council essentially translated embargo into Norwegian regulatory standards.

On the other hand, the Ethics Council has noted that over twenty companies from East Asia and Europe have been examined for their participation with the Burmese government; these are mainly oil, gas, banking, and pharmaceutical companies and they have all been found to not be in violation with the Council.²⁸⁸ The Ethics Council uses a two-part regulatory test to apply exclusion for economic activity other than the sale of military goods and arms: “First, there must be a connection between the company’s operations and the relevant violations. Second, there must be an unacceptable risk for the company, and thus also, for the Fund, of contributing to future violations.”²⁸⁹

The result is a very narrow standard for exclusion, grounded in a high threshold for finding complicity in state action by companies (and thus the indirect complicity of the Norwegian state through the Fund). Certain connections are not enough to bar a company from the NSWF, “[e]ven though it can be inferred that the presence of a company generates revenues for the repressive regime and thereby contributes to uphold it.”²⁹⁰ Yet, an expansive application of similar standards in other regions—for example, the Middle East—then belies this narrowness.²⁹¹ Again, political considerations tend to

286. See Ethics Guidelines, *supra* note 23 (specifying that the Ethics Council is seeking to deepen its standard that the Fund should avoid indirect complicity).

287. *Recommendation on Exclusion of Dongfeng*, *supra* note 285.

288. Advisory Council for the Norwegian Government Petroleum Fund, *Assessment of Companies with Operations in Burma*, NORWEGIAN MINISTRY OF FIN. (Oct. 11, 2007), available at <http://www.regjeringen.no/pages/2018769/Burma%20letter%20english.pdf> [hereinafter *Burma Assessment*].

289. *Id.* (emphasis removed).

290. *Id.*

291. See, e.g., Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of November 16th, 2009*, NORWEGIAN MINISTRY OF FIN. (Nov. 16, 2009), available at <http://www.regjeringen.no/pages/>

distort the juridification of access to NSWF investment, or perhaps juridification is meant to veil the use of the NSWF as an instrument of Norwegian foreign policy.

More importantly, in these cases the Ethics Council refined its standard by distinguishing “precedent” in the form of prior decisions in related cases involving companies excluded as a result of operations in states where the regime arguably violated human rights.²⁹² Thus, selling arms is grounds for exclusion, but providing petroleum for vehicles, including military vehicles, is not.²⁹³ Yet the Ethics Council also suggested that it might use the two part standard in the future against companies on a broader reading of its standard. In its suggestion of broader application, the Council included companies such as PetroChina for a “possible” construction of an oil pipeline between China and Burma, as well as Daewoo for establishing an arms manufacturing plant in Burma. The Council has suggested that if “a company violates national law by illegally selling weapon technology to a suppressive regime, this may be viewed as a serious violation of fundamental ethical norms, and thus fall inside the last section of the Fund’s ethical guidelines.”²⁹⁴

The standard is hard to violate. One of most prominent companies to escape exclusion was Total SA (France). The Ethics Council allowed the company to stay included in the Fund because it found no clear link between the company’s operations and support of the Burmese Military, which appears to be the touchstone of the Council’s application of its standard, a touchstone that makes

13898012/Recommendation_Africa_Israel.pdf [hereinafter *Recommendation of November 16th, 2009*] (stating that the Fund’s investment in Africa Israel Investments Ltd. constitutes an unacceptable risk “of the Fund contributing to serious violations of individuals’ rights in situations of war or conflict” due to Africa Israel Investments’ subsidiary, Dania Cebus Ltd.’s involvement in the building of settlements in the West Bank).

292. See Pia Rudolfsson Goyer, *Can the Norwegian Government Pensions Fund-Global Be Used to Promote Human Rights? If So, How?*, NORWEGIAN MINISTRY OF FOREIGN AFFAIRS (Nov. 11, 2008), http://www.regjeringen.no/nb/dep/ud/kampanjer/refleks/innspill/menneskerettigheter/etikkraadet.html?id=535169#_ftn3 (establishing that the council does not consider itself bound by precedent, but by a dynamic interpretation method).

293. Aslak Skancke, *Regarding Investments Connected with the Middle East*, NORWEGIAN MINISTRY OF FIN. (May 15, 2006), <http://www.regjeringen.no/pages/1957953/Attachment%205%20Israel.pdf>.

294. *Burma Assessment*, *supra* note 288.

exclusion much harder.²⁹⁵ Thus, on that basis, the Council has yet to find the evidence provided by many NGOs and others that Total SA aided the rebel government's attacks on people who lived in the pipeline region as a plausible basis for exclusion. While Total SA does not manufacture arms for either side of the war, it does pay for security of the pipeline and for what appears to be the elimination of opposition to the construction of the pipeline.

5. *Products, Tobacco Production*

There is one principal determination that can be understood as the articulation of the common position of the Norwegian *demos* as developed through its representatives in the Storting.²⁹⁶ The basis for determining the meaning and character of that position can be gleaned from the legislative actions of the Storting—in this case the tightening of the Tobacco Control Act—and policy position. The determination reminds us that with “government Whitepaper no. 20 (2008-2009), the Ministry of Finance proposed that tobacco companies should be excluded from the investment universe of the Government Pension Fund Global.”²⁹⁷ This policy was then memorialized in changes to the Ethics Guidelines themselves.

The Ethics Council effectively transformed policy positions to regulation by construing the Ethics Guidelines as mandating the action without the need for intervention from the Storting. But that common position also had to be informed by developing consensus at the international level, reflected in supra-national instruments such as the World Health Organization Framework Convention. In this sense, the Ethical Guidelines represent a regulatory vehicle that can be flexibly applied on a case-by-case basis, the products of which serve to gloss the Ethics Guidelines in ways that have effect beyond

295. *Recommendation of 14 November 2005*, *supra* note 285.

296. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of October 22, 2009*, NORWEGIAN MINISTRY OF FIN. (Oct. 22, 2009), available at www.regjeringen.no/Upload/FIN/etikk/rec_tobacco_english.pdf [hereinafter *Recommendation of October 22, 2009*]; *Tobacco Producers Excluded from Government Pension Fund Global*, NORWEGIAN MINISTRY OF FIN. (Jan. 19, 2010), <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2010/Tobacco-producers-excluded-from-Government-Pension-Fund-Global.html?id=591449#>.

297. *New Guidelines*, *supra* note 22 (allowing for a broader assessment before making an exclusion).

the specific context of a particular determination, and produce something similar to regulation through judicial interpretation.

Because of the regulatory character of the determination, and because the Ethics Council took the admissions in the subject companies' public documents to be dispositive, the Ethics Council did not seek the participation of the companies excluded in the process leading to their exclusion.²⁹⁸ The Ethics Council also failed to engage the companies regarding the systems it used to make an exclusion determination, in this case the FTSE industry index for equities and the Barclay's Global Aggregate for bonds.²⁹⁹ The company had no opportunity to suggest alternatives.

From an efficiency perspective, this approach might well have made sense. However, because the Council sought to translate general regulation into a decision specific to a set of companies, the Ethics Council's own determination might be understood as a violation of Norwegian sensibilities about the need for procedural protection of people adversely affected by state action. That the Ethics Council failed to protect the procedural rights of companies (and failed to permit them to make statements or produce evidence that might have furthered their obligations under the Ethics Guidelines) puts the procedural legitimacy of this determination in doubt.

6. *Conduct—Complicity, Serious or Systemic Human Rights Violations*

There are three principle determinations that more precisely define corporate conduct that may constitute serious or systematic human rights violations requiring exclusion from the NSWF investment universe.³⁰⁰ Currently only two companies are excluded on the

298. *Recommendation of October 22, 2009*, *supra* note 296 (clarifying that the Council did not confirm the companies' manufacturing of tobacco because the companies stated it themselves).

299. *Id.* at 2.

300. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 20 November 2006*, NORWEGIAN MINISTRY OF FIN. (Nov. 20, 2006), <http://www.regjeringen.no/pages/2105482/Recommendation%20Monsanto%20ENG.pdf> [hereinafter *Recommendation of 20 November 2006*]; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 15 November 2005*, NORWEGIAN MINISTRY OF FIN. (Nov. 15, 2005), [http://www.regjeringen.no/pages/1661427/Tilr%C3%A5dning%20WM%](http://www.regjeringen.no/pages/1661427/Tilr%C3%A5dning%20WM%20)

grounds of what the Council states are human rights violations: Monsanto and Wal-Mart (with the subsidiary Wal-Mart de Mexico); however, the Ethics Council does refer to exclusions of other companies for human rights factors because of their involvement with Israel in the West Bank region.³⁰¹ The Israeli companies are excluded under the type “other.” The most significant difference between them and Wal-Mart and Monsanto is that the Israeli companies were working under contract for and producing goods for the Israeli war and territorial claims efforts, whereas Wal-Mart and Monsanto are directly responsible for atrocities under their control—namely, their contradiction of human rights and labor standards, including employment of minors, tolerance of dangerous working conditions, pay issues, gender discrimination, hostility to union organization, and physical punishment of employees.³⁰² The cases also suggest a broad reading of the notion of “company.” In the Monsanto redetermination, the Ethics Council specifically broadened the scope of its inquiry not merely to the company and its controlled subsidiaries but to a larger group of entities within Monsanto’s supply chain: “[T]he risk of the company’s complicity violations . . . is not necessarily limited to the company’s legal entities, but may also apply to the conditions at the company’s suppliers, licensees and others” who the company influences.³⁰³

In its investigation of Wal-Mart, the Ethics Council focused on allegations of “systematic violations of human rights,” specifically that Wal-Mart ran its business in ways that contradicted international human rights and labor standards through its suppliers and in its own

20eng%20format.pdf [hereinafter *Recommendation of 15 November 2005*]; *Recommendation of 14 November 2005*, *supra* note 285.

301. *Supplier of Surveillance Equipment for the Separation Barrier in the West Bank Excluded from the Government Pension Fund – Global*, NORWEGIAN MINISTRY OF FIN. (Sept. 3, 2009), <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/supplier-of-surveillance-equipment-for-t.html?id=575444> [hereinafter *Supplier for Separation Barrier in West Bank Excluded*].

302. *Recommendation of 15 November 2005*, *supra* note 300, § 4.1.1.

303. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Regarding Recommendation to Exclude the Company Monsanto Co from the Investment Universe of the Government Pension Fund – Global*, NORWEGIAN MINISTRY OF FIN. (June 10, 2008), http://www.regjeringen.no/pages/2105482/Brev_til_FIN_vedr_Monsanto%20ENG.pdf [hereinafter *Recommendation to Exclude Monsanto*].

operations.³⁰⁴ The Ethics Council applied its procedural standards: a direct link must exist between the company's operations and the relevant violations, the violations must serve the company's interest, and the company must have been aware of the violations and failed to prevent them.³⁰⁵ The Ethics Council carefully affirmed that an enterprise was not directly liable for violations of international law, and that an enterprise could not be deemed complicit in such violations absent proof of state violation. But none of this mattered for purposes of developing a standard of complicity under Norwegian application of international law standards to guide its own investment decisions, and thus to develop a distinctive governance order for companies wishing to remain within the NSWF investment universe.³⁰⁶

The Ethics Council's secretariat was tasked with developing evidence.³⁰⁷ The Ethics Council listed a large variety of allegations derived from reports, cases, and its own assessments of the operations of the enterprise which was also adduced from information provided by NGOs.³⁰⁸ On the basis of this evidence, the Ethics Council determined that Monsanto's operations violated the Ethics Guidelines. The Council emphasized the importance of the number of violations—not just in the company, but also within its supply chain.³⁰⁹ This effectively imports the supply chain responsibility premises of the OECD Guidelines and U.N. Guiding Principles. The Ethics Council specified that the “systematic and planned practice on the part of the company [is] to operate on, or

304. *Recommendation of 15 November 2005, supra* note 300, § 1.

305. *Id.* § 3.3.

306.

However, it is entirely possible under both Norwegian and international criminal law to sentence someone for complicity in an act without having established another party as the main perpetrator. The Council presumes that it was hardly the intention that the Council, as a precondition for establishing companies' complicity in human rights violations, should be required to determine whether states violate such rights.

Id. § 3.2. The basis for this was the sense that international law memorialized consensus at the international level on appropriate conduct that establishes a customary governance baseline for assessing conduct. *Id.*

307. *Id.* § 2 (stating that evidence developed from publicly available sources and “from lawyers, various organisations and individuals. Certain parts of this source base will, at the request of the sources involved, not be made public”).

308. *Id.* § 4; *Recommendation to Exclude Monsanto, supra* note 303.

309. *Recommendation of 15 November 2005, supra* note 300, § 6.3.

below, the threshold of what are accepted standards for the work environment.”³¹⁰ Also important were the efforts of other shareholders, through their own active shareholding, to address the human rights concerns raised.³¹¹

The most commonly used international law through the International Labour Organization regarding atrocities committed against children is Article 32 of the U.N. Convention of the Child, but the Ethics Council looked at other labor organizations, NGOs, and other states’ laws for applicable customary international law. Especially in the Wal-Mart case, the Council examined litigation in U.S. courts against Wal-Mart for discrimination, unfair wages, child labor, employment of illegal immigrants, and anti-union policies, while it looked at numerous other states around the world for how Wal-Mart conducted its business.³¹² Over a dozen states had standing accusations against the company, but many states are not taking action due to the subordinate nature of the local government and the sheer size of the company.

In the Monsanto case, precedent played a critical role in the application of the Ethics Guidelines:

In previous recommendations the Council has taken as its basis that even if States, and not companies, are obliged by international human rights conventions, companies may be said to contribute to human rights violations. The Council has not deemed it necessary to evaluate whether States are responsible for possible human rights violations, even if it accepts as a fact that companies may be complicit in such violations: “It is sufficient to establish the presence of an unacceptable risk of companies acting in such a way as to entail serious or systematic breaches of internationally recognised [sic] minimum standards for the rights of individuals.”³¹³

310. *Id.*

311. *Id.* (“Several investors have sought through a variety of initiatives to improve the company’s practices in the areas addressed by this recommendation. Nothing suggests that Wal-Mart has complied with any of these initiatives, or that they have brought about improvements.”).

312. *Id.* § 4.2 (describing labor abuses perpetrated by Wal-Mart in the United States, including allegations of labor law provisions that prohibit unpaid overtime, employment of minors, illegal labor, discrimination, and obstruction of unionization).

313. *Recommendation of 20 November 2006, supra* note 300, § 5.1 (applying the Wal-Mart determinations).

The unacceptable risk standard was derived from the determination in Total SA and requires: (1) linkage between company operations and Guidelines breaches; (2) the breaches being carried out to advance company interests; (3) active contribution to or knowledge by the company of violation; and (4) ongoing violation or risk of repetition.³¹⁴

These cases suggest how the active ownership principles of Fund investment, vested in the Norges Bank, are harmonized through the mediating role of the Finance Ministry. The Finance Ministry's role is particularly evident in the saga of the Monsanto determination. The Ministry of Finance appeared unwilling to accept the initial determination of the Ethics Council to exclude Monsanto, deeming it "opportune to attempt the exercise of ownership rights during a limited period of time in order to see if this would reduce the risk of the Fund contributing to serious violations."³¹⁵ The Ethics Council then gathered more evidence, resulting in a redetermination of a narrower, quasi-judicial standard for the character of its determinations: "The Council on Ethics' mandate is limited to a concrete evaluation of whether the company's operations fall within or without the scope of the Fund's Ethical Guidelines."³¹⁶ It also noted the potential effect of the Norges Bank's efforts to effect change from within through its energetic use of the active ownership principle.³¹⁷

This decision, along with other efforts at company-initiated and industry-based changes, served as a basis for a reconsideration of the original determination to exclude Monsanto. Though the Ethics Council was unwilling to concede that Monsanto's conduct did not violate the Ethics Guidelines, it relented on its determination that such violation should warrant exclusion. The two principal rationales have significant potential for application to future cases. The first is

314. *Id.* (listing the "decisive elements in the overall assessment of whether there is an unacceptable risk of the Fund contributing to human rights violations").

315. *Recommendation to Exclude Monsanto, supra* note 303, at 1.

316. *Id.* at 5.

317. *Id.* at 6 (noting the Council's awareness that the Norges Bank has attempted to influence Monsanto's use of child labor by taking advantage of its ownership rights; "[m]oreover, Norges Bank has proposed a sector-wide programme encompassing various companies within the industry, and Monsanto has endorsed this initiative").

that an exclusion recommendation need not necessarily follow from a violation of the Ethics Guidelines where such a determination might undermine the Norges Bank's application of its active ownership procedures, as it might have in the Monsanto case. "The role of the Norges Bank in the improvement efforts are thus even more essential, and it seems clear that a possible exclusion of the company may undermine the ongoing process initiated by Norges Bank."³¹⁸ This is an important example of how the Ethics Council can harmonize the two prongs of responsible investing.

The second principle is the adequate system of monitoring that Monsanto had instituted "through independent third-party audits evaluating the occurrence of child labour in the supply chain, that the factors leading to children's harmful exposure to pesticides [was] eliminated, and that the child labour rate in the company's own production and licence [sic] production [was] drastically reduced."³¹⁹ This suggests a balancing of factors that tend to favor companies who change their behavior. It emphasizes the regulatory aspects of responsible investment as a tool to manage and change corporate behavior.

7. Conduct—Complicity, Environmental Damage

The determination for exclusion based on environmental degradation is based on a set of nine principles derived from domestic law and customary international law.³²⁰ The environmental

318. *Id.* at 7.

319. *Id.*

320. See Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 22 February 2010*, NORWEGIAN MINISTRY OF FIN. (Feb. 22, 2010), http://www.regjeringen.no/pages/13896797/Recommendation_final_110810.pdf [hereinafter *Recommendation of 22 February 2010*]; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 16 February 2009*, NORWEGIAN MINISTRY OF FIN. (Feb. 16, 2009), <http://www.regjeringen.no/pages/2267887/Recommendation%20-%20%20Final.pdf>; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 13th February 2009*, NORWEGIAN MINISTRY OF FIN. (Feb. 13, 2009), <http://www.regjeringen.no/pages/2236719/Recommendation%20inclusion.pdf>; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 14 August 2008*, NORWEGIAN MINISTRY OF FIN. (Aug. 14, 2008), <http://www.regjeringen.no/pages/2146647/Recommendation%20Barrick%20final.pdf>; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 15 February, 2008*,

determinations represent the Ethics Council at its most quasi-judicial, filling in gaps and extending the logic and implications of the Ethics Guidelines to develop a set of exclusion standards. The allegations provide the context within which the Ethics Council utilizes customary international and domestic law to develop a jurisprudence of environmental investment ethics. Most of the cases involve mining and natural resource companies with the exception of Samling in Malaysia, which was alleged to have contributed to deforestation in violation of legal standards applied by the Ethics Council.

In virtually all the determinations, the companies were found to have violated the law of the host state. However, the Council emphasized that, while many of these companies were in direct violation of domestic law, the host state did nothing to stop the violation of its own law and at times supported the companies in their work.³²¹ In this context, the Ethics Council applied a standard grounded in the law of the home state as well as international consensus standards. The theories were either of the need for projections of international norms in “weak governance zones” or the extraterritorial application of Norwegian law (appropriately internationalized as required by the Ethics Guidelines and including the responsible investment strategy at the heart of the regulations). In either case, the Ethics Council discounted both the law and the effect of the sovereign application of the domestic legal order of the host

NORWEGIAN MINISTRY OF FIN. (Feb. 15, 2008), <http://www.regjeringen.no/upload/Fin/etikkk/recommendation%20rt.pdf>; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 15 May 2007*, NORWEGIAN MINISTRY OF FIN. (May 15, 2007), <http://www.regjeringen.no/Upload/FIN/Statens%20pensjonsfond/RecommendationVedanta.pdf>; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 24 August 2006*, NORWEGIAN MINISTRY OF FIN. (Aug. 24, 2006), <http://www.regjeringen.no/pages/1965381/DRD%20Recommendation%20eng.pdf>; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 15 February 2006*, NORWEGIAN MINISTRY OF FIN. (Feb. 15, 2006), <http://www.regjeringen.no/pages/1956975/F%20Recommendation%20Final.pdf>; *Annual Report 2010*, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND GLOBAL (2010), http://www.spainsif.es/sites/default/files/upload/publicaciones/AnnualReport_2010%20Fondo%20Noruego.pdf.

321. *Recommendation of 15 February, 2008*, *supra* note 320, at 3, 5 (finding that the lack of environmental measures and transparency causes an increased risk of damage); *Recommendation of 24 August 2006*, *supra* note 320, at 22 (finding direct violation of environmental requirements).

state and it privileged the law of the Fund in determining the legitimacy of investment. The legitimacy of investment, of course, comes from the heart of the responsible investment strategy—by applying Norwegian law to the investment activities of the Fund, and by aggressively moving into private markets as an influential investment stakeholder, the Fund can affect governance decisions of the companies even if it could not affect the regulatory climate of the targeted host state.

To better regulate globally, the Ethics Council has created its own regulatory standards and criteria for exclusion. The basics of this standard were developed in the first of the environmental determinations—Freeport McMoRan (United States). In the Freeport determination, the Ethics Council established a seven-factor standard where exclusion is sought on environmental grounds: the damage is significant; the damage causes irreversible or long-term effects; the damage has considerable negative consequences for human life and health; the damage is the result of violations of national law or international norms; the company has failed to act to prevent damage; the company has not implemented adequate measures to rectify the damage; and it is probable that the company’s unacceptable practice will continue.³²² It appears that these factors were created solely by the Council to legitimize its own actions and recommendations while drawing on international customs as well as western standards to an extent.

In its consideration of the exclusion of Lingui Developments Berhad,³²³ the Ethics Council reaffirmed and applied its earlier reasoning from Samling.³²⁴ The most interesting part of the determination is the assessment of the company’s response to the Ethics Council’s findings. It suggests both the importance of careful company responses to inquiries from the Ethics Council, and the

322. *Annual Report 2010*, *supra* note 320, at 42.

323. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 15 September 2010*, NORWEGIAN MINISTRY OF FIN. (Sept. 15, 2010), http://www.regjeringen.no/upload/FIN/etikk/2011/recommendation_lingui.pdf (recommending the exclusion of Lingui Developments Berhad from the Fund because the company was involved in “illegal logging and severe environmental damage”); *Annual Report 2010*, *supra* note 320 (finding conflict with national law).

324. *Recommendation of 22 February 2010*, *supra* note 320.

standards used by the Ethics Council in weighing evidence and arguments offered by companies subject to investigation. The most significant insights in that respect are these: first, the Ethics Council will consider arguments raising doubts about the Council's methods and sources, but those arguments must provide specific information or documentation that illuminates or counters the basis for the Council's recommendation. Second, companies must produce evidence to meet or contest the evidence produced by the Ethics Council. Failure to contest the facts found or accepted by the Council will tend to result in the Council treating those facts as dispositive. Third, where the company offers evidence, it will have to be specific and well substantiated.

8. *Conduct—Complicity, Serious Violations of Ethical Norms*

There are two principal determinations that tie notions of corporate complicity with international norms.³²⁵ The basis for the exclusion of this category of cases appears to be the determination by the Council of violations of international norms or Norwegian national policy that is not covered elsewhere. The Council exercises a certain amount of flexibility for broadening the scope of the international norms incorporated into the NSWF's regulatory framework that was contemplated in the fashioning of the Ethics Guidelines themselves.³²⁶ The first company the Ethics Council excluded was Kerr-McGee on the basis of a contract with the government of Morocco for the exploration for minerals off the coast of Western Sahara.³²⁷ While exploration for minerals neither

325. *KerrMcGee Corporation Is Again Included in the Government Pension Fund – Global*, NORWEGIAN MINISTRY OF FIN. (Sept. 1, 2006), <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2006/KerrMcGee-Corporation-is-again-included-.html?id=419868>; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation on Suspension of Exclusion of KerrMcGee Corporation (“KerrMcGee”)*, NORWEGIAN MINISTRY OF FIN. (Sept. 1, 2006), <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation-on-suspension-of-exclusion-of-KerrMcGee-Corporation-KerrMcGee.html?id=419593> [hereinafter *Recommendation on Suspension of Exclusion of KerrMcGee*].

326. Ethics Guidelines, *supra* note 23, § 2(3)(e) (citing “other particularly serious violations of fundamental ethical norms” as a cause for exclusion).

327. *Company Excluded from the Government Petroleum Fund*, NORWEGIAN

breaches domestic law of Norway or Morocco nor international norms, the issue became complicated because of the unsettled political status of part of the territory covered, the Western Sahara over which Morocco was asserting de facto sovereignty.³²⁸ As a consequence, under international law, Morocco was obligated to respect the culture of the peoples concerned. The official position of the Norwegian state was that no governmental agency should act in a manner that might prejudice ongoing peace efforts.³²⁹ That policy applied to the NSWF as well as to the political branches of the state. Though the Norwegian state might consider occupation invalid, some activity might still be lawful within the particular context of Western Sahara. Therefore, the Council referred to the U.N. Convention on the Law of the Sea and a contradictory opinion of the U.N. Office of the Legal Advisor.³³⁰ The Ethics Council developed a standard for applying internal law through the Ethics Guidelines: “[I]n a situation of contradictory interpretations of international law, treaty law would prevail over a legal opinion.”³³¹

In this case, the Ethics Council determined that, though companies cannot be directly responsible for serious or systematic human rights violations, they might be complicit in or profit from such violations. The Council recommended that the company be excluded since it had not properly consulted with or paid any reparations to the local people for the natural resources, but instead had business dealings and consultation with the occupying power of Morocco. Because such a violation did not comfortably fit within the other categories of

MINISTRY OF FIN. (June 6, 2007), http://www.regjeringen.no/en/archive/Bondeviks-2nd-Government/ministry-of-finance/Nyheter-og-pressemeldinger/2005/company_excluded_from_the_government.html?id=256359 [hereinafter *KerrMcGee Excluded from the Fund*].

328. *Id.* (noting that Western Sahara, as a non-self-governing territory, is not subject to Moroccan sovereignty).

329. *Id.*

330. *Id.*

331. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation on Exclusion from the Government Petroleum Fund's Investment Universe of the Company Kerr-McGee Corporation*, NORWEGIAN MINISTRY OF FIN. (June 6, 2005), http://www.regjeringen.no/en/dep/fin/tema/status_pensjonsfond/ansvarlige-investeringer/tilradninger-og-brev-fra-etikkradet/Recommendation-on-Exclusion-from-the-Government-Petroleum-Funds-Investment-Universe-of-the-Company-Kerr-McGee-Corporation.html?id=419582.

conduct for exclusion, the Ethics Council assessed the conduct and the standard for exclusion on the “catch all” provision.³³² The Ethics Council ultimately lifted that exclusion determination only after “the company had ceased its activities in the Boujdour field and that the licence [sic] to conduct explorations had expired.”³³³

Similarly, the Ethics Council excluded Elbit Systems Ltd. and Africa Israel Investments Ltd. from the Fund for their role in aiding the Israeli government in its occupation of the West Bank and for purported violations of rights of the people of the West Bank following the large-scale military action in 2008–09.³³⁴ Similar to the exclusion of companies for producing nuclear components, the items produced by these companies are not illegal, but the Council had concerns about the use of the items. Both Elbit Systems and Africa Israel Investments had contracts with the Israeli government to manufacture systems that, through their intended use, aid the Israeli occupation, which many states and NGOs view as violating laws, norms, or other standards that political bodies may give effect in the form of laws or ethics. Further, the exclusion of these companies might be on the basis that the Council is giving a warning and applying pressure to Israeli companies without directly engaging in politics with the government. In this case, the focus was on complicity: the Council found that “the Fund’s investment in Elbit represent[ed] an unacceptable risk of complicity in particularly serious violations of ethical norms and that the company should be excluded from the Fund’s investment universe.”³³⁵ The Norwegian state did not want to hold shares of a company that might have contracts with the Israeli government, avoiding actions that the Norwegian government objected to on political and legal bases.

The Ethics Council conceded that it had no mandate to make a determination of international law in these cases.³³⁶ Instead, it made a

332. *KerrMcGee Excluded from the Fund*, *supra* note 327 (reviewing the possible ethics violation under Ethical Guideline 4.6).

333. *Recommendation on Suspension of Exclusion of KerrMcGee*, *supra* note 325.

334. *Supplier for Separation Barrier in West Bank Excluded*, *supra* note 301.

335. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation of 15 May 2009*, NORWEGIAN MINISTRY OF FIN. (May 15, 2009), http://www.regjeringen.no/pages/2236685/Elbit_engelsk.pdf.

336. *Id.* at 8 (stating that it would be outside the Ethics Council’s mandate to rule on an international law issue in regard to the separate barrier).

determination of the risk of complicity by the application of a combination of an International Commission of Jurists (“ICJ”) opinion (deciding that the route of the separation barrier in the West Bank of the Palestinian Territories is illegal under international law) and an opinion of the Israeli Supreme Court (saying that the separation barrier cannot be used as a means of annexation).³³⁷ The Ethics Council, though, declined a similar balancing with respect to military decisions about the protection of civilian populations and the harm caused to others by the methods chosen, and weighed most heavily its determination of the nationality of the land on which the separation barrier was built.

A state’s construction of fences or other control mechanisms on its own territory cannot, in principle, be considered illegal or unethical. Neither does the ICJ’s advisory opinion concern the sections of the separation barrier that are located inside Israeli territory. Israel, however, has chosen to build a separation barrier, and nearly ninety percent of the barrier’s extension is located in areas occupied by Israel. This, and the humanitarian problems that the route causes, constitute the problematic aspects of the separation barrier.³³⁸ The Ethics Council thus fashions a determination by blending the legal opinions of the highest court of a domestic legal order within the state where the actions occurred with a judicial determination of international bodies that produces something functioning like jurisprudence. To these it adds its own interpretative application of the Ethics Guidelines to produce a standard for exclusion on the basis of complicity that is broader than prior ethics specific to Israel (and Norwegian foreign policy goals in that relationship) or whether Elbit stands for a broader principle of applying the Ethics Guidelines.

9. Conduct—Complicity, Serious Violations of Individual Rights in War or Conflict

The one determination of this subject³³⁹ is one of the most interesting of the cases in terms of the refinement of the Ethics

337. *Id.* (discussing the Council’s awareness that the government of Israel sees the wall as a “necessary and temporary measure to prevent terror attacks and that the considerations regarding the necessity of the barrier must carry more weight than the considerations vis-à-vis the disadvantages it entails”).

338. *Id.*

339. *Recommendation of November 16th, 2009, supra* note 291.

Council's jurisprudential approach and in terms of the focus of the Norwegians on the Israeli-Palestinian conflict. On its face, the case is fairly straightforward: the Israeli government's building of settlements for Jews violates international consensus on the application of international conventional law; the company participates in the building of settlements, and therefore the company is complicit. To that extent, investment in the company would be prohibited by the Ethics Guidelines that bar investment where the Fund contributes to serious violation of individual rights in situations of war or conflict. The company did not respond to requests for information from the Ethics Council.

The Ethics Council tended to read the relevant law broadly. For purposes of determining the existence of a broad consensus that Israeli (Jewish) settlements are "illegal," the Ethics Council pointed to the views of the International Committee of the Red Cross, resolutions of the U.N. Security Council, and an advisory opinion of the International Court of Justice, the principal focus of which had been the legality of the separation barrier crossing between Israel and Palestine. Israeli claims were not found credible.³⁴⁰ The Ethics Council applied its evidentiary standard—that past activity creates a presumption of the possibility of similar future activity—to determine that the company's complicity would be ongoing.³⁴¹ Yet the Ethics Council was careful to limit the scope of the complicity formula to "construction activities related to the building of real estate in the settlements" because they were "the most significant contribution to the further expansion of West Bank settlements."³⁴² But given the force of the Council's argument, the basis for this limitation is unclear other than as grounded in political considerations.

10. Conduct—Complicity, Corruption

This is one of the most interesting of the cases, and one in which the tension between the juridification within the Ethics Council and the political agenda of the Ministry of Finance is most clearly

340. *Id.* (indicating that the Ethics Council failed to give credence to Israeli claims, relying on the Government White Paper (NOU 2003:22)).

341. *Id.* at 8 (asserting that past activity created an unacceptable risk of future violations).

342. *Id.*

illustrated. The one determination involved one of the most prominent companies in Europe and touched on the sort of corruption that appeared to threaten the integrity of global markets in the goods involved.³⁴³ The Ethics Council recommended the company for exclusion on November 15th, 2007.³⁴⁴

The Ethics Council did not use the exclusion on the grounds of gross corruption until the 2007 allegations of widespread and public corruption against the Germany multinational enterprise, Siemens. The touchstone of the decision was finding an unacceptable risk of continuing gross corruption. The Ethics Council standard for gross corruption requires a finding that a company, through its representatives,

- a) gives or offers an advantage – or attempts to do so – in order to unduly influence: i) a public official in the performance of public duties or in decisions that may confer an advantage on the company; or ii) a person in the private sector who makes decisions or exerts influence over decisions that may confer an advantage on the company, and b) the corrupt practices as mentioned under letter a) are carried out in a systematic or extensive way.³⁴⁵

Following an analysis similar to that used against Wal-Mart, the Ethics Council considered court trials in Italy, the United States, Singapore, Germany, and Norway as well as accusations in over twenty-five states as evidence of gross corruption for the basis of recommending exclusion.³⁴⁶ This is one of the few cases where direct court cases were used and cited for violations of domestic law. The Council based much of its decision on the standing laws that were allegedly broken in each nation. The Council also integrated Norwegian and international customary law where applicable.³⁴⁷

343. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation 15 November 2007*, NORWEGIAN MINISTRY OF FIN. (Nov. 15, 2007), <http://www.regjeringen.no/pages/2162791/Recommendation%20on%20Siemens%20Final.pdf> [hereinafter *Recommendation 15 November 2007*].

344. *Id.*; *The Council on Ethics' Recommendation to Exclude Siemens AG*, NORWEGIAN MINISTRY OF FIN. (Sept. 3, 2008), http://www.regjeringen.no/pages/2162791/Svarbrev%20til%20Finansdepartementet_ENG.pdf [hereinafter *Recommendation to Exclude Siemens AG*].

345. *Recommendation 15 November 2007*, *supra* note 343, at 3–4.

346. *Id.* at 5–6.

347. *Id.* at 3, 4, 6.

The Ethics Council was asked to re-evaluate its original exclusion determination. In a letter, the Ethics Council refused to change its determination despite substantial evidence of efforts by Siemens to change its practices and deal directly with the underlying issues of corruption.³⁴⁸ This action is inconsistent with the position the Ethics Council took regarding the mitigation that proved an important consideration in the decision not to exclude Monsanto against charges of systematic violation of human rights.³⁴⁹

However, the Ethics Council applied its evidentiary rule that evidence of past conduct creates a presumption of future conduct that the company (e.g., Africa Israel Investments) must overcome.³⁵⁰ Importantly, the Council gave the changes undertaken by Siemens little weight because they were partially forced on the company. Effectively fashioning a standard of care, the Council faulted the company for the failure of its internal monitoring³⁵¹ and the failure to take corruption seriously.³⁵² It concluded: "It seems to be a characteristic trend that Siemens only starts the clean-up once it is forced to, and not on its own initiative."³⁵³ As such, the Council stood by its earlier determination.³⁵⁴

The Finance Ministry disagreed, electing to put the company on observation status.³⁵⁵ This was the first time that the Ministry of Finance came to a conclusion that was contrary to that of the Council. Minister of Finance Kristin Halvorsen stated,

I agree with the Council on Ethics that Siemens has been involved in gross corruption. That I, nevertheless, want to see how things develop is a

348. *Recommendation to Exclude Siemens AG*, *supra* note 344, at 4–5.

349. *Recommendation to Exclude Monsanto*, *supra* note 303, at 7.

350. *Cf. Recommendation to Exclude Siemens AG*, *supra* note 344, at 5 (comparing Siemens' anti-corruption measures with the extensive anti-corruption measures implemented in the 1990s and deciding whether the new measures would be more effective).

351. *Id.* (noting that the new corruption revelations occurred only because of a public prosecutor's raid at Siemens' Munich headquarters).

352. *Id.* (finding that Siemens had a passive attitude because it only acted after the Securities and Exchange Commission initiated formal investigations).

353. *Id.* at 6.

354. *Id.*

355. *Siemens Under Observation in Corruption Case*, NORWEGIAN MINISTRY OF FIN. (Mar. 13, 2009), <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/siemens-under-observation-in-corruption-.html?id=549155> [hereinafter *Siemens Under Observation*].

result of the developments in Siemens and the measures the company has introduced to fight corruption, particularly over the last year. By placing the company under observation we, as an investor, can signal that we expect the measures to be implemented as intended.³⁵⁶

The Minister additionally suggested that governmental scrutiny in the wake of the corruption allegations would make it harder for Siemens to continue to engage in the sort of poor practices that led to the Ethics Council investigation.³⁵⁷

11. Non-Exclusion Actions, Observation of Companies

The purpose of the observation status is to warn companies that they are possibly in violation of the Fund's guidelines, but preserve the NSWF's ability to continue to influence the company through active shareholding. "In some cases there may be doubt as to whether the conditions for exclusion have been fulfilled or how the company's behaviour will develop in the future. In such cases, the Ministry may put the company under observation" on the advice of the Ethics Council.³⁵⁸ To date, the only companies to be placed on observation status are Siemens AG and Alstom SA.³⁵⁹ However, at the time it was recommended for Siemens, observation status was not explicitly available as a remedial option in the Ethics Guidelines. The Ethics Guidelines³⁶⁰ then provided only for negative screening

356. *Id.*

357. *Id.*

358. *Observation of Companies from the Funds's Investment Universe*, NORWEGIAN MINISTRY OF FIN. (May 31, 2013), <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u/Observation-of-companies.html?id=601811> (last visited Oct. 17, 2013).

359. See *Government Pension Fund Global: Company Placed on Observation List*, NORWEGIAN MINISTRY OF FIN., <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2011/statens-pensjonsfond-utland-nye-beslutni/government-pension-fund-global-company-p.html?id=665635> (last visited Sept. 21, 2013). On November 15, 2007, the Council recommended that Siemens AG be excluded from the Fund, and on September 3, 2008, it reevaluated its recommendation and recommended to the Ministry of Finance that the company remain excluded. On March 13, 2009, the Ministry of Finance chose to put the company under observation status, citing that the company had made significant changes in fighting corruption and was on its way to reforming its corporate structure to deal with the systemic corruption. *Recommendation to Exclude Siemens AG*, *supra* note 344, at 1.

360. The reference here is to the Guidelines issued on December 22, 2005,

and exclusion of companies on the basis of producing or selling certain products or engaging in certain identified conduct.³⁶¹ There was no provision for placing a company under observation. The Ministry of Finance ordered observation under its general regulatory power,³⁶² though it is not clear how the regulations creating the status of “observation” were enacted. The Ministry of Finance announced this action in the 2009 Annual Report of the Ethics Council to create a watch list of companies to determine whether they ought to be excluded.³⁶³

Within a short time after the Ministry of Finance put Siemens under observation, the Ethics Guidelines were amended.³⁶⁴ The amendments included a new provision on observation that substantially mirrored the form of observation contained in the Ethics Council’s 2009 Annual Report.³⁶⁵ What had been unclear at the time of Siemens’ observation became part of the regulatory scheme thereafter. Ironically, had the Ministry of Finance acted under the revised Ethics Guidelines in putting Siemens under

pursuant to regulation on the management of the Government Pension Fund – Global.

361. Ethics Guidelines, *supra* note 23, §§ 2, 4.

362. The Government Pension Fund Act of 2005, no. 123 (Dec. 21, 2005) § 7, available at <http://www.regjeringen.no/pages/1719656/governmentPensionFundact.pdf>.

363. *Annual Report 2009*, *supra* note 83, at 14. The Ministry noted,

The Ministry of Finance has decided to introduce a watch-list for companies where there is uncertainty as to whether the conditions for exclusion have been met or uncertainty about future developments. The Ministry of Finance can put a company under observation on the basis of recommendations of exclusion or observation from the Council on Ethics. In these cases, assessments will be made regularly to determine whether the company should remain on the watch-list. If the risk of norm violations is reduced over time, the company can be taken off the watch-list. If the required improvements are not observed, companies on the watch-list may be recommended for exclusion from the Fund.

Id.

364. Ethics Guidelines, *supra* note 23.

365. The Ethics Guidelines now provide that the Ministry of Finance may put a company under observation on the basis of a recommendation of the Ethics Council. Observation is appropriate “if there is doubt as to whether the conditions for exclusion have been fulfilled, uncertainty about how the situation will develop, or if it is deemed appropriate for other reasons.” *Id.* Once under observation, the Guidelines specify a regimen of regular monitoring and assessment. *Id.* Observation decisions are made public absent “special circumstances [that] warrant that the decision be known only to Norges Bank and the Council on Ethics.” *Id.*

observation, it would have violated the Guidelines themselves. Here it is clear that the Ministry of Finance would have overstepped its authority where the Ethics Council had recommended excluding Siemens twice. The Ministry could have chosen to reject the Ethics Council recommendation, but it could not have chosen to adopt observation in lieu of exclusion in the absence of advice to that effect from the Ethics Council. Observation would have required a third consultation of the Ethics Council, in which the issue of observation would have had to be considered.

The move to incorporate observation suggests the extent of the connection, within responsible investing, of active ownership and exclusion from the NSWF investment universe. This was made clear at the time by Finance Minister, who noted, “the assessment made when considering exclusion of a company shall be forward-looking. Siemens is now in the spotlight and it is important that pressure to bring the corruption to an end is kept high. By keeping the company under observation we can contribute to this.”³⁶⁶ Rather than exclude Siemens, the Finance Minister sought to bring Siemens under greater observation to ensure conformity with expectations, in return for which NSWF capital would remain available to Siemens (and the announcement of exclusion would not otherwise affect Siemens’ access to capital markets on the most advantageous terms possible given its operations). But the threat of exclusion continued to be offered as the stick to the carrot of observation. The Minister asked the “Council on Ethics and the Norges Bank to keep Siemens under close scrutiny with regard to the general anticorruption efforts, and in case new cases of gross corruption are uncovered. We will have a low threshold for excluding Siemens if new cases of gross corruption are discovered.”³⁶⁷

Indeed, the size of the NSWF’s investment in Siemens may have also contributed to this decision. The first time that the Ethics Council recommended Siemens be excluded, the NSWF held almost one percent of Siemens’ shares, a sizeable investment that might have contributed to the decision to use its influence under its active shareholder policy than to divest under its Ethics Guidelines. Indeed, between 2007 and December 2008, the NSWF increased its stake in

366. *Siemens Under Observation*, *supra* note 355.

367. *Id.*

Siemens to about 1.34%.

The Ministry's actions also highlighted the potential for differences in interpreting the legal framework within which exclusion decisions would be made; they further highlighted the relationship between use of active ownership and exclusion as instruments of corporate behavior management. The Chair of the Ethics Council, Gro Nystuen, suggested this in an interview he gave at the time of the Ministry's action, noting the importance of emphasizing "that we are giving advice, and the Ministry of Finance makes the decisions. It is therefore quite natural that it will sometimes differ from us in its assessment."³⁶⁸ But she also noted that this difference might also suggest differences in governance standards, saying that the Ministry "has to consider other aspects as well. We have different rules and have different mandates. In my opinion, this case only shows that the system works as it is supposed to work."³⁶⁹ Nystuen also dismissed concerns about observation status as unwarranted.³⁷⁰ Yet, the critics have a point that subjecting a company to endless observation is similar to the way a state endlessly observes its citizens. This is hardly troubling when a private investment firm engages in active shareholding, but it assumes a different character when the state assumes the shareholder role.

After four years of observations, the Ministry of Finance, on a

368. Larry Catá Backer, *Part XVI: Developing a Coherent Transnational Jurisprudence of Ethical Investing: The Norwegian Sovereign Wealth Fund Ethics Council Model*, LAW AT THE END OF THE DAY (Feb. 16, 2011, 10:41 PM), http://lcbackerblog.blogspot.com/2011/02/developing-coherent-transnational_16.html (quoting from an interview with the Chair of the Ethics Council Gro Nystuen conducted and published on June 15, 2009).

369. *Id.*

370. *Id.* Gro Nystuen explained:

Critics have voiced concerns that the introduction of the observation list may lead to non-transparent, 'endless engagement', that will allow continued investment in companies whose behaviour could, and should, be improved. Is that a fair criticism? I don't see this as the beginning of a trend, because that would mean having to reconsider the entirety of the guidelines. While we don't have strong views on it, I think it makes sense that the ministry decided what it wanted to achieve and this is a way of telling the company, and any other companies that may be in the same situation, that they are being watched. If other examples of corruption at Siemens emerge, we may still move towards excluding them.

Id.

recommendation from the Ethics Council,³⁷¹ ended the observation status of Siemens in early 2013.³⁷² The basis of the recommendation was the Council's determination that Siemens had implemented and was effectively operating systems of monitoring and surveillance throughout its operations that effectively reduced the likelihood of corruption within the organization.³⁷³ That the behavior was grounded in compliance with standards of internal corporate management was sufficient to satisfy the active shareholding criteria of the NSWF.³⁷⁴

Observation of Siemens produced a curious result, at least as measured by traditional markers of corporate regulation. Observation status effectively required Siemens to meet with representatives of the NSWF to describe efforts to minimize the likelihood of corruption within corporate operations. The Ethics Council monitored Siemens by observing the progress of the various corruption cases in which Siemens was a defendant and attending annual meetings with Siemens representatives.³⁷⁵

In effect, Siemens permitted the Norwegian state to become an important monitor and standard-setter for the scope, content, and operation of its monitoring and surveillance regimes. This marks a substantial departure from the traditional arrangement in which corporations were subject to the legal constraints of the state of incorporation, at least with respect to its internal organization, operation, and management. What was once the province of the state through law has now become the province of the state through

371. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Recommendation to Remove Siemens AG from the Watch List of the Norwegian Government Pension Fund Global*, NORWEGIAN MINISTRY OF FIN. (June 15, 2012), http://www.regjeringen.no/upload/FIN/etikk/2013/siemens_eng.pdf [hereinafter *Remove Siemens AG from the Watch List*].

372. *Observation of Siemens Concluded*, NORWEGIAN MINISTRY OF FIN. (Jan. 11, 2013), <http://www.regjeringen.no/en/dep/fin/news/news/2013/observation-of-siemens-concluded.html?id=711933>.

373. *Remove Siemens AG from the Watch List*, *supra* note 371, § 5 (finding that Siemens had shown its willingness and ability to improve the company's culture through a new compliance system consisting of a monitoring unit and clear communication of the company's intolerance for corruption).

374. *Id.* § 4.3 (describing Siemens' stance that it has "developed and strengthened its compliance system so that compliance is now an integral part of the company's standard business processes").

375. *Id.*

market interactions producing governance principals with the functional effect of law.³⁷⁶

The Finance Ministry Announcement emphasized the critical effect of the implementation of monitoring and surveillance architectures that met its basic standards of sufficiency.³⁷⁷ The Ethics Council Recommendation went into substantially more detail. Its most interesting part focused on the evaluation of Siemens' monitoring system and its sufficiency for the purposes of meeting minimum corporate governance standards for avoiding observation (and thus the instrumental effects of the NSWF's active shareholding activities).

12. Non-Exclusion Actions, Other Forms of Interventions by the Ethics Council

The advisory role of the Ethics Council is most clearly evidenced through other actions, principally its formal letters of explanation for determinations not to act or in response to criticism.³⁷⁸ The move

376. See generally Backer, *Governance Without Government*, *supra* note 31, 87–123.

377. *Observation of Siemens Concluded*, *supra* note 372.

378. See Gro Nystuen, *Exclusion of the Company Poongsan Corp.*, COUNCIL ON ETHICS NORWEGIAN GOV'T PENSION FUND GLOBAL (Sept. 7, 2009), http://www.regjeringen.no/pages/2290596/Letter_Poongsan.pdf; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *On the Council on Ethics' Assessment of Investments in Companies with Activities in Israel*, NORWEGIAN MINISTRY OF FIN. (Mar. 19, 2009), http://www.regjeringen.no/pages/2181162/Letter_to_Ministry_March_2009.pdf; Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Council on Ethics' Assessment on Investments in Israel Electric Corporation*, NORWEGIAN MINISTRY OF FIN. (Apr. 18, 2008), http://www.regjeringen.no/pages/2099548/IEC_letter_English.pdf; Gro Nystuen, *Council on Ethics' Assessment of Companies with Operations in Burma*, COUNCIL ON ETHICS NORWEGIAN GOV'T PENSION FUND GLOBAL (Oct. 11, 2009), <http://www.regjeringen.no/pages/2018769/Burma%20letter%20english.pdf> [hereinafter Nystuen, *Companies with Operations in Burma*]; Gro Nystuen, *Response to Criticism Concerning the Exclusion of Companies from the Norwegian Government Pension Fund*, COUNCIL ON ETHICS NORWEGIAN GOV'T PENSION FUND GLOBAL (Sept. 11, 2006), <http://www.regjeringen.no/pages/1958695/Eng%20versjon%20kronikk%20DN.pdf>; Skancke, *supra* note 293; Gro Nystuen, *Aracruz*, COUNCIL ON ETHICS NORWEGIAN GOV'T PENSION FUND GLOBAL (Mar. 22, 2006), <http://www.regjeringen.no/pages/1957949/engelsk%20oversettelse%20av%20svarbrev%20til%20FIN.pdf> [hereinafter Nystuen, *Aracruz*].

from exclusion to observation, described in the last section, suggests a pattern of governance that is replicated here. The Ethics Council has, like the Ministry of Finance, sought to fill in the spaces within the regulatory scheme with additional processes and standards that, while not explicit in the Ethics Guidelines, are not prohibited. This section explores some of the non-exclusion, non-observation measures that the Ethics Council has taken. The first involves Aracruz Celulose SA, in which five Brazilian NGOs asked the Council to evaluate the Fund's holdings in the company for complicity in helping the company violate land and personal rights against indigenous people in Brazil.³⁷⁹ After evaluating the company, the Council decided to increase scrutiny of the company but retain investment, allowing for the Brazilian courts and other bodies to form a solution.³⁸⁰

The Ethics Council has also devoted much work to the issue of investment in Israel from an early date.³⁸¹ It is unclear whether the action requested was part of a coordinated global effort, popular at the time among some religious and non-governmental organizations, to seek divestment in Israeli companies and companies that provided assistance to Israel.³⁸² The Ethics Council declined to move forward with exclusion proceedings on the basis of information it had then.³⁸³ The letter is important as an expression of the Ethics Council's efforts to focus specifically on company action rather than on the political situation, but is also important as an application of precedent. In 2007, the Ethics Council considered a request to exclude the Israel Electric Corporation for reducing the electricity supply to Gaza. This consideration is important for a number of reasons. First, it evidences the growing importance of Ethics Council determinations—the investigation included the participation of governmental officials from Israel and Palestine and the growing use

379. Nystuen, *Aracruz*, *supra* note 378.

380. *Id.* (qualifying the conflict as primarily between Indians and Aracruz with certain elements of environmental issues and workers' rights).

381. *See, e.g.*, Skancke, *supra* note 293.

382. Advisory Council on Ethics for the Norwegian Government Petroleum Fund, *Council on Ethics' Assessment on Investments in Israel Electric Corporation*, NORWEGIAN MINISTRY OF FIN. (Apr. 18, 2008), http://www.regjeringen.no/pages/2099548/IEC_letter_English.pdf.

383. *Id.* (failing to recommend exclusion of the Israeli Electric Corporation but retaining the ability to do so in the future).

of the Fund as an important source of Norwegian foreign policy projection.

Another action from 2006 comes from Ethics Council Chair Gro Nystuen and was written in response to allegations that the Council was not doing enough to fully implement the Guidelines.³⁸⁴ Similar to the Aracruz cases, and with some of the same characteristics as the recommendation on Israel, the Council appeared to be responding directly to pressure from outside stakeholders (i.e. media, NGOs, Norwegian press, and public).³⁸⁵ In October 2007, the Council made a formal assessment of investments in Burma,³⁸⁶ following the 2005 recommendation of Total SA in which the company was not excluded for aiding the government in atrocities. The stance of the Council was to not exclude companies that deal in or with Burma, but only those that had directly contributed money, resources, weapons, or other items that the government of Burma used to commit human rights violations against the population. Additionally, the Council distinguished that companies aiding the government solely through commerce and tax revenues are not excludable. The only company that was excluded for involvement with the Burmese government was Dongfeng Motors in 2008 for supplying the government with armored trucks and other military equipment.

Together, these cases form the construction of a legal-judicial framework for managing corporate governance and standards of economic behavior by seeking to affect access to capital markets. Though the NSWF can only affect its own investment decisions, its invocation of law and the legitimacy-producing effects of a quasi-judicial administrative process is meant to influence other market stakeholders and ultimately state regulators themselves. Its immediate effect, though, is to seek to raise the targeted companies' cost of capital. Though it is not clear that exclusion has only long-term impact on corporate behavior, it might have a greater influence on public international bodies responsible for maintaining the

384. Gro Nystuen, *Response to Criticism Concerning the Exclusion of Companies from the Norwegian Government Pension Fund* DAGENS NÆRINGSLIV [Today's Market] (Sept. 11, 2006), <http://www.regjeringen.no/pages/1958695/Eng%20versjon%20kronikk%20DN.pdf>.

385. Nystuen, *Companies with Operations in Burma*, *supra* note 378.

386. *See generally id.*

integrity of markets.³⁸⁷ That is the hope.

This case law produced a number of generalizations. First, the Ethics Council is not constrained by the jurisdictional limitations of national courts. This is most apparent in the scope of law and norm that the Ethics Council invoked in reaching its decisions. While the Ethics Council uses the Ethics Guidelines, and Norwegian law generally, when the Council engaged in gap-filling, it was unconstrained in its choice of sources. These included Norwegian national law, the decisions of courts of other states, international law, and international norms with no legal effect. This use of these sources of law produced an internationalized governance framework in which the traditional hierarchies of law were effectively abandoned in favor of a more global approach.³⁸⁸

Second, the Ethics Council feels unconstrained by traditionally applicable procedural protections, principally among the right of the subjects of adverse governmental action to appear and defend themselves. Though the Ethics Council adopts some of the forms of the judicial function, it by no means seeks to act like a traditional court. Thus, while one may speak to the juridification of economic decision making and investment under the Ethics Council framework, one cannot speak of it as a traditional court. Of course, part of the reason for this shift is provided by changes in the way information is available. The Ethics Council feels free to use corporate communications as both evidence and admissions against interest. On the other hand, juridification produced a body of decisions that increasingly have come to be seen as precedent (though not formally constraining).

Third, the Ethics Council has, like a common law court, been active in gap-filling and extending the regulatory framework to novel situations that might not have been contemplated at the time of the enactment of the Ethics Guidelines. The standards of liability for corruption and human rights violations are particularly significant

387. See Backer, *Private Actors and Public Governance*, *supra* note 8, at 755 (discussing the linking of international public organizations, private standard-setting bodies, and states in the management and control of global finance markets).

388. Backer, *The Structural Characteristics of Global Law*, *supra* note 14, at 181 (explaining how international law builds upon domestic law).

examples discussed above. But so are the rules adopted relating to causation, intent, and remediation that have been developed as factors to consider in excluding companies.

Fourth, for all of its juridified character, the process of exclusion remains embedded in political considerations. To some extent, the legal governance-based agenda of the NSWF also incorporates very specific foreign policy objectives of the Norwegian state. In this sense, the NSWF remains an instrument of state power and a means of projecting that power abroad through private markets. Most telling here is the focus on Israeli companies. Complicity also serves as an elastic principle developed by the Ethics Council and applied in ways that balance the normative principles of governance but also the political objectives of the state. Politics, of course, is sieved through the language of complicity in violations of human rights norms, but the choices for emphasis are essentially political choices.³⁸⁹

Fifth, the political objectives of the NSWF are not merely grounded in the narrow national political interests of Norway. The Ethics Council also aggressively seeks to transpose international policy objectives, whether or not in binding international law, into the rules governing corporate governance and corporate behavior. This provides an example not of classic extraterritorialism but of a new form through which states conceive of themselves as equally bound to apply international law and norms to all activities within their control.³⁹⁰

Sixth, the willingness to invoke weak governance zone rules contributes to global movements vesting corporations and other

389. In its 2012 Annual Report, the Ethics Council noted that it will continue to monitor companies that operate in areas where there is a heightened risk of the company contributing to conflicts or being complicit in human rights violations. Examples of such areas include mineral extraction in the Democratic Republic of Congo, investments in infrastructure in Myanmar, the building of settlements in the West Bank, and the extraction of mineral resources in Western Sahara and Eritrea.

Annual Report 2012, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND GLOBAL 10 (2012), http://www.regjeringen.no/pages/1957930/aarsmelding_2012_engelsk.pdf.

390. See generally Sara Seck, *Conceptualizing the Home State Duty to Protect Human Rights*, in *CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES: GLOBAL LEGAL AND MANAGEMENT PERSPECTIVES* (Karin Buhmann, Lynn Roseberry, Mette Morsing eds., 2010).

economic enterprises with direct responsibility for complying with international law.³⁹¹ In effect, the Ethics Council contributes to the development of an autonomous set of corporate regulatory structures that are both distinct from national law and bind corporation and state simultaneously but in different ways. This is especially the case where, for example, international law impositions embraced by the Ethics Council include either international norms without legal effect or international law that has been explicitly rejected by the state regulating the corporate actor. More generally, the Ethics Guidelines framework appears to have some effect on the willingness of companies to incorporate international norms.³⁹² Together, these suggest broader insights that this article considers next.

V. A FIRST STEP TOWARD IMPLICATIONS— COOPERATIVE AND INTER-SYSTEMIC GOVERNANCE

Roscoe Pound famously noted that “the habit of obedience rests to no small extent upon the consciousness of intelligent persons that force will be applied to them if they persistently adhere to the anti-social residuum.”³⁹³ But the character of force and the identification of the anti-social have changed dramatically since 1942. Yet, even as the nature of force changes, Norway has shown how the basic insight still has power.

We have seen how the regulatory aspects of NSWF policy are quite consciously undertaken with “a responsibility for and an interest in promoting good corporate governance and safeguarding environmental and social concerns.”³⁹⁴ At the center of the

391. Cf. *U.N. Guiding Principles*, *supra* note 248, at 13–16 (identifying the standards and obligations with which businesses are expected to comply); *OECD Guidelines*, *supra* note 249, at 3, 8, 19 (stating that enterprises must follow international law and protect human rights).

392. Gurneeta Vasudeva, *Weaving Together the Normative and Regulative Roles of Government: How the Norwegian Sovereign Wealth Fund’s Responsible Conduct Is Shaping Firms’ Cross-Border Investments*, 24 *ORGANIZATION SCIENCE* (2013), available at http://www.hbs.edu/faculty/conferences/2013-paulrlawrence/Documents/OS_Gurneeta_%20SWF_Final_Jan2_2013.pdf.

393. ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* 33 (1942).

394. Kristin Halvorsen, *Foreword – UN-Report for Promoting the Integration of Environmental, Social and Governance Issues into Institutional Investment*, NORWEGIAN MINISTRY OF FIN. (July 15, 2009), <http://www.regjeringen.no/en/dep/>

construction of this inter-systemic project is a curious mix of instrumentalities and techniques of private and public power, effectuated through market investments outside the territorial borders of the Norwegian state, and designed to incorporate Norwegian law and policy within global markets. These instrumentalities and techniques actively participate in the shaping of international law and custom on the one hand, and the domestic governance regimes of other states on the other.

Social control, a significant obligation of the state through law, has now entered the global age—where a state can no longer control directly through its organs within its territory, it can now seek to control through its investment organs beyond its territory. The state becomes another institution in which social control is a matter of market power. The Norwegian Finance Minister Kristen Halvorsen nicely summarized the Norwegian premise underlying the operations of the NSWF and the development of its structures: “In a global economy, ownership of companies is the most important way to have influence.”³⁹⁵

Norway is pioneering a form of inter-systemic harmonization, or harmonization “of public and private governance systems and by public and private actors.”³⁹⁶ These new harmonizations “both augment the power of states (with respect to the expansion of the palette of legitimate governance tools) and shrink the scope of its control (as other governance communities emerge with authority over actors operating within the territory of states).”³⁹⁷

We have considered the administration system of the Ethics Guidelines. We have posited that the Ethics Guidelines system is an essential element of Norway’s efforts to construct what will eventually serve as an international standard for responsible

fin/News/Speeches-and-articles/minister-2/finansminister_kristin_halvorsen/2009/foreword-for-the-report-fiduciary-respon.html?id=571262 (expressing the Ministry’s desire to integrate “environmental, social and governance issues, such as the risks and opportunities associated with climate change, into different parts of the management of the Fund”).

395. Mark Landler, *Norway Keeps Nest Egg from Some U.S. Companies*, N.Y. TIMES (May 4, 2007), <http://www.nytimes.com/2007/05/04/business/worldbusiness/04norway.html?pagewanted=all>.

396. Backer, *Inter-Systemic Harmonization*, *supra* note 21, at 427.

397. *Id.* at 430.

investment. We have come to understand responsible investment as a three-pronged program consisting of the following elements: (1) a political-regulatory element derived from the Norwegian state apparatus (Storting and Ministry); (2) an economic-private element derived from the position of the Norwegian state as a shareholder-investor in publicly traded companies; and (3) a quasi-judicial element derived from the Ethics Guidelines and implemented through the Ethics Council. Together, the three prongs apply national and international law in the public sphere and private markets. In the process, they seek to contribute to the development of international law and domesticate that law and regulatory framework into the operations of corporations (and the regulatory programs of corporate home states) through shareholder action.

The Ethics Council plays a critical role in that process by standing between the state and the private sector. It transforms politics into a set of predictable standards of conduct that are then applied on a case-by-case basis to the investment universe of the NSWF. The role of the Norges Bank and its use of “active ownership” principles cannot be underestimated. Together, the public and private interventions in governance utilize the levers of private market transactions beyond the territorial borders of the state and point to a new, complex, and cooperative structure of rule-making. As I have noted before, “Just as law-making might have become unmoored from the state, the state has itself become unmoored. And so the issue of corporate citizenship serves as a proxy for the equally important converse issues—that of the private rights of states as participants in global markets.”³⁹⁸

The NSWF’s goal of responsible investing is central to the operation of the Fund. We understand that the centrality of the responsible investment goal is memorialized in the management regulation for the NSWF, enacted by the Ministry of Finance. Responsible investing is a cluster of concepts. First, the ultimate goal of Fund investing is to achieve the *highest possible* return. Second, a *good return* is grounded in a long-term time horizon and is, in part, dependent on the contribution of the investment to sustainable development in economic, environmental, and social terms, as well as to functioning, legitimate, and effective markets. To achieve the

398. *Id.* at 431.

highest possible good return, the Norges Bank must develop guidelines for integrating good corporate governance and environmental and social issues in investment activities. These guidelines are to be based on internationally recognized principles for responsible investment.

Within this framework, the state controls corporate behavior through direct regulation and investment standards. Those standards in turn incorporate international soft law and require the state to participate in internal corporate governance through active ownership. Simultaneously, the state actively participates in the development of international standards that are then incorporated into domestic law and used as a basis for determining the character of shareholder activism with respect to companies within the Fund's investment universe; "[t]his reflects international developments," according to the Minister of Finance.³⁹⁹

The Ethics Guidelines present the regulatory function of the NSWF responsible investment framework. Through the development of a set of approaches to determine the application of the Ethical Guidelines, or rules for determining conformity to those Guidelines, the Ethics Council begins to develop jurisprudence. This jurisprudence sets behavior standards for corporate governance and for contributing to the development of international standards (which will then be memorialized as law within the Norwegian domestic legal order). The jurisprudential framework substantially augments the principles embedded in the Ethics Guidelines and provides an international law-based framework for distinguishing which business activities conform to the Norwegian interpretation of international norms.

As a result, Norway has begun to import the obligations of international law once limited to states into private investment markets. But this application of international norms directly to corporations has two significant differences from its application to states. First, Norway applies international law to enterprises in its investment decisions irrespective of the willingness of the home states to accede to these international law instruments. Second, Norway imposes a requirement for complying with international

399. *New Guidelines*, *supra* note 22.

norms without the force of law—that is, to norms that are soft law and not binding on states. Effectively, through its private market activities, Norway seeks to legislate a set of obligations that would neither bind all states nor would be altogether recognized as law directly onto corporations. This is a remarkable extension of international law in ways that are novel and polycentric,⁴⁰⁰ though not necessarily cooperative.

The exclusion of Wal-Mart provides a case in point.⁴⁰¹ The Ethics Council used the Guidelines as a gateway to introduce a particular interpretation of international norms. But it did not apply international law; instead, it used international law norms to develop a normative governance structure grounded in international law through which it could assess a corporation's liability as an autonomous actor. In other words, Norway used its own law to extract international law and refashion it into a governance framework for assessing corporate compliance with law. As the Council stated, “international standards and norms can be indicative of which acts or omissions are deemed unacceptable, without asserting that companies are legally responsible for violations of international conventions.”⁴⁰² The effects of this statement were powerfully felt, drawing a sharp protest from the U.S. Ambassador to Norway, Benson K. Whitney, who accused the government of a sloppy screening process that unfairly singled out American companies: “An accusation of bad ethics is not an abstract thing They're alleging serious misconduct. It is essentially a national judgment of the ethics of these companies.”⁴⁰³ But the criticism

400. See generally Bruce L. Benson, *Polycentric Law Versus Monopolized Law: Implications from International Trade for the Potential Success of Emerging Markets*, 15 J. OF PRIVATE ENTERPRISE 36, 36–66 (1999) (explaining polycentricity in efforts to impose international law obligations directly on corporate actors through soft law frameworks); Larry Catá Backer, *The United Nations' "Protect, Respect, and Remedy" Human Rights Project: On Operationalizing a Global Framework for the Regulation of Transnational Corporations*, 9 SANTA CLARA J. INT'L L. 37 (2011); John K. Palchak & Stanley T. Leung, *No State Required? A Critical Review of the Polycentric Legal Order*, 38 GONZ. L. REV. 289 (2002) (critiquing state-based polycentrism).

401. *Recommendation of 15 November 2005*, *supra* note 300.

402. *Id.*

403. Mark Landler, *Norway Backs Its Ethics with Cash*, N.Y. TIMES (May 4, 2007), <http://query.nytimes.com/gst/fullpage.html?res=9E01E1DB113EF937A35756C0A9619C8B63&sec=&spn>.

highlights the novelty of the approach. The national judgment is based on national interests but applied in private markets. The Ambassador missed the irony of his assessment: “I’m not sure the Norway government understands the power of being one of the largest investors in the world.”⁴⁰⁴ Indeed, the Norwegians understood this power precisely. And they understood that such power could be used to develop not merely an investment strategy but a governance strategy, one that would come to the attention of even the most powerful enterprises and states.

Yet, particularly in the case of developing a jurisprudence of complicity, the Ethics Council has demonstrated the difficulty of harmonizing its ethical and wealth-maximizing objectives. The ICJ produced an excellent three-volume study of complicity by economic enterprises in human rights violations and judicial recourse.⁴⁰⁵ One of the report’s important insights concerned the broadening of the meaning of complicity, which has acquired a double meaning. One meaning is grounded in the governance framework of the law-state. The other is tied to the social-norm systems of non-state governance regimes—the market, the consumer society, multinational corporations, and other governance communities.⁴⁰⁶

In a recently released report,⁴⁰⁷ the civil society organization EarthRights International began to argue that SWFs also have the obligation to avoid complicity in human rights violations of the corporations in which they invest or the states in which these corporations operate. Its report found the Norwegian government complicit in human rights abuses in Burma through investments held

404. *Id.*

405. The ICJ is an organization dedicated to the primacy, coherence, and implementation of international law and principles that advance human rights. INTERNATIONAL COMMISSION OF JURISTS, <http://www.icj.org/> (last visited Sept. 8, 2013); *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes*, INT’L COMM’N OF JURISTS (Jan. 1, 2008), <http://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/> [hereinafter *Complicity in International Crimes*].

406. *Complicity in International Crimes*, *supra* note 405 (comparing the sophistication of the definition of human rights with the emerging complexity of the concept of complicity).

407. *Broken Ethics: The Norwegian Government’s Investment in Oil and Gas Companies Operating in Burma (Myanmar)*, EARTHRIGHTS INT’L 9 (Dec. 2010), <http://www.earthrights.org/sites/default/files/documents/Broken-Ethics.pdf>.

by the Norwegian Pension Fund-Global, including 4.7 billion USD invested in fifteen oil and gas companies operating in Burma.⁴⁰⁸ The report documents human rights conditions associated with these fifteen companies' projects, finding ongoing abuses including forced labor, killings, land confiscation, and the high likelihood that other projects will result in additional abuses in the coming years.⁴⁰⁹ These continued investments put Norway in violation of its own Ethical Guidelines for responsible investment.⁴¹⁰

But EarthRights is doing more than seeking to impose soft law standards on the NSWF. Rather, it suggests that, because the state is the owner of the investment vehicle, the hard law obligations that bind Norway also bind its actions as a shareholder of companies and as the owner of an investment business.⁴¹¹ In this case, the character of the shareholder affects the character of the rules that bind it.⁴¹² As a state actor, even in private form, the Kingdom of Norway might find that soft law is quite hard. In Norway's case, moreover, EarthRights appears to suggest that the internal operating rules of the SWF, articulated through the remedial structures of the Ethics Council, have binding effects, not merely as soft law, but as binding as the domestic law of Norway.⁴¹³

There is a suggestion of political motivation for the Ethics Council's reticence.

Norway is particularly afraid to single out Total, one of Europe's biggest companies, a multibillion-dollar giant known to have the backing of the French government in everything it does. If Norway acknowledged the truth about Total, they would then have to examine many other European firms they've invested in. Companies like BP, Shell and BAE that have all engaged in extremely unethical behaviour both at home and abroad.⁴¹⁴

408. *Id.* at 6.

409. *Id.* at 14, 18.

410. *Id.* at 38.

411. *Id.* at 10, 29.

412. *Id.* at 10, 31.

413. *See id.* at 10, 38.

414. Thomas Maung Shwe, *Report Condemns Norway Fund's Burma Investments*, MIZZIMA (Dec. 17, 2010), <http://www.mizzima.com/opinion/analysis/4687-report-condemns-norway-funds-burma-investments> (quoting Matthew Morgan, York University doctoral candidate and scholar of Western foreign policy towards Burma).

But EarthRights International seeks to hold the Ethics Council to its own rules, its own prior determinations, and the norms that it has created. Effectively, EarthRights International suggests that the Ethics Council is impermissibly acting like a political institution when its obligation is a judicial one.

The EarthRights International Report is important for several other reasons.⁴¹⁵ First, the Report demonstrates how civil society has begun to understand the Ethics Council aspects of NSWF operations as quasi-judicial in character, with a binding jurisprudence. EarthRights International identifies the Council's standard for complicity in investment in quasi-judicial terms and speaks of its prior determinations as having some effect of a jurisprudential character.⁴¹⁶ It also speaks of the need for the Ethics Council to "reform and build upon its approach to the ethics of investment in Burma."⁴¹⁷ The Report describes approving the adoption of a "strict standard of immediate exclusion for companies involved in new onshore pipeline construction in Burma."⁴¹⁸ The judicialization of standards for determining complicity are described as well, noting the reliance on judicial opinions of other jurisdictions.⁴¹⁹

Second, it suggests that the idea of complicity as a prudential standard for responsible investing might extend to second-level participants in markets, especially if those second-level actors are states or their instrumentalities. While mere investment has not generally been accepted as a legally sufficient trigger for such liability, the affirmative act of investment by a state or by a commercial enterprise owned or controlled by a state may be an exception to this limitation.⁴²⁰ The reason for the exception is

415. Larry Catá Backer, *Complicity in Human Rights Violations and Sovereign Wealth Funds – the Norwegian Sovereign Wealth Fund and Myanmar Investments*, LAW AT THE END OF THE DAY (Dec. 23, 2010), <http://lbackerblog.blogspot.com/2010/12/complicity-in-human-rights-violations.html>.

416. *Broken Ethics*, *supra* note 407, at 9.

417. *Id.* at 37.

418. *Id.* at 39.

419. *Id.* at 11–13.

420. The recently endorsed Guiding Principles for Business and Human Rights may support the position of EarthRights International. U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights*, ¶¶ 4, 8, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>. Guiding Principle 4 provides that the state "should take additional steps

grounded in the independent obligation of states to comply with international law and legal obligations, including human rights and humanitarian law, beyond a connection with the object of investment. SWFs are especially likely to be bound by human rights obligations, even ones that flow from the secondary consequences of their investment activities. The NSWF Ethics Council has suggested embracing this reading of complicity as a guiding principle for its screening decisions.⁴²¹

Responsible investing is not limited to the use of international standards as a touchstone for national governance of the Fund's activities. Rather, responsible investing extends to the use of the Fund's power as an investor under principles of active ownership. That role is proving important in the construction of cultures of corporate governance at the transnational level.⁴²² Active ownership

to protect against human rights abuses." *Id.* ¶ 4. These steps might include "requiring human rights due diligence"—steps that would otherwise have a more compelling character in cases where enterprises are not state-owned. *Id.* Thus, state commercial instrumentalities might be understood to acquire both the duties binding states and the responsibilities attached to corporate enterprises simultaneously. The Commentary to Guiding Principle 4 provides,

Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk—in reputational, financial, political and potentially legal terms—for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

Id. ¶ 4, commentary. The complicity provisions also suggest the double role of the state. The Commentary to Principle 17 notes,

Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.

Id. ¶ 17, commentary. It seems clear that the Ethics Council might well breach its obligations in this respect. *See generally*, Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: the Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 69, 121 (2012) (noting that principles guiding Principle 8 apply externally to relationships between the state and other states or businesses).

421. *Annual Report 2008*, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND GLOBAL (2010), http://www.regjeringen.no/pages/1957930/etikkradet_engelsk08.pdf (establishing that companies shall be excluded from the Government Pension Fund to prevent the Fund's complicity in grave violations).

422. *New Guidelines*, *supra* note 22 ("Norges Bank participates in a variety of formal and informal initiatives in collaboration with other investors. The new

conflates governance, law, and economic welfare maximization in ways that undermine the traditional distinction between public and private activity. The NSWF engages in active ownership not merely to maximize the value of its investment—it believes that the maximization of the value of its investment is dependent on its ability to change the internal and external governance structures of the enterprises in which it owns shares. Lawmaking, governance, and regulation are thus inexorably integrated with economic decision-making.

The result can only be understood as a polycentric exercise. That is, active ownership provides Norway the power to engage in governance beyond its borders by participating in systems in which those borders are not relevant for stakeholding. That, in turn, has an important effect on governance regimes of the states within which these non-state governance roles are significant. Recent commentators have suggested the potential importance of minority government stakes in corporate securities on the development of corporate governance cultures and corporate governance law in the home states of enterprises.⁴²³

While the Norges Bank operates in a regulatory capacity—operationalizing a regulatory standard under which the Ethics Council can measure the lawfulness of Fund investment—it is also obligated to exercise its ownership rights, or its rights as a shareholder, for the purposes specified by statute and regulation. Specifically, the Fund is obligated to make decisions about the nature of its participation and the exercise of its shareholder rights in a corporation on the basis of a set of international soft law frameworks.

guidelines emphasize the importance of this by stipulating that the bank actively contribute to development of good international standards within responsible investment practice and exercise of ownership rights. New requirements have also been defined regarding transparency and reporting in Norges Bank.”).

423. See Mariana Pargendler, *State Ownership and Corporate Governance*, 80 *FORDHAM L. REV.* 2917 (2012) (“If the government is indeed a minority shareholder and is otherwise unable to exercise informal control over management and obtain private benefits of control—and this is a big ‘if’—the cases analyzed throughout this Article suggest that minority state ownership could be more conducive to the adoption of legal investor protections than a system in which the government is the controlling shareholder Future research is needed to elucidate the precise dynamics and political implications of state minority holdings, a subject that will be particularly useful for guiding public policy on domestic and international sovereign wealth funds.”).

These include the U.N. Global Compact, the OECD Principles of Corporate Governance and the OECD Guidelines for Multinational Corporations. The effect is profound as the regulations compel the Fund to govern its conduct as a shareholder (thus determining the character of its interests in the corporation) on a set of international soft law standards. Soft law is thus hardened, indirectly, by compelling a public entity to incorporate these standards in its private self-interested conduct.

In his work on framing of the law of SWFs,⁴²⁴ Fabio Bassan rejects the prior conventional analysis premised on the notion that states and economic enterprises are necessarily distinct—he rejects the twentieth-century convention of a distinction between law and politics. But, unlike those who then suggest that economics is absorbed within politics,⁴²⁵ he suggests the opposite; under the logic of globalization, economics may absorb politics: “[O]ne should admit that there are not separate political and economic playing fields where states and companies operate respectively They both make a political use of financial power trying to influence the market they operate in.”⁴²⁶ He uses this insight both to distinguish between state (political government) and company (economic government), in three respects—influence, purpose, and relationship⁴²⁷—and to suggest its integration in the form of SWFs.⁴²⁸ With that insight, Bassan criticizes the view of SWFs as reducible to one of state capitalism, which would limit the analysis of this sovereign enterprise in economic terms.⁴²⁹

Thus understood, responsible investment does not merely compel the incorporation of international standards in national norms for investment. It also requires the Norges Bank to actively contribute to the development of the standards under which it is to be governed:

424. BASSAN, *supra* note 10.

425. See generally Larry Catá Backer, *Globalization and the Socialist Multinational: Cuba at the Intersection of Business and Human Rights*, in HANDBOOK ON CONTEMPORARY CUBA: ECONOMY, CIVIL SOCIETY, AND GLOBALIZATION (Mauricio A. Font & Carlos Riobó, eds., 2013), available at <http://web.gc.cuny.edu/dept/bildn/publications/Handbook%20of%20contemporary%20Cuba%20-%20Table%20of%20Contents.pdf>.

426. BASSAN, *supra* note 10, at 3.

427. *Id.* at 4.

428. *Id.* at 4–5.

429. *Id.* at 5–14.

“The Government will play an active role in international processes aimed at further developing the [corporate social responsibility] framework.”⁴³⁰ As such, investing is both participation in markets and development of the rules under which such private market participation is organized and its companies are regulated. Norway’s critical support for the Special Representative of the U.N. Secretary General John Ruggie in his work to develop a framework for business and human rights is an important example of that outward projection of Norwegian state power in the construction of international norms that it internalizes in its domestic legal order.

The extraterritoriality and polycentric approaches of the NSWF are not developed in isolation. Roberta Karmel recently noted,

In addition to concerns about hedge funds, regulators have also focused on two other alternative investment vehicles: private equity funds and sovereign wealth funds Sovereign wealth funds also are alternative investment vehicles, but regulatory concerns and prohibitions have generally not focused on their systemic threats, but rather on the political implications of their investment activities.⁴³¹

Home states, particularly the United States, have sought to match the extraterritorial potential of the NSWF approach with extraterritoriality of their own. For example, the United States recently sought to expand the reach of the Foreign Corrupt Practices Act⁴³² to foreign SWFs, wherever they operate.⁴³³ The focus on bribery, of course, is also grounded in recent efforts to create an international framework for its suppression⁴³⁴ that followed but also

430. *Corporate Social Responsibility*, *supra* note 88, at 6.

431. Roberta Karmel, *IOSCO’s Response to the Financial Crisis*, 37 J. CORP. L. 849, 857–58 (2012).

432. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988), and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302, 3302-04 (1998)).

433. Michael J. Gilbert & Joshua W.B. Richards, *Foreign Corrupt Practices Act: The SEC’s Investigation of FCPA Violations and Sovereign Wealth Funds – Implications for Hedge Funds*, 4 HEDGE FUND L. REP. 2–3 (Feb. 3, 2011), available at http://www.dechert.com/files/Publication/9d66f31d-f613-40c6-9d0a-8c120bd1c901/Presentation/PublicationAttachment/2ea4c494-79a4-4151-8c70-18a904d3c01a/HFLR%20Reprint%202_3_11%20FCPA.pdf (explaining that SWF employees qualify as foreign officials under the FCPA due to the fact that SWFs are government entities).

434. *Convention on Combating Bribery of Foreign Public Officials in*

built an international governance architecture around the initial U.S. effort.

This suggests perhaps the most fundamental insight from this national effort: Norway is not seeking to use its SWF as an instrument of nationalist power projection. Extraterritoriality, whether in the form of active shareholding or the investment universe management of the Ethics Council, is not meant to project any peculiar Norwegian national law or policy abroad. Rather, the NSWF is evidence of a new form of complex and cooperative regulation, one in which the state itself serves as a nexus for the domestication of international norms, its internationalization of governance power through projections in private markets, and two-way engagement with international public and private law and norm making, one in which economic wealth maximization and governance objectives are conflated. Professor Sara Seck has captured this new and emerging form of public stake holding in global governance, one in which the state is an important but not necessarily the only stakeholder.⁴³⁵ Professor Seck develops a strong argument for extraterritoriality, one that promotes a harmonizing internationalism rather than furthering a conventional understanding grounded in the assertion of a power to project the idiosyncrasies of states' domestic legal orders onto or within other states.⁴³⁶ The governance agendas of the NSWF provide a striking example of this second generation extraterritoriality, one that is deployed in the service of international norms but remains grounded in domestication and projection through states. States thus remain significant to regulatory internationalization but neither central to that process nor necessarily in control of the venues through which

International Business Transactions, OECD, http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (last visited June 26, 2013) (explaining recent efforts to eliminate international corruption).

435. Seck, *supra* note 390.

436. Larry Catá Backer, *Sara Seck on the Possibilities and Limits of Extraterritoriality in a Corporate Social Responsibility and Human Rights Context*, LAW AT THE END OF THE DAY (Sept. 6, 2012), <http://lbackerblog.blogspot.com/2012/09/sara-seck-on-possibilities-and-limits.html> ("But, greater irony still, by recasting extraterritoriality as itself legitimate only as an instrument of internationalism, it effectively contributes to the reduction of the authority of states beyond the confines of their own territory for any action other than those that might further international law and the norms of the emerging international order.").

internationalization now occurs.

Yet it is possible that in this effort to construct a regulating investment vehicle in the form of the NSWF, the Norwegians have ultimately sacrificed efficiency for political aims. That is the argument that Gordon Clark and Ashby Monk have made.

Democratic societies may value their role in shaping institutions, but when it comes to financial management, policies that privilege *participation* over *expertise* tend to have efficiency costs Undoubtedly, many view these costs as worth paying, in particular with the Norwegian fund, where the ethics policies applied to GPFG are of moral, not financial, value.⁴³⁷

If the object of the NSWF regulatory edifice is to represent public values, whether or not this representation has effects on the targeted companies, the costs in terms of reduced financial returns “are visible in the substandard performance of GPFG against the Clark and Urwin best practice framework for investment management.”⁴³⁸ The value of this foregone or lost financial return might then be understood as the price or value of the public and political legitimacy of the NSWF.⁴³⁹ Clark and Monk are correct when the NSWF is judged by its investment portfolio. Yet, when the NSWF is understood as a mechanism for positive regulation at the national and international level and as a means of extraterritorial application of transnational standards—rather than merely as a special sort of pension fund with a need to develop internal public and political legitimacy—what appears to be a sacrifice of market fundamentals in the operation of the fund⁴⁴⁰ actually reflects the regulatory value of the Fund to Norway. The principle objective of the NSWF is not merely to maximize value understood in historically conventional terms,⁴⁴¹ but to maximize the value of the fund to the Norwegian people by generating income over the long term and contributing to the ordering of globalization and corporate behaviors. In this case,

437. Gordon L. Clark & Ashby Monk, *The Norwegian Government Pension Fund: Ethics Over Efficiency*, 3 ROTMAN INT'L J. OF PENSION MGMT. 14, 17 (2010).

438. *Id.*

439. *Id.* at 17–18.

440. *See id.* at 18.

441. Alexander Dyck & Adair Morse, *Sovereign Wealth Fund Portfolios* (MFI, Working Paper Series No. 2011–003, 2011).

then, regulation through markets has positive value that is not captured solely by looking at conventional measures of fund performance.

Benjamin Richardson echoes this idea in his comparative study of the NSWF and similar efforts in New Zealand.⁴⁴² In considering how the NSWF and the New Zealand variant reconcile their ethical and financial aspirations, he concludes that such reconciliation requires a narrow and focused view of ethical obligation, one centered on “avoiding *complicity* in unethical conduct or social and environmental harm.”⁴⁴³ But even with respect to complicity, the NSWF has been subject to sometimes substantial criticism.⁴⁴⁴ Legislation, Professor Richardson argues, is likely required to broaden the ethical obligation, even one made more compatible with the business case for sustainable investing.⁴⁴⁵ But more than that, both would be required to become more active promoters of sustainable development.⁴⁴⁶ Still, any tension between public and private obligation ultimately disappears over the very long term.⁴⁴⁷ To some extent, this is all well taken. Yet it is clear that the NSWF’s objectives are more complex and nuanced than one might expect of a similarly constituted private fund. As such, it is unclear that the same metrics are as useful. Norway is a state with substantial ambitions within the marketplace of policy. States compete for influence within global structures to develop transnational rules, parameters, customs, and expectations. That is of great value to Norway—and ultimately to Norway’s people. It has a value that is not measured by the financial performance of one of its instruments. To limit assessment of the value of an instrumentality of state action to one of its uses (albeit an important one) misses the fundamental point of the

442. Richardson, *supra* note 17, at 6.

443. *Id.* at 5 (redefining ethical investment as allowing and promoting long-term financial returns). However, “neither the NGPF- G nor the NZSF is mandated to actively promote sustainable development or to seek improvements in corporations’ sustainability performance.” *Id.*

444. See, e.g., *Broken Ethics*, *supra* note 407, at 5, 6 (noting that the Norwegian population has invested through the NSWF “USD \$4.7 billion . . . in 15 companies – hailing from eight countries – involved in the oil and gas sector in Burma”).

445. Richardson, *supra* note 17, at 25.

446. *Id.* (“[T]hey would need to rely mainly on a mix of corporate engagement and positive investment in environmental programs.”).

447. *Id.* at 23.

operation of the NSWF. Professor Richardson nicely illustrates the need for a new set of metrics for the assessment of SWFs as multi-purpose politico-economic enterprises.

Joel Slawotsky was right to suggest that

SWFs demonstrate convincingly that states are involved in traditionally private sector roles. States also own private sector businesses through state owned enterprises (SOEs). Thus, the role of the private sector is no longer relegated exclusively to corporations. Given the blurring of the distinctions, there is no reason to treat corporations differently than states.⁴⁴⁸

But the NSWF has also convincingly suggested that the opposite is true: there is no reason to treat states differently than corporations. Within the logic of globalization, the distinctions may increasingly carry a smaller difference.⁴⁴⁹

VI. CONCLUSION

Through the NSWF, the dynamics of power and politics have assumed a new alignment. Power is no longer necessarily based solely on the ability to command technology or vast armies of people; power is now available to any enterprise that can assert it through global markets which even the conventionally strongest state is bound to protect if for no other reason than self-interest. Norway has become a more influential power in the world precisely because it can influence global investment markets and, through its ownership, influence the development of law and custom. This the Norwegians have done quite consciously.⁴⁵⁰ Norway is not alone; the mix of finance and politics has now become quite pronounced.⁴⁵¹ The

448. Joel Slawotsky, *The Global Corporation as International Law Actor*, 52 VA. J. INT'L L. DIGEST 79, 86 (2012).

449. *Id.* at 88.

450. See, e.g., Anita M. Halvorsen, *Addressing Climate Change Through the Norwegian Sovereign Wealth Fund (SWF) – Using Responsible Investments to Encourage Corporations to Take ESG Issues into Account in Their Decision-Making 13-14*, (Univ. of Oslo Faculty of Law Research Paper Series No. 2010-06, 2010).

451. At the end of 2008, Former President Mohamed Nasheed announced that the Maldives was establishing an SWF to purchase a new island for the country. He stated, "This trust fund will act as a national insurance policy to help pay for a new homeland, should future generations have to evacuate a country disappearing under the waves." Mostafa Mahmud Naser, *Climate Change, Environmental*

ways in which SWFs are used to govern are now as important as the ways in which the global community might seek to regulate, or at least manage, the behaviors of SWFs.

Despite these complicating elements, in the aggregate, the NSWF's two-fold set of techniques for state intervention in private markets—as a participant and as a public enterprise, with the object of securing economic and regulatory “returns”—represents the most innovative part of the NSWF framework.⁴⁵² Norway's SWF project may provide a window into governance frameworks for the coming century because it embraces a set of governing parameters incompatible with traditional assumptions of the operation of the law-state system from the last century. Neither the state nor the law occupies the central position in this system. The NSWF governance regime acknowledges three simultaneously operating governance regimes—the law-state system, the social-norm system of private actors, and the international law-custom system of the community of states (and their partner-constructs). It seeks to both mediate between these governance systems and to actively participate within them. The NSWF is created and operated as an instrumentality of the state, a fund controlled through the Norse Ministry of Finance. As a state instrumentality it is used to generate income for Norway; yet its income production also affects governance through the use of shareholder power to influence Norwegian public policy in the enterprises in which the NSWF owns shares. Public policy that is reflected in the NSWF investment activity as a shareholder and investor in turn reflects the internalization of international law and governance within the Norwegian domestic legal order. This then contributes to the development of international law and custom that are applied to the law or social-norm systems of the other two governance regimes.

The NSWF experiment reminds us of the importance of public policy in the operation of the private investment activities. It also

Degradation, and Migration: A Complex Nexus, 36 WM. & MARY ENVTL. L. & POL'Y REV. 713, 745 n.265 (2012) (citing Christine Russell, *First Wave*, SCI. NEWS, 27 (Feb. 28, 2009)).

452. See GHALF-PATER CALLIESS & PEWER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2011) (theorizing the way the NSWF serves as a variant on the emerging mechanics of law).

serves as a reminder of the substantial irrelevance of international efforts, like the Santiago Principles, to draw a strong connection between public and private investment in private markets.⁴⁵³ More importantly, it suggests the implausibility of the distinction between public and private when states enter global markets as participants.⁴⁵⁴ Yet it is all for a good cause, as the Norwegian people see it through their governmental representatives. It is thus interesting to witness the way the actions of great SWF actors rewrite the rules of SWF operations—Norway in this case, China and Singapore in others. Its shape will not be the product of convergence of the interests of host states, but more likely the policies of SWF home states and the needs of host states. In the meantime, there will be plenty of dialogue for the press to follow.⁴⁵⁵

Norway has risen to the challenge that globalization set for states—to find a way in which they might more actively engage in the processes of inter-systemic and vertical harmonization without losing their fundamental character and democratic connection with their citizens. To that end, Norway has begun to develop a domestic legal order that incorporates evolving international standards that are themselves a product of the active participation of states and other relevant stakeholders. It has sought to leverage its political power by operationalizing this system through its participation in global markets rather than through its legislature and inter-governmental relations. SWFs, then, are not merely publicly-owned private actors

453. Thus, for example, the Norwegians appear to formally comply with its provisions, especially GAAP 19, but in a way that substantially evades the spirit of that provision. *Santiago Principles*, *supra* note 181, at 8; *The Norwegian Government Pension Fund Global's Adherence with the Santiago Principles*, NORWEGIAN MINISTRY OF FIN. 18 (Apr. 2011), http://www.regjeringen.no/upload/FIN/brosjyre/2011/GapSurvey_Global.pdf [hereinafter *Norwegian Government's Adherence With the Santiago Principles*]. Indeed the essence of both responsible investing and active shareholding runs counter to the economic objectives focus of GAAP 19.

454. *Santiago Principles*, *supra* note 181, at 19; *Norwegian Government's Adherence With the Santiago Principles*, *supra* note 453 (making no distinction between public and private actors for investment purposes).

455. See, e.g., *Working Group Announces Creation of International Forum of Sovereign Wealth Funds*, INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS (Apr. 6, 2009), <http://www.iwg-swf.org/pr/swfpr0901.htm> (establishing a forum to discuss common interests and facilitate greater understanding of the Santiago Principles).

in global financial markets. In Norway's case, they are also a means by which a state can engage in the process of international law making, regulate corporate culture through market activities, and politicize shareholder power. The NSWF system embodies the ways in which the market can serve as a substitute for a parliament, and an ethics council can construct an interpretive jurisprudence, which together can produce the glimmering of a governance system that is personal to the NSWF but which has significant effects on the development of global standards of conduct for companies and markets. More importantly, the NSWF system points to the ways in which the terrain on which the global human rights protection project has changed—no longer solely the province of states (through their constitutions) or international organizations (through their treaties or standard setting bodies), human rights is being woven into more tightly intermeshed relationships between states, investors, markets, and international organizations. The NSWF evidences the emerging international notions of a state duty to protect and a corporate responsibility to respect human rights, as well as the ways in which the form and scope of corporate governance are being fashioned across old jurisdictional barriers in new ways.

APPENDIX A

I. COMPANIES EXCLUDED FROM THE INVESTMENT UNIVERSE

A. Production of weapons that through their normal use may violate fundamental humanitarian principles

Anti-personnel land mines

Singapore Technologies Engineering (26 April 2002)

Production of cluster munitions

Textron Inc. (Dec. 31, 2008)

Hanwha Corporation (Dec. 31, 2007)

Poongsan Corporation (Nov. 30, 2006)

Raytheon Co. (Aug. 31, 2005)

Lockheed Martin Corp. (Aug. 31, 2005)

General Dynamics Corp. (Aug. 31, 2005)

Alliant Techsystems Inc. (Aug. 31, 2005)

Production of nuclear arms

The Babcock & Wilcox Co. (Jan. 11, 2013)

Jacobs Engineering Group Inc. (Jan. 11, 2013)

Serco Group Plc. (Dec. 31, 2007)

Gen Corp. Inc. (Dec. 31, 2007)

Safran SA. (Dec. 31, 2005)

Northrop Grumman Corp. (Dec. 31, 2005)

Honeywell International Corp. (Dec. 31, 2005)

EADS Finance BV (Dec. 31, 2005)

EADS Co. (Dec. 31, 2005)

Boeing Co. (Dec. 31, 2005)

B. Sale of weapons and military material to Burma

Dongfeng Motor Group Co. Ltd. (Feb. 28, 2009)

C. Production of tobacco

Grupo Carso SAB de CV (Aug. 24, 2011)

Shanghai Industrial Holdings Ltd. (Mar. 15, 2011)

Alliance One International Inc. (Dec. 31, 2009)

Altria Group Inc. (Dec. 31, 2009)

British American Tobacco BHD (Dec. 31, 2009)

British American Tobacco Plc. (Dec. 31, 2009)

Gudang Garam Tbk Pt. (Dec. 31, 2009)

Imperial Tobacco Group Plc. (Dec. 31, 2009)

ITC Ltd. (Dec. 31, 2009)
Japan Tobacco Inc. (Dec. 31, 2009)
KT&G Corp. (Dec. 31, 2009)
Lorillard Inc. (Dec. 31, 2009)
Philip Morris International Inc. (Dec. 31, 2009)
Philip Morris Cr AS. (Dec. 31, 2009)
Reynolds American Inc. (Dec. 31, 2009)
Souza Cruz SA (Dec. 31, 2009)
Swedish Match AB (Dec. 31, 2009)
Universal Corp VA (Dec. 31, 2009)
Vector Group Ltd. (Dec. 31, 2009)

D. Actions or omissions that constitute an unacceptable risk of the Fund contributing to:

Serious or systematic human rights violations

Wal-Mart Stores Inc. (May 31, 2006)
Wal-Mart de Mexico SA de CV (May 31, 2006)

Severe environmental damages

Lingui Development Berhad Ltd. (Feb. 16, 2011)
Samling Global Ltd. (Aug. 23, 2010)
Norilsk Nickel (Oct. 31, 2009)
Barrick Gold Corp. (Nov. 30, 2008)
Rio Tinto Plc. (June 30, 2008)
Rio Tinto Ltd. (June 30, 2008)
Madras Aluminium Company (Oct. 31, 2007)
Sterlite Industries Ltd. (Oct. 31, 2007)
Vedanta Resources Plc. (Oct. 31, 2007)
Freeport McMoRan Copper & Gold Inc. (May 31, 2006)

E. Other particularly serious violations of fundamental ethical norms

Potash Corporation of Saskatchewan (Dec. 6, 2011)
Elbit Systems Ltd. (Aug. 31, 2009)

F. Serious violations of the rights of individuals in situations of war or conflict

Shikun & Binui Ltd.
Africa Israel Investments Ltd. and Danya Cebus Ltd. (Aug. 23, 2010)

Companies that have been excluded, but where the decision to exclude has later been revoked are listed separately. All recommendations for exclusion and decisions to exclude or to revoke previous decisions to exclude, are listed here (latest first).

Jan. 11, 2013

Observation of Siemens AG concluded
Press Release from the Ministry of Finance, *available at*
<http://www.regjeringen.no/en/dep/fin/News/news/2013/observation-of-siemens-concluded.html?id=711933>.

Recommendation from the Council on Ethics, *available at*
http://www.regjeringen.no/upload/FIN/etikk/2013/siemens_eng.pdf.

Jan. 11, 2013

Exclusion of following companies reversed:

Finmeccanica Sp. A.

BAE Systems Plc.

FMC Corp.

Press Release from the Ministry of Finance, *available at*
<http://www.regjeringen.no/en/dep/fin/News/news/2013/new-decisions-about-the-government-pensi.html?id=711932>.

Recommendation from the Council on Ethics on BAE Systems Plc. and Finmeccanica Sp. A., *available at* http://www.regjeringen.no/upload/FIN/etikk/2013/bae_finmec_eng.pdf.

Recommendation from the Council on Ethics on FMC Corporation, *available at* http://www.regjeringen.no/upload/FIN/etikk/2013/fmc_eng.pdf.

Jan. 11, 2013

The Babcock & Wilcox Co.

Jacobs Engineering Group Inc.

Press Release from the Ministry of Finance, *available at*
<http://www.regjeringen.no/en/dep/fin/News/news/2013/new-decisions-about-the-government-pensi.html?id=711932>.

Recommendation from the Council on Ethics, *available at*
http://www.regjeringen.no/upload/FIN/etikk/2013/babcock_wilcox_jacobs_eng.pdf.

June 15, 2012

Shikun & Binui Ltd.

Press Release from the Ministry of Finance, *available at*

<http://www.regjeringen.no/en/dep/fin/News/news/2012/exclusion-of-a-company-from-the-governme.html?id=685898>.

Recommendation from the Council on Ethics, *available at*

http://www.regjeringen.no/pages/1930865/Shikun_Binui_eng.pdf.

Dec. 6, 2011

FMC Corporation

Potash Corporation of Saskatchewan

Press Release from the Ministry of Finance, *available at*

<http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2011/statens-pensjonsfond-utland-nye-beslutni/government-pension-fund-global-two-compa.html?id=665637>.

Recommendation from the Council on Ethics, *available at* http://www.regjeringen.no/upload/FIN/etikk/2011/Rec_phospahte.pdf.

Aug. 24, 2011

Grupo Carso SAB de CV

Press Release from the Ministry of Finance, *available at*

<http://www.regjeringen.no/en/dep/fin/News/news/2011/tobacco-producer-excluded-from-the-gover.html?id=652773>.

Recommendation from the Council on Ethics, *available at*

http://www.regjeringen.no/Upload/FIN/Statens_pensjonsfond/2011/spu/carso_2011e.pdf.

Mar. 15, 2011

Shanghai Industrial Holdings Ltd.

Press Release from the Ministry of Finance, *available at*

<http://www.regjeringen.no/en/dep/fin/News/news/2011/one-company-excluded-from-the-government.html?id=635913>.

Recommendation from the Council on Ethics, *available at*

http://www.regjeringen.no/upload/FIN/etikk/2011/shanghai_eng.pdf.

Feb. 16, 2011

Lingui Development Berhad Ltd.

Press Release from the Ministry of Finance, *available at*

<http://www.regjeringen.no/en/dep/fin/News/news/2011/Lingui-Development-Berhad-Ltd-excluded-from-the-GPFG.html?id=633660>.

Recommendation from the Council on Ethics, *available at*

http://www.regjeringen.no/upload/FIN/etikk/2011/recommendation_lingui.pdf.

Aug. 23, 2010

Africa Israel Investments Ltd.

Danya Cebus Ltd.

Samling Global Ltd.

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2010/three-companies-excluded-from-the-govern.html?id=612790>.

Recommendation from the Council on Ethics (Africa Israel Investments Ltd. and Danya Cebus Ltd.), *available at* http://www.regjeringen.no/upload/FIN/etikk/Recommendation_Africa_Israel.pdf.

Recommendation from the Council on Ethics (Samling Global Ltd.), *available at* http://www.regjeringen.no/upload/FIN/etikk/Recommendation_Samling.pdf.

Mar. 2, 2010

Exclusion of United Technologies Corp. reversed

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/News/news/2010/Decision-on-exclusion-reversed.html?id=594307>.

Recommendation from the Council on Ethics, *available at* http://www.regjeringen.no/upload/FIN/etikk/united_technologies_english_nov09.pdf.

Jan. 20, 2010

Seventeen Tobacco Producers Excluded

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2010/Tobacco-producers-excluded-from-Government-Pension-Fund-Global.html?id=591449>.

Recommendation from the Council on Ethics, *available at* http://www.regjeringen.no/upload/FIN/etikk/rec_tobacco_english.pdf.

Nov. 19, 2009

Norilsk Nickel

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/News/news/2009/exclusion-of-metallurgical-and-mining-co.html?id=586655>.

Recommendation from the Council on Ethics, *available at* http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/recommendation_norilsk.pdf.

Sept. 3, 2009

Elbit Systems Ltd.

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/supplier-of-surveillance-equipment-for-t.html?id=575444>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/the-council-on-ethics-recommends-that-th.html?id=575451>.

Mar. 13, 2009

Dongfeng Motor Group Co. Ltd.

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/nb/dep/fin/pressemeldinger/2009/leverandor-av-militart-materiell-til-bur.html?id=549152>.

Recommendation from the Council on Ethics, *available at* http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/Dongfeng_english.pdf.

Jan. 30, 2009

Textron Inc.

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/cluster-weapons-manufacturer-excluded-fr.html?id=543105>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/upload/FIN/etikk/textron.pdf>.

Jan. 30, 2009

Barrick Gold Corporation

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/mining-company-excluded-from-the-governm.html?id=543107>

Recommendation from the Council on Ethics, *available at* http://www.regjeringen.no/upload/FIN/etikk/recommendation_barrick.pdf.

Sept. 9, 2008

Rio Tinto Ltd.

Rio Tinto Plc.

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2008/the-government-pension-fund-divests-its-.html?id=526030>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/upload/FIN/etikk/Recommendation%20RT.pdf>.

Jan. 11, 2008

Hanwha Corporation

Serco Group Plc.

GenCorp Inc.

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2008/One-producer-of-cluster-munitions-and-tw.html?id=496485>.

Recommendation from the Council on Ethics (Hanwha Corporation), *available at* <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation-on-exclusion-of-the-company-2.html?id=496492>.

Recommendation from the Council on Ethics (Serco Group Plc), *available at* <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation-on-the-exclusion-of-the-company.html?id=496487>.

Recommendation from the Council on Ethics (GenCorp Inc), *available at* <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation-on-exclusion-of-the-company.html?id=496487>.

[compa.html?id=496494](http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2007/Metals-and-mining-company-excluded-from-compa.html?id=496494).

Nov. 9, 2007

Vedanta Resources Plc.
Sterlite Industries Ltd.
Madras Aluminium Company Ltd.

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2007/Metals-and-mining-company-excluded-from-.html?id=488626>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation---Vedanta-Resources-Plc.html?id=488630>.

Sept. 3, 2009

Exclusion of DRD Gold Limited reversed
Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/thales-sa-and-drd-gold-limited-to-be-rei.html?id=575442>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/recommendation-to-reverse-a-decision-to-.html?id=575438>.

Apr. 11, 2007

DRD Gold Limited
Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/templates/Pressemelding.aspx?id=462551&epslanguage=EN-GB>.

Recommendation from the Council on Ethics, *available at* http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/recommendation_drd.pdf.

Dec. 6, 2006

Poongsan Corporation

Press Release from the Ministry of Finance, *available at*

<http://www.regjeringen.no/templates/Pressemelding.aspx?id=437729&epslanguage=EN-GB>.

Recommendation from the Council on Ethics, *available at*

<http://www.regjeringen.no/templates/Brev.aspx?id=449053&epslanguage=EN-GB>.

June 6, 2006

Wal-Mart Stores Inc.

Wal-Mart de Mexico SA de CV

Freeport McMoRan Copper & Gold Inc

Press Release from the Ministry of Finance, *available at*

<http://www.regjeringen.no/templates/Pressemelding.aspx?id=104396&epslanguage=EN-GB>.

Recommendation from the Council on Ethics (Wal-Mart), *available at*

<http://www.regjeringen.no/templates/Brev.aspx?id=450120&epslanguage=EN-GB>.

Recommendation from the Council on Ethics (Freeport), *available at*

http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/Recommendation%20_15_February_2006.pdf.

Jan. 5, 2006

BAE Systems Plc.

Boeing Co.

Finmeccanica Sp.A.

Honeywell International Inc.

Northrop Grumman Corp.

United Technologies Corp.

Safran SA

Press Release from the Ministry of Finance, *available at*

<http://www.regjeringen.no/templates/Pressemelding.aspx?id=419804&epslanguage=EN-GB>.

Recommendation from the Council on Ethics, *available at*

<http://www.regjeringen.no/templates/Brev.aspx?id=419589&epslanguage=EN-GB>.

Sept. 3, 2009

Exclusion of Thales SA reversed

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2009/thales-sa-and-drd-gold-limited-to-be-rei.html?id=575442>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/recommendation-to-reverse-the-exclusion.html?id=575446>.

Aug. 31, 2005

Alliant Techsystems Inc.

EADS Co (European Aeronautic Defence and Space Company)

EADS Finance BV

General Dynamics Corporation

Lockheed Martin Corp.

Raytheon Co.

Thales SA

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/templates/Pressemelding.aspx?id=256695&epslanguage=EN-GB>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/templates/Brev.aspx?id=419583&epslanguage=EN-GB>.

Sept. 1, 2006

Exclusion of Kerr-McGee reversed

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/templates/Pressemelding.aspx?id=419868&epslanguage=EN-GB>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/Recommendations-and-Letters-from-the-Advisory-Council-on-Ethics/Recommendation-on-suspension-of-exclusion-of-KerrMcGee-Corporation-KerrMcGee.html?id=419593>.

June 6, 2005

Kerr-McGee Corporation

Press Release from the Ministry of Finance, *available at* <http://www.regjeringen.no/templates/Pressemelding.aspx?id=256359&epslanguage=EN-GB>.

Recommendation from the Council on Ethics, *available at* <http://www.regjeringen.no/nb/dep/fin/tema/andre/Etiske-retningslinjer/Tilradninger-og-brev-fra-Etikkradet/Recommendation-on-Exclusion-from-the-Government-Petroleum-Funds-Investment-Universe-of-the-Company-Kerr-McGee-Corporation.html?id=419582>.

Mar. 22, 2002

Singapore Technologies Engineering
Recommendation from the Advisory Commission on International Law, *available at* <http://www.regjeringen.no/templates/RedaksjonellArtikkel.aspx?id=413581&epslanguage=EN-GB>.

APPENDIX B

COMPANIES THAT HAVE BEEN EXCLUDED, BUT WHERE THE DECISION
TO EXCLUDE HAS LATER BEEN REVOKED

PRODUCTION OF WEAPONS THAT THROUGH THEIR NORMAL USE MAY
VIOLATE FUNDAMENTAL HUMANITARIAN PRINCIPLES

Production of cluster munitions

Thales S.A. (Aug. 31, 2009)

Production of nuclear arms

United Technologies Corp (Feb. 28, 2010)

ACTIONS OR OMISSIONS THAT CONSTITUTE AN UNACCEPTABLE RISK OF
THE FUND CONTRIBUTING TO:

Severe environmental damages

DRD Gold Limited (Aug. 31, 2009)

OTHER PARTICULARLY SERIOUS VIOLATIONS OF FUNDAMENTAL
ETHICAL NORMS

KerrMcGee Corporation (Aug. 31, 2006)

APPENDIX C

OBSERVATION OF COMPANIES FROM THE FUNDS' INVESTMENT UNIVERSE

In some cases there may be doubt as to whether the conditions for exclusion have been fulfilled or how the company's behaviour will develop in the future. In such cases, the Ministry may put the company under observation on the advice of the Council of ethics.

Currently under observation

Siemens AG is under observation due to the gross and systematic corruption the group has been involved in over many years. Press release 24/2009; Observation status concluded Jan. 11, 2013.