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THE TURN TO ETHICS: DISINVESTMENT FROM MULTINATIONAL CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS — THE CASE OF NORWAY'S SOVEREIGN WEALTH FUND

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The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations — The Case of Norway's Sovereign Wealth Fund[†]

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Abstract

Norway's Global Pension Fund, a sovereign wealth fund worth over $300 billion, is the second largest in the world. Beginning in 2004 it adopted ethical guidelines intended to promote sustainable development and, in particular, to minimize the risk of complicity in serious human rights violations. The turn to ethical investment strategies to promote corporate social responsibility can be seen as an important supplement to emerging regulation of multinational corporations — or as an admission that regulation has failed. In the case of Norway, it has seen controversial decisions such as disinvestment from Wal-Mart and a decision *not* to disinvest from companies operating in Myanmar (Burma). This article discusses the creation and work of the Council on Ethics, focusing on the ambiguous legal and ethical meanings of "complicity" and the uncertain impact that disinvestment has on behavior. The turn to ethics 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, providing illusory rather than genuine accountability.

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INTRODUCTION

The question of how to influence the human rights behavior of multinational corporations has long been a concern of non-governmental organizations,[1] scholars,[2] and governments.[3] Their efforts at mobilization, analysis, and regulation have achieved mixed results.[4] More recently, pension funds and other institutional investors have assumed an important role in channeling such influence into a form that may exert greater leverage on the decision-making process of a

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[1] *See, e.g.* Bennett Freeman, *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423 (2001); Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16 ETHICS & INT'L AFF. 71 (2002).

[2] *See, e.g.*, Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401 (2002); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon — An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91 (2002); Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075 (2002); Tawny Aine Bridgeford, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009 (2003); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from here?*, 19 CONN. J. INT'L L. 1 (2003); Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT'L L.J. 53 (2004); Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL. 307 (2004); Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701 (2004); Sukanya Pillay, *And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections*, 81 U. DET. MERCY L. REV. 489 (2004); Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT'L ECON. L. 1 (2005); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389 (2005); Matthew Nick, *Rethinking Multinational Corporate Governance in Extractive Industries: The Caspian Development Project and the Promise of Cooperative Governance*, 38 VAND. J. TRANSNAT'L L. 577 (2005); Heather Bowman, *If I Had a Hammer: The OECD Guidelines for Multinational Enterprises as Another Tool to Protect Indigenous Rights To Land*, 15 PAC. RIM L. & POL'Y J. 703 (2006); Christopher N. Franciose, *A Critical Assessment of the United States' Implementation of the OECD Guidelines for Multinational Enterprises*, 30 B.C. INT'L & COMP. L. REV. 223 (2007); Allison M. Snyder, *Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer?*, 2007 COLUM. BUS. L. REV. 565 (2007).

[3] *See, e.g.*, Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2003); Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. MARSHALL L. REV. 1205 (2004); David Weissbrodt and Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003); Rosanne Altshuler and Harry Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Companies*, 7 FLA. TAX REV. 153 (2005); Tracy M. Schmidt, *Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?*, 36 CAL. W. INT'L L.J. 217 (2005); Larry Cata Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006) (discussing the United Nations' efforts to regulate "transnational corporations" through the development of its Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights); Ann Marie McLoughlin, *International Trend of Multinational Corporate Accountability for Human Rights Abuses and the Role of the United States*, 33 OHIO N.U.L. REV. 153 (2007).

[4] *See generally* NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005); KLAUS M. LEISINGER AND KARIN M. SCHMITT, CORPORATE ETHICS IN A TIME OF GLOBALIZATION (2003). *Cf.* Peter Muchlinksi, *The Development of Human Rights Responsibilities for Multinational Enterprises*, *in* BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 33, 35 (Rory Sullivan ed. 2003) (discussing arguments against the extension of human rights obligations to multinational corporations).

multinational: through its shareholders.[5] Companies with operations in Myanmar (Burma) and Sudan have been punished for their ties to governments engaged in human rights abuses;[6] a far larger number have signed onto voluntary principles and codes of conduct embracing best practice in the field of human rights.[7] These various efforts to shape behavior through inducements and public pressure are an admission that traditional regulation through coercion for violations of specific rights is not working. Praise for "corporate social responsibility" generally assumes that traditional regulation cannot work;[8] criticism often asserts that the illusion of accountability undermines the prospects of establishing an effective mechanism with teeth and is worse than nothing at all.[9]

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[5] This is, to be sure, a slowly emerging trend. This is particularly true of the United States. *See, e.g.*, Cynthia A. Williams and John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 546 (2005) (quoting statistics from the Investor Responsibility Research Center showing that 55 percent of the largest mutual funds in the United States vote against all social and environmental shareholder proposals; 15 percent vote against nearly all such proposals; and 30 percent cast abstentions). Pressure to consider such issues has increased, however, since the introduction of proxy voting rules requiring disclosure on how mutual funds vote on shareholder resolutions. *Id.* 526-27. The United Kingdom, by contrast, has seen broader support for corporate social responsibility initiatives, with mainstream institutional investor trade associations including the Association of British Insurers and the Institutional Shareholders Committee issuing statements about the corporate social responsibility disclosure they expect from portfolio companies. *Id.* 541-43. *See also* Simon Deakin, *Squaring the Circle? Shareholder Value and Corporate Social Responsibility in the U.K.*, 70 GEO. WASH. L. REV. 976 (2002) (discussing corporate social responsibility in the United Kingdom); Pall A. Davidsson, *Legal Enforcement of Corporate Social Responsibility within the EU*, 8 COLUM. J. EUR. L. 529 (2002) (discussing progress of corporate social responsibility within the European Union); Sorcha MacLeod, *Corporate Social Responsibility Within the European Union Framework*, 23 WIS. INT'L L.J. 541 (2005) (discussing the EU).

[6] *See, e.g.*, *Bailing Out of Burma*, N.Y. TIMES, Apr. 2, 1995 (describing early efforts to force companies to cease operations in Myanmar; Evelyn Iritani, *Effort to Divest from Sudan Picks Up Steam*, L.A. TIMES, Apr. 11, 2007 (noting Talisman's withdrawal from Sudan following a disinvestment campaign in 2002-03); Laura Smitherman, *Divestment Effort Aimed at Ending Killing in Sudan; "Blood Money" Targeted as Activists Seek to Pressure Khartoum Government*, BALTIMORE SUN, May 21, 2005 (describing efforts to use state legislation to force public pension funds to disinvest from Sudan over Darfur atrocities).

[7] *See, e.g.*, Mark Turner, *Blueprint for 21st Century: UN Global Compact*, FINANCIAL TIMES, June 13, 2006 (discussing Principles for Responsible Investment, promoted under the auspices of the UN Global Compact).

[8] *See, e.g.*, Claire Moore Dickerson, *Ozymandias as Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035 (2003); Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309 (2004); Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Re-sponsibility*, 30 DEL. J. CORP. L. 767 (2005); Christiana Ochoa, *Corporate Social Responsibility in the International Context: Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post Sosa v. Alva-rez-Machain*, 74 U. CIN. L. REV. 105 (2005); David Weissbrodt, *Corporate Social Responsibility in the International Context: Business and Human Rights*, 74 U. CIN. L. REV. 55 (2005); Cynthia A. Williams and John M. Conley, *Corporate Social Responsibility In The International Context: Is There An Emerging Fiduciary Duty To Consider Human Rights?*, 74 U. CIN. L. REV. 75 (2005); Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207 (2007).

[9] *See, e.g.*, Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 47 (2002) ("Both domestic governments and international organizations have danced around [the topic of enforceability of human rights norms], urging voluntary codes of conduct rather than seeking to impose binding rules of law. I argue that such circumspection is unfounded. Corporations are already bound by many core human rights norms. So-called voluntary codes that ask business entities to refrain from committing genocide or to avoid profiting from slave labor are weak concessions to the enormous economic and political power of multinational corporations."); Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171 (2007). *Cf.* Thomas Nagel, *The Problem of Global*

Leaving aside that larger question of whether formal regulation — such as through treaty or legislation — is desirable or possible, should the ad hoc efforts of investors to shape the human rights behavior of the companies in which they own shares themselves be regulated? That is, by what standard, if any, should the activist shareholder be judged? This article will consider this question by examining one of the most interesting recent experiments in activist shareholding: the Council on Ethics of the Norwegian Government Pension Fund – Global.

Part I briefly introduces the Pension Fund and the Council on Ethics, surveying the recommendations the Council has made since its creation in November 2004. Part II then situates the Council's work in the context of other legal and voluntary frameworks. Part III considers an issue that has posed a key challenge to the Council's work: the meaning of "complicity." Part IV then returns to the question of whether the Council's work is best seen as legal or purely "ethical."

I. THE NORWEGIAN GOVERNMENT PENSION FUND AND THE COUNCIL ON ETHICS

The Norwegian Government Pension Fund – Global (*Statens pensjonsfond – Utland*) invests surplus wealth produced by Norway's petroleum sector, principally revenue from taxes and licensing agreements. Known until January 2006 as the Petroleum Fund of Norway, it is the second largest pension fund in the world with assets in excess of $300 billion.[10]

The fund was created in 1990 by an act of the Norwegian Parliament (*Stortinget*).[11] Since its mandate was to receive money when there was a budget surplus, however, the first transfer was made only in 1996 for fiscal year 1995.[12] Subsequent years were more bountiful and the fund has now grown well beyond Norway's annual gross domestic product (GDP) — $264.4 billion in 2006[13] — and is projected to reach a level of around 250 percent of GDP by 2030. As oil revenues diminish, it is then expected gradually to decline.[14] (Crude oil production is believed to have peaked; natural gas production will peak around 2013.[15])

The purpose of the fund was, first, to avoid the wide fluctuations of economic activity caused by the petroleum sector. By limiting the impact of variable oil revenues on government spending and investing a substantial portion of those revenues abroad, the fund reduces these fluctuations and stabilizes the exchange rate.[16] Second, the fund provides a savings vehicle for

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Justice, 33(2) PHILOSOPHY & PUBLIC AFFAIRS 113 (2005).

[10] The largest is Japan's Government Pension Investment Fund. *See* Top 100 Global Funds (Pension Funds Online, London, 2007), *at* http://www.pensionfundsonline.co.uk/pdfs/Top-100-Global-Pension-Funds.pdf.

[11] Act on the Government Petroleum Fund (Act of June 22, 1990, No. 36).

[12] Tore Eriksen, The Norwegian Petroleum Sector and the Government Pension Fund – Global (Ministry of Finance, Oslo, June 2006), *at* http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/The_Norwegian_Petroleum_Sector_te.pdf, 7.

[13] World Factbook (Central Intelligence Agency, Langley, VA, 2007), *at* http://www.cia.gov/library/publications/the-world-factbook.

[14] Eriksen, Norwegian Petroleum Sector (7.

[15] *Id.*, 4.

[16] *Id.*, 6.

future generations of Norwegians — an aim reflected in its re-branding in 2006 as a "Government Pension" Fund.[17]

A. The Turn to Ethics

In addition to these domestic considerations of economic stability and intergenerational equity, the Government of Norway later adopted two mechanisms addressing the impact of its international investments. In 2001 an "Environmental Fund" was established within the larger fund. This new instrument invested exclusively in developed markets and was restricted to acquiring equity in companies assumed to have limited negative influence on the environment, and which met specific environmental reporting and certification requirements based on analysis from the British consulting firm Ethical Investment Research Service (EIRiS).[18]

In the same year, the Ministry of Finance appointed an Advisory Commission on International Law for the fund. The Commission responded to requests from the Ministry as to whether specific investments were in conflict with Norway's commitments under international law. In March 2002 the Commission responded to such a request concerning Singapore Technologies Engineering. It concluded that, as there was "a large degree of probability" that the company through a subsidiary produced anti-personnel mines, even modest investments in the company could constitute a violation of Norway's obligations under the Ottawa Convention on Anti-Personnel Mines.[19] Such an investment could imply a violation of the Ottawa Convention prohibition on "assist[ing]" the production of anti-personnel mines.[20] A month later the Government formally excluded Singapore Technologies Engineering from the fund's investment universe.[21]

In Fall 2002, the Government appointed a committee to develop more general ethical guidelines for the fund's investments. The committee, which was chaired by Professor Hans Petter Graver, reported on 25 June 2003. In recognition of the pluralism of Norwegian society and the fact that beneficiaries of the fund included future generations, the foundation of the ethical guidelines was made broad and relatively vague. The Graver Report sought to identify an overlapping consensus of ethical values that were consistent over time,[22] relying largely on internationally-accepted principles rather than seeking to develop a separate basis founded on Norwegian national culture or policy.[23] The Report specifically cited principles on protection of the environment, human rights, labor standards, and corporate governance embodied in the UN

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[17] *Id.*, 6-7.
[18] Council on Ethics, Annual Report 2005 (Government Pension Fund – Global, Oslo, January 2006), *at* http://www.etikkradet.no.
[19] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction (Ottawa Convention), done at Oslo, Sept. 18, 1997 (in force Mar. 1, 1999).
[20] The Petroleum Fund Advisory Commission on International Law, Memorandum to the Ministry of Finance: Question of whether investments in Singapore Technologies Engineering can imply a violation of Norway's international obligations (Ministry of Finance, Oslo, Mar. 22, 2002), *at* http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/Advisory-Commission-Documents/Advisory-Commission.html?id=413581&epslanguage=EN-GB, citing Ottawa Convention, arts. 1(1)(c) and 1(1)(b).
[21] *Id.*
[22] The Report from the Graver Committee (Ministry of Finance, Oslo, Nov. 7, 2003), *at* http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/The-Graver-Committee---documents/Report-on-ethical-guidelines.html?id=420232&epslanguage=EN-GB, §2.1.
[23] *Id.*, §4.2.

Global Compact[24] and adopted by the International Labour Organization (ILO),[25] the Organisation for Economic Co-operation and Development (OECD),[26] and the UN Sub-Commission on the Promotion and Protection of Human Rights.[27]

Such a pragmatic formulation of substantive obligations was also an attempt to avoid problems of theory. The Report explicitly sought to embrace both teleological and deontological schools of ethics:[28] teleological ethics, such as utilitarianism,[29] emphasize the importance of consequences; deontological ethics, such as Kant's categorical imperative,[30] emphasize hold that one should do the right thing not in order to achieve a goal but simply because it is right.[31] The two schools are also known as consequentialism and non-consequentialism respectively.[32] Though the division is not quite so neat, these two approaches to ethics are broadly reflected in the two instruments ultimately adopted to implement the general standards to which the Norwegian fund would be held.

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[24] The Ten Principles of the Global Compact (United Nations Global Compact, New York, 2004), *at* http://www.unglobalcompact.org. *See generally* William H. Meyer and Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501 (2001); Surya Deva, *Global Compact: A Critique of the U.N.'S "Public-Private" Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107 (2006).

[25] Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session, as amended at its 279th (November 2000) and 295th Session (March 2006), done at Geneva, November 1977, *at* http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf. *See generally* Lance Compa and Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995); Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347 (1999); Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 228 (2007).

[26] OECD Guidelines for Multinational Enterprises (Organisation for Economic Co-operation and Development, Paris, 2000), *at* http://www.oecd.org/daf/investment/guidelines. *See generally* James Salzman, *Labor Rights, Globalization, and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769 (2000); Elisa Morgera, *An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead Up to the 2006 Review*, 18 GEO. INT'L ENVTL. L. REV. 751 (2006); Franciose, *supra* note 2.

[27] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights), UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003), *at* http://documents.un.org. *See generally* David Kinley and Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 959 (2004); Troy Rule, *Using "Norms" to Change International Law: UN Human Rights Laws Sneaking in through the Back Door?*, 5 CHI. J. INT'L L. 325 (2004); Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 464 (2004); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005); Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 751-52 (2006).

[28] Graver Committee Report, *supra* note 22, §2.2.

[29] *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ([1789] 1961); JOHN STUART MILL, UTILITARIANISM, EDITED, WITH AN INTRODUCTION, BY GEORGE SHER (2d ed. [1861] 2001); DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965); FREDERICK ROSEN, CLASSICAL UTILITARIANISM FROM HUME TO MILL (2003).

[30] IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS (3d ed. [1785] 1993).

[31] *See generally* DEONTOLOGY (Stephen L. Darwall ed., 2002).

[32] *See generally* JEROME SCHNEEWIND, MORAL PHILIOSOPHY FROM MONTAIGNE TO KANT (1990); CONSEQUENTIALISM (Stephen L. Darwall ed., 2003).

The first, reflecting the teleological conception of ethics, was the exercise of active ownership rights to promote long-term financial returns — explicitly understood as including protection of human rights and sustainability of the environment. When the Ministry of Finance adopted ethical guidelines that included environmental considerations, the Environmental Fund as a separate entity was discontinued. Those general guidelines now provide that the overall objective remains safeguarding the fund's financial interests, but that the exercise of ownership rights "shall mainly be based on the UN's Global Compact and the OECD Guidelines for Corporate Governance and for Multinational Enterprises."[33] Norges Bank, which administers the fund, is required to report on how it has acted as owner representative, "including a description of the work to promote special interests relating to the long-term horizon and diversification of investments in accordance with" the guidelines on ownership.[34]

The second instrument is the exclusion from the investment universe, either through negative screening or disinvestment,[35] of companies where there is an unacceptable risk as an owner of complicity in gross or systematic breaches of ethical norms within the areas of human rights and the environment. Though exclusion may in some circumstances influence the behavior of companies, the Graver Report focused on the importance of exclusion as a means of avoiding one's own complicity in ethically suspect activity, rather than as a means of influencing the activity itself.[36] This was seen as an extension of the work of the Advisory Commission on International Law,[37] which was replaced in December 2004 by a five-member Council on Ethics. Reflecting the deontological conception of ethics, the focus of the Council's work is on avoiding the risk of doing the wrong thing rather than ensuring a desirable course of action is followed. Moreover, the Council's examination is focused — at least technically — on the potential for Norwegian complicity rather than the actual conduct of the company in question. As the Graver Report observed, "the Council does not have to prove that a company is guilty of unethical practices."[38] As we shall see, for some companies this is a distinction without a difference.

Formally, the Council submits recommendations to the Ministry of Finance, which makes final decisions on negative screening and exclusion of companies from the investment universe.[39] These recommendations and decisions are to be made public, though there is provision for a delay in publication in order to "ensure a financially sound implementation of the exclusion of the company concerned."[40] This recognizes the likelihood that a recommendation

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[33] Ethical Guidelines (Government Pension Fund – Global, Oslo, Dec. 22, 2005), *at* http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/Ethical-Guidelines.html, §3.1.
[34] *Id.*, §3.2.
[35] Divestment or divestiture, sometimes used in this context, is a more general term meaning the reduction of some kind of asset. Disinvestment is used here to indicate the selling of assets for ethical purposes.
[36] Graver Committee Report, *supra* note 22, §5.1 ("The Committee does not recommend the use of exclusion as a means of exerting influence. The Committee believes that the exercise of ownership rights might be more effective in influencing a company's conduct. Disposing of holdings in a company in order to influence its conduct presupposes that the publicity around the Fund's withdrawal would result in the company changing its practices. It is not realistic to believe that by excluding a company the Fund could contribute to reducing the company's access to capital or causing demand for the company's stock to decline in such a way that the company would be compelled to change its conduct. Negative publicity, on the other hand, might influence the company.")
[37] In addition to the more expansive role described below, the Council took on the Advisory Commission's task of responding to requests concerning Norway's compliance with international law: Ethical Guidelines, *supra* note 33, §4.3.
[38] Graver Committee Report, *supra* note 22, §5.4. *Cf.* Ramasastry, *supra* note 2.
[39] Ethical Guidelines, *supra* note 33, §4.1.
[40] *Id.*, §4.1.

or decision to disinvest may have a negative impact on the share price of the company in question; keeping that information closely held enables the fund to sell at what would presumably be a higher share price.

The five members of the Council include three academics at the University of Oslo,[41] a professional scientist,[42] and a professional economist.[43] The Council is given a broad power to make recommendations on its own initiative.[44] The first basis for exclusion of a company is for "production of weapons that through their normal use may violate fundamental humanitarian principles".[45] In addition, the Council may issue a recommendation because of acts or omissions that constitute an unacceptable risk of the Fund contributing to:

- Serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other forms of child exploitation
- Serious violations of individuals' rights in situations of war or conflict
- Severe environmental damage
- Gross corruption
- Other particularly serious violations of fundamental ethical norms.[46]

This allows, clearly, wide discretion on the part of the Council, which is not constituted as a court but nevertheless required to "gather all necessary information at its own discretion and … ensure that the matter is documented as fully as possible."[47] When the Council is considering recommending exclusion, "the company in question shall receive the draft recommendation and the reasons for it, for comment."[48] As might be expected, questions of burden of proof and natural justice swiftly arose.[49]

The Council is also tasked with reviewing "on a regular basis" whether the grounds for exclusion of a particular company continue to apply; on the basis of new information it may recommend to the Ministry of Finance the revocation of a decision to exclude.[50]

B. The Council's Recommendations

In its first two years to January 2007, the Council published ten recommendations, all of which were adopted by the Norwegian Ministry of Finance. Six concerned recommendations to exclude one or more companies from the investment universe: (i) Kerr-McGee for activities off the coast of the non-self-governing territory Western Sahara;[51] (ii) seven companies producing cluster weapons components;[52] (iii) seven companies producing nuclear weapons components;[53] (iv)

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[41] Gro Nystuen (Chair), dr. juris and Associate Professor at the Center for Human Rights, the University of Oslo; Andreas Føllesdal professor PhD in Philosophy at the Center for Human Rights, the University of Oslo; Ola Mestad dr. juris and Professor at the Centre for European Law, University of Oslo.
[42] Anne Lill Gade MSc in limnology (freshwater ecology), Product Safety Manager at Jotun AS.
[43] Bjørn Østbø economist HAE, Chief Executive Officer at Vital Eiendom AS.
[44] Ethical Guidelines, *supra* note 33, §4.4.
[45] *Id.*, §4.4.
[46] *Id.*, §4.4.
[47] *Id.*, §4.5.
[48] *Id.*, §4.5.
[49] *See infra* note 124 and accompanying text.
[50] Ethical Guidelines, *supra* note 33, §4.6.
[51] Council on Ethics, Recommendation on Exclusion of Kerr-McGee Corporation (Government Pension Fund – Global, Oslo, Apr. 11, 2005, published June 6, 2005), *at* http://www.etikkradet.no.
[52] Council on Ethics, Recommendation on Exclusion of Companies Producing Cluster Weapons (Government Pension Fund – Global, Oslo, June 16, 2005, published Sept. 2, 2005), *at* http://www.etikkradet.no. The companies

Wal-Mart Stores Inc. for unacceptable working conditions in some of the company's own stores and among suppliers;[54] (v) Freeport McMoRan Copper & Gold Inc. for environmental damage;[55] and (vi) Poongsan Corporation, also for production of cluster weapons components.[56] Two recommendations considered allegations of improper activity but did not call for exclusion of the relevant companies: the first concerned whether two weapons systems in development constituted violations of the Ottawa Convention;[57] the second whether the fund should disinvest from Total S.A. because of its operations in Myanmar (Burma).[58] Just over a year after it excluded Kerr-McGee, the Council revoked its decision on the basis that the company had ceased operations off the coast of Western Sahara.[59] The Council also published a decision revoking its exclusion of EADS Co. for production of cluster munitions, but keeping the exclusion in place as the company also manufactured nuclear weapons components.[60] By the end of 2006, 19 companies had been excluded, leaving about 4,000 in the fund's portfolio.[61]

In addition to predictable unhappiness on the part of companies publicly excluded from investment by the fund, there has been some measure of criticism within Norway of the Council's activity. The chair of the Council, Gro Nystuen, responded to some of these criticisms in an article published in the newspaper *Dagens Næringsliv*, including claims that the Council did not allow companies the opportunity to rebut accusations of improper activity, and that companies that did answer accusations were nevertheless excluded anyway. Nystuen explained that allegations are substantiated with "concrete references to sources" and that companies being assessed for exclusion are sent a letter and invited to "comment on the allegations":[62]

> I would assume that this process represents a more or less universal method for processing allegations and accusations. Whether one wants to complain about an administrative decision, respond to a complaint from the neighbor or challenge a criminal indictment, it is a basic requirement that the claims which are presented are concrete and that they are well substantiated

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were Alliant Techsystems Inc., EADS Co., General Dynamics Corp., L3 Communications Holdings Inc., Lockheed Martin Corp., Raytheon Co., Thales S.A.

[53] Council on Ethics, Recommendation on Exclusion of Companies Developing and Producing Nuclear Weapons (Government Pension Fund – Global, Oslo, Sept. 19, 2005, published Jan. 5, 2006), *at* http://www.etikkradet.no. The companies were BAE Systems Plc., Boeing Co., Finmeccanica Sp.A., Honeywell International Inc., Northrop Grumman Corp., United Technologies Corp. and Safran SA.

[54] Council on Ethics, Recommendation on Exclusion of Wal-Mart Stores Inc. (Government Pension Fund – Global, Oslo, Nov. 15, 2005, published June 6, 2006), *at* http://www.etikkradet.no. *See infra* notes 125-27 and accompanying text.

[55] Council on Ethics, Recommendation on Exclusion of Freeport McMoRan Copper & Gold Inc. (Government Pension Fund – Global, Oslo, Feb. 15, 2006, published June 6, 2006), *at* http://www.etikkradet.no.

[56] Council on Ethics, Recommendation on Exclusion of Poongsan Corporation (Government Pension Fund – Global, Oslo, Sept. 6, 2006, published Dec. 6, 2006), *at* http://www.etikkradet.no.

[57] Council on Ethics, Recommendation Concerning Whether the Weapons Systems Spider and Intelligent Munition System (IMS) Might Be Contrary to International Law (Government Pension Fund – Global, Oslo, Sept. 20, 2005, published Oct. 13, 2005), *at* http://www.etikkradet.no.

[58] Council on Ethics, Recommendation on Total S.A. (Government Pension Fund – Global, Oslo, Nov. 14, 2005, published Jan. 5, 2006), *at* http://www.etikkradet.no.

[59] Council on Ethics, Recommendation on Suspension of Exclusion of Kerr-McGee Corporation (Government Pension Fund – Global, Oslo, May 24, 2006, published Sept. 1, 2006), *at* http://www.etikkradet.no.

[60] Council on Ethics, Supplementary Recommendation on EADS Co. (Government Pension Fund – Global, Oslo, Apr. 18, 2006, published Apr. 18, 2006), *at* http://www.etikkradet.no.

[61] Council on Ethics, Annual Report 2006 (Government Pension Fund – Global, Oslo, January 2006), *at* http://www.etikkradet.no, 10.

[62] Gro Nystuen, *Response to Criticism Concerning the Exclusion of Companies from the Norwegian Government Pension Fund*, DAGENS NÆRINGSLIV, Sept. 11, 2006.

> and documented. It is much more difficult to respond to, or counter, vague allegations or rumors.[63]

The response was suggestive of the unusual nature of the Council on Ethics. Technically it is not a legal tribunal bound by rules of due process; technically it focuses on the risk of complicity on the part of the fund rather than proof of allegations against a given company. In practice, however, it has justified its decisions on quasi-legal grounds, establishing precedent and following or distinguishing prior decisions; it has also adopted a quasi-adversarial procedure, allowing companies the opportunity to know allegations and respond to them, though without the full trappings of legal process. This begs the question of whether the Council is properly seen as an ethical or legal body, a point to which we will return in Part IV.

II. LEGAL AND NON-LEGAL APPROACHES TO REGULATING MULTINATIONAL CORPORATIONS

Regulating the activities of corporations that operate across national borders poses a challenge to the international legal order, which is premised on the centrality of states. The largest multinationals dwarf the economies of many countries; frequently they are also able to mobilize greater political influence.[64] As the Council on Ethics noted in its *Exclusion of Wal-Mart* recommendation, Wal-Mart's annual turnover is larger than the GDP of 161 of the world's states.[65]

Nevertheless, efforts to analyze and delimit the international legal status of natural persons have had far more success than comparable efforts with respect to their juridical counterparts.[66] This is due in part to the longer history of prosecuting individuals. The Nuremberg Trials are the iconic example of this, but these built upon a tradition of individual responsibility at international law, most consistently with respect to pirates.[67] In addition, however, war criminal and *génocidaires* have fewer defenders in the governments of wealthy countries that frequently drive transformations in the law.

Evidence of this different treatment is found in the debates over whether to include corporations within the jurisdiction of the International Criminal Court. At the negotiations in Rome in 1998, the delegation of France pushed for inclusion of the criminal liability of "legal persons" or "juridical persons" on the basis that this would make it easier for victims of crimes to sue for restitution and compensation.[68] Differences in the forms of accountability of corporate entities across jurisdictions — where they existed at all — meant that consensus was impossible

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[63] *Id.*.

[64] For example, Texaco operated for years in Ecuador with annual global earnings four times the size of Ecuador's GNP and with the active support of the U.S. government. Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights*, 21 HUM. RTS. Q. 56, 58 (1999). *See also id.* at 65 (noting that many developing countries face transnational corporations with revenues many times larger than their domestic economies). *See further* Chesterman, *supra* note 2.

[65] Council on Ethics, Exclusion of Wal-Mart, *supra* note 54, §4.1.2.

[66] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 565 (5th ed. 1998).

[67] *Id.* 235-37.

[68] Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Roy S.K. Lee ed. 1999).

and the language was ultimately dropped.[69] The International Criminal Court was ultimately created,[70] but there is no comparable regulatory framework for corporations. Instead, six months after the Rome Statute was adopted, United Nations Secretary-General Kofi Annan proposed a "Global Compact," challenging business leaders to abide by principles on human rights, labor, and the environment that are essentially voluntary.[71]

In theory, of course, legal controls on the activities of a multinational corporation do exist. This Part will briefly review the possibility of holding a corporation to account before considering the impact of non-legal mechanisms on corporate behavior.

A. Regulation in the Local Jurisdiction

First, it is appropriate to regulate the activities of a corporation in the jurisdiction within which it is actually operating. Wrongs committed by multinational actors will generally occur within a given jurisdiction; primary responsibility for pursuing a remedy lies with the state in which the wrong occurs.[72] This is supported by a general principle in human rights and other conventions that states parties undertake "to respect and to ensure" certain rights.[73]

This will not always be effective, however. A state may be unable or unwilling to regulate the activities of an entity with far greater economic and political power than the institutions of government. In some cases, the government itself may be perpetrating abuses in which a corporation is complicit. In those situations it may be more appropriate or more effective to seek redress in other jurisdictions. The most obvious is to go to the jurisdiction in which the corporation has its base — and, as importantly, its assets.

B. Regulation in the Home Jurisdiction of a Multinational Corporation

Second, therefore, legal remedies may in some circumstances be pursued in the home jurisdiction of a multinational corporation — particularly when that jurisdiction is the United States. When it can be established that a corporation or its officers have violated the laws of the country in which it is incorporated or in which it maintains its registered offices, for example by engaging in practices that are proscribed even if they take place extraterritorially, bringing an action against the corporation in that home jurisdiction might be an attractive avenue.[74] This section will briefly consider one important barrier to such proceedings — the doctrine of *forum non conveniens* — and the most important means of avoiding it in the most important jurisdiction: the U.S. Alien Tort Claims Act.[75]

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[69] *Id.*; Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 779, 779 (Antonio Cassese ed. 2002).

[70] Statute of the International Criminal Court (Rome Statute), UN Doc. A/Conf.183/9 (July 17, 1998), *at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

[71] *See* United Nations, *The Global Compact: Overview*, *at* http://www.unglobalcompact.org.

[72] *See* Jochnick, *supra* note 64, at 65-66.

[73] *See, e.g.*, International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 2, para. 1, 999 U.N.T.S. 171, 173 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant").

[74] *See, e.g.*, Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399 (2002).

[75] 28 U.S.C. § 1350 (2001).

Forum non conveniens is a principle in the conflict of laws whereby a forum — in other words, a court — technically entitled to exercise jurisdiction over a matter may forgo its jurisdiction in favor of another forum that could entertain the case more conveniently.[76] In the *Bhopal* case,[77] for example, a pesticide plant in India run by the subsidiary of the U.S. company Union Carbide malfunctioned. Clouds of toxic gas were released, killing thousands and crippling many more.[78] India filed a civil suit in the U.S. federal courts against the parent company, alleging that it functioned in all material respects as the same enterprise as the Indian subsidiary and that relevant conduct occurred in the United States.[79] The trial judge accepted defendant's argument of *forum non conveniens*.[80] Soon after the U.S. proceedings were dismissed, a $500 million dollar settlement was brokered in under the auspices of the Indian Supreme Court — a large amount by Indian standards but far less than what a U.S. civil jury might have awarded.[81]

This approach was followed in subsequent cases in the United States until the late-1990s,[82] including a large number of cases against the extractive industry.[83] Wrongs alleged range from harm to the environment and harm to human health, to corporate complicity in physical brutality (including forced labor, torture, and slavery).[84] More recently, however, there is evidence of moves by courts to reduce the use of this doctrine in bad faith, such as making its invocation subject to an agreement actually to submit the claim to a court in the other jurisdiction.[85]

One way of avoiding these procedural hurdles in the United States is through recourse to the Alien Tort Claims Act, which has become central to the recent history of such proceedings against multinational corporations.[86] The act was originally intended to bring pirates to justice and was enacted in the first session of the U.S. Congress in 1789. It authorizes civil lawsuits in U.S. courts by aliens for torts committed "in violation of the law of nations or a treaty of the United States."[87] Rediscovered almost two centuries later in a case brought in the United States

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[76] *Forum non conveniens* rules are embodied in federal practice for the most part in the transfer provisions of 28 U.S.C. § 1404(a) (2001). *See generally* RONALD A. BRAND AND SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (2007).
[77] *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir. 1987).
[78] *Id.* at 844.
[79] *Id.* at 855-56.
[80] *Id.* at 865-67.
[81] *See* Craig Scott, *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 563, 588 (Asbjørn Eide, Catarina Krause, and Allan Rosas eds., 2001).
[82] *See, e.g.*, Gonzalez v. Chrysler Corp., 301 F.3d 377, 381-84 (5th Cir. 2002); Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1529 (D. Minn. 1996); Ernst v. Ernst, 722 F. Supp. 61, 64-68 (S.D.N.Y. 1989).
[83] *See, e.g.*, Torres v. S. Peru Copper Corp., 965 F. Supp. 899 (S.D. Tex. 1996). More recently the fashion in litigation has tended towards apparel and footwear companies, reflecting the somewhat arbitrary manner of case selection on the basis of popular opinion. *See, e.g.*, Kaepa, Inc. v. Achilles Corp., 76 F.3d 624 (5th Cir. 1996).
[84] Sequihua v. Texaco, Inc., 847 F.Supp. 61, 65 (S.D. Tex. 1994); Aquinda v. Texaco, Inc., 945 F.Supp. 625, 628 (S.D.N.Y. 1996); Ashanga v. Texaco, S.D.N.Y. Dkt. No. 94 Civ. 9266 (Aug. 13, 1997).
[85] Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002). *See further* Chesterman, *supra* note 2, at 317-18.
[86] *See* Alex Markels, *Showdown for a Tool in Human Rights Lawsuits*, N.Y. TIMES, June 15, 2003, C11.
[87] 28 U.S.C. § 1350 (2001).

by Paraguayan citizens against a former Inspector General of Police in Paraguay, the procedure is unique to the United States.[88]

Alien Tort actions were largely thought of as symbolic as no judgment has yet been enforced, but in 2005 Unocal settled an action that had been brought against it alleging that it used forced labor in Myanmar.[89] Ironically, this sole example of the Alien Tort Claims Act leading to money changing hands corresponds to the factual situation in which the Council on Ethics issued its only recommendation for *non*-exclusion of a specific company, in the case of Total's operations in Myanmar.[90]

C. International Law

International law may, in some circumstances, provide a third arena in which legal remedies may be pursued, particularly through the emerging discourse of international criminal law. Some international crimes may be committed by individuals: for example, piracy (including aircraft hijacking), enslavement (including forced labor), genocide, war crimes, and crimes against humanity.[91] Other crimes may be committed only by states.[92] It has been accepted at least since the war crimes trials after the Second World War that individuals may be held accountable for acts undertaken through corporations.[93] A more controversial possibility is that corporations themselves may be held liable.

In general, international criminal prosecution has tended to pursue the individual. As the Nuremberg Tribunal observed, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[94] The court was referring to the danger of allowing individuals to hide behind the veil of the state, but the principle might be seen as applying equally to the corporate veil. Nevertheless, establishing the liability of a corporation itself may be appropriate, especially if the organizational structure made it difficult to establish the criminal responsibility of a particular individual. In practice, however, this area of international law remains of academic rather than practical interest.[95]

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[88] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[89] Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005 (monetary terms of the settlement were not made public, but a statement released by both sides said the agreement would compensate villagers and provide money "to develop programs to improve living conditions, healthcare and education and protect the rights of people from the pipeline region").

[90] Council on Ethics, Recommendation on Total, *supra* note 58.

[91] *See* BROWNLIE, *supra* note 66, at 565-68.

[92] *See generally id.* 435-78 (discussing the responsibilities and obligations of states).

[93] *See, e.g.*, United Kingdom v. Tesch et al. ("The Zyklon B Case") 1 I.L.R. 93 (UN War Crimes Comm'n, Brit. Milit. Ct., Hamburg 1946).

[94] 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (William S. Hein, 1995) (1947).

[95] Conceptual problems once seen as a bar to corporate criminal liability in domestic law now largely have been overcome. Traditional reservations arose from the nature of a corporate entity being a creature of law with no physical existence and the difficulty of establishing the requisite *mens rea* to attribute criminal liability. *See, e.g.*, Lennard's Carrying Co. v. Asiatic Petroleum Co., Law Reports 705, 713 (A.C. 1915). One leg of this bar to corporate responsibility specifically concerned the penalty that could be imposed following conviction. Clearly, a crime punishable only by imprisonment (or death) hardly could be attributed to a corporation without a substantial change to our conception of sentencing. Rex v. I.C.R. Haulage, Ltd., 1944 K.B. 551, 554. The absence of an alternative penalty to imprisonment is arguably still a bar to convicting a corporation of murder in some jurisdictions. *See, e.g.*, Chris Corns, *The Liability of Corporations for Homicide in Victoria*, 15 CRIM. L.J. 351, 354

D. *Voluntary Codes*

A few days after the Rome Statute of the International Criminal Court was adopted in July 1998, the *Financial Times* published an article warning that the accomplice liability provisions in the treaty "could create international criminal liability for employees, officers and directors of corporations."[96] This was technically true, but the failure to include the liability of juridical persons within the Court's jurisdiction and the likely difficulties of establishing individual guilt on the part of corporate officers mean that the breathless tone was somewhat exaggerated.

Six months later, at the 1999 World Economic Forum in Davos, UN Secretary General Kofi Annan proposed the Global Compact.[97] The Compact is not a regulatory instrument — it does not "police," enforce, or measure the behavior or actions of companies.[98] Instead, it relies on "public accountability, transparency and the enlightened self-interest of companies, labor and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based."[99]

The emergence of this and other codes of conduct that are essentially voluntary is an acknowledgement of the inadequacy of efforts to protect the environment, human rights, and labor standards through traditional governmental and intergovernmental regulation. It also reflects the preference of many governments, particularly those in the industrialized world, for minimal regulation generally. In such an economic environment, many governments opt for voluntary undertakings on the part of companies themselves, perhaps supplemented through market mechanisms, over legislation to compel companies to comply with particular standards — and perhaps putting them at a competitive disadvantage with respect to their global competitors.[100]

(1991). A second consideration relates to certain crimes which are considered to be of such a nature that only a human could commit them (e.g., sexual offenses, bigamy, and, arguably, perjury); *See, e.g.,* Dean v. John Menzies (Holdings) Ltd., 1981 J.C. 23, 35 (1980) (Lord Stott). These and related issues have tended to be overcome as problems of proof rather than of philosophy. *See, e.g.*, New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909) (holding that an agent's culpable mental state can be imputed or directly attributed to the corporation and that the prosecution must prove only that an illegal act was committed by an employee within the scope of employment, with an intent to benefit the corporation); People v. Reagan, 94 N.Y.2d 804 (App. Div. 1999) (holding that a corporation and its president were not criminally liable for workers' deaths where the plaintiffs could not prove that deaths were foreseeable). *See generally* WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS*, 43 EMORY L.J. 648 (1994).

There is modest support for such an approach at international law. The 1993 Security Council resolution establishing a sanctions regime against UNITA in Angola is of interest for two reasons. First, it imposed an oil and arms embargo against a non-state entity — the rebel group UNITA. S.C. Res. 864 (1993). Second, however, the Council called upon states "to bring proceedings against persons *and entities* violating the measures imposed by this resolution and to impose appropriate penalties." *Id.* para. 21. Nevertheless, the greatest enthusiasm for pursuing such avenues is exhibited by those furthest from policy influence. *See further* Saland, *supra* note 68, at 199; Eser, *supra* note 69, at 779.

[96] Maurice Nyberg, *At Risk from Complicity with Crime*, FINANCIAL TIMES, July 27, 1998, 15.

[97] *See The Global Compact: Overview*, *supra* note 71.

[98] *Id.* The emerging literature on "global administrative law" provides an overview of non-traditional regulatory regimes. *See, e.g.,* Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Richard B. Stewart, *US Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63 (2005); Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law,* GLOBAL GOVERNANCE forthcoming (2008).

[99] *See The Global Compact: Overview*, *supra* note 71.

[100] *See* Jochnick, *supra* note 64, 67-68.

Such codes are, therefore, essentially marketing tools, but this is hardly unusual.[101] The Alien Torts Claims Act has been influential despite the practical impossibility of enforcing judgments. It played an important role, for example, in encouraging companies to contribute to the "voluntary" slave labor fund in Germany.[102] Actions against Unocal for its activities in Myanmar were also intended to put pressure on the military government; there is some evidence that the lawsuits also influenced U.S. policy towards that military government.[103] In the absence of a global enforcement regime, such tactical litigation is most effective when combined with broader norm-generating activities. In its application to multinational corporations, this is presently an early state of development. A voluntarist regime may not seem to be the most efficient means of advancing this cause, but an analogy may be drawn with the development of international law, which is itself not far removed from voluntarism.[104]

An optimistic analogy might also be drawn with the emergence of human rights in Eastern Europe. In 1975, the Conference on Security and Cooperation in Europe's Final Act of the Helsinki Conference included human rights provisions that were, at the time, derided as laughably unenforceable.[105] Despite the scorn of western international relations scholars, dissidents were later able to co-opt the language of such documents to call for union rights in Poland, glasnost in Russia, and, after 1989, multi-party elections.[106] These weak norms provided a language for the articulation of rights that later transformed societies. It would be overly optimistic to suggest that corporate social responsibility is laying similar foundations for regulation of multinational corporations, but it is possible that regimes such as the Global Compact, "enforced" through mechanisms such as the Council on Ethics, is at least changing the language.

III. ETHICS, COMPLICITY, AND RESPONSIBILITY

Though the Council on Ethics is not a court and its recommendations do not have the force of law, it swiftly assumed a legal character. Through careful interpretation of its mandate, evaluation of evidence, and justification of decisions, the recommendations resemble judgments

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[101] One of the best known sets of standards may be those promulgated by the International Organization for Standardization (ISO). The ISO 14000 family is primarily concerned with "environmental management," covering standards intended to minimize harmful effects on the environment caused by its activities. "ISO 9000 and ISO 14000 - In Brief," at http://www.iso.org/iso/en/iso9000-14000/understand/inbrief.html. *See also* Jennifer Clapp, *The Privatization of Global Environmental Governance: ISO 14000 and the Developing World*, 4 GLOBAL GOVERNANCE 295 (1998). For a discussion of "SA8000," developed by Social Accountability International (SAI), which focuses on managing ethical workplace conditions throughout global supply chains, *see* Deborah Leipziger and Eileen Kaufman, *SA 8000: Human Rights in the Workplace*, *in* BUSINESS AND HUMAN RIGHTS 197 (Rory Sullivan ed. 2003).

[102] *See* Michael J. Bazyler, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 613-17 (2000); *see also* Roger Cohen, *German Companies Adopt Fund for Slave Laborers Under Nazis*, N.Y. TIMES, Feb. 17, 1999.

[103] *See* Jim Lobe, *U.S.-Burma: Sanctions Campaign Keeps Rolling*, IPS-INTER PRESS SERVICE, May 15, 1997.

[104] *See generally* MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW (1999).

[105] DANIEL C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM 244-55 (2001).

[106] Michael Ignatieff, *Human Rights, Power, and the State*, *in* MAKING STATES WORK: STATE FAILURE AND THE CRISIS OF GOVERNANCE 59, 62 (Simon Chesterman, Michael Ignatieff, and Ramesh Thakur eds., 2005).

of a rudimentary court of first instance — rudimentary not because of the quality of the reasoning but because of the limited resources available to make independent findings of fact, and the absence of discipline imposed by the possibility of formal appeal. The decisions are ultimately administrative recommendations, yet the nature of the ethical judgments being made and the dispositions of the individuals making them has led to a kind of jurisprudence of ethics.

Though the Ethical Guidelines do not mention the word, the touchstone of this jurisprudence has been the notion of "complicity." The term was used in the Graver Report to explain the reasons why investment in a company may itself raise human rights concerns:

> Even though the issue of complicity raises difficult questions, the Committee considers, in principle, that owning shares or bonds in a company that can be expected to commit grossly unethical actions may be regarded as complicity in these actions. The reason for this is that such investments are directly intended to achieve returns from the company, that a permanent connection is thus established between the Petroleum Fund and the company, and that the question of whether or not to invest in a company is a matter of free choice.[107]

This and other fairly broad references to complicity were not elaborated. By its fifth and sixth recommendations, however, the Council on Ethics was using complicity to define the human rights obligations relevant to its decisions. In the *Recommendation on Total*,[108] quoted again in the *Exclusion of Wal-Mart*,[109] the idea of complicity is introduced.[110] Whereas complicity had previously been understood in terms of explaining Norway's ancillary responsibility for wrongs through investment of its resources, complicity was now invoked to justify the reference to human rights treaties that apply in a formal sense only to states:

> Only states can violate human rights directly. Companies can, as indicated in paragraph 4.4 [of the Ethical Guidelines], contribute to human rights violations committed by states. The Fund may in its turn contribute to companies' complicity through its ownership. It is such complicity in a state's human rights violations which is to be assessed under this provision.[111]

This is, of course, partly correct but conflates the ethical and legal conceptions of complicity: a company may indeed contribute to a violation, but this is quite separate from the legal notion of complicity as a form of ancillary responsibility.[112] The reason only states can violate human rights in the sense of rights protected by treaty is that the parties to those treaties are *states*. Individuals (arguably including juridical as well as natural persons[113]) can violate international criminal law, either directly or through ancillary offences,[114] but the insertion of complicity in these two ways — both explaining the company's and Norway's relationship to the alleged violation — seems confusing, unnecessary, and unhelpful.

Confusion arises from the multiple ways in which complicity is simultaneously invoked — as ethical and legal principle, as applicable to company and to the fund itself (and thereby to Norway).[115] Its use derives in part from Principle Two of the Global Compact, which provides

[107] Graver Committee Report, *supra* note 22, §2.2.
[108] Council on Ethics, Recommendation on Total, *supra* note 58.
[109] Council on Ethics, Exclusion of Wal-Mart, *supra* note 54.
[110] There was also passing reference to complicity in Council on Ethics, Recommendation on Spider and IMS, *supra* note 57.
[111] Council on Ethics, Recommendation on Total, *supra* note 58, §3.1.
[112] *See generally* CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE (2000).
[113] *See supra* note 95 and accompanying text.
[114] In 2003, for example, the International Criminal Tribunal for Rwanda convicted Laurent Semanza of complicity in genocide. Prosecutor v. Laurent Semanza (ICTR, Judgment, May 15, 2003) Case No. ICTR-97-20-T (2003), *at* http://www.ictr.org.
[115] In the *Exclusion of Freeport McMoRan*, for example, the Council considered its first exclusion of a company on

that "Businesses should make sure they are not complicit in human rights abuses."[116] The Global Compact itself acknowledges the difficulty of defining complicity, outlining three distinct meanings relevant to businesses:

> **Direct Complicity**
> Occurs when a company knowingly assists a state in violating human rights. An example of this is in the case where a company assists in the forced relocation of peoples in circumstances related to business activity.
> **Beneficial Complicity**
> Suggests that a company benefits directly from human rights abuses committed by someone else. For example, violations committed by security forces, such as the suppression of a peaceful protest against business activities or the use of repressive measures while guarding company facilities, are often cited in this context.
> **Silent complicity**
> Describes the way human rights advocates see the failure by a company to raise the question of systematic or continuous human rights violations in its interactions with the appropriate authorities. For example, inaction or acceptance by companies of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender could bring accusations of silent complicity.[117]

Direct and beneficial complicity are clearly intended to be covered by the Ethical Guidelines, but the notion of "silent complicity" would appear to go well beyond those guidelines, which requires some form of contribution to a wrongful act. This was partly acknowledged by the Council when it distinguished purely "passive complicity" as it is understood in Norwegian criminal law from situations where a defendant knows that such passivity assists the main perpetrator's commission of the criminal act.[118] Again, however, the importing of criminal law concepts to delimit ethical responsibility blurs the nature of the inquiry — among other things undermining assertions by the Council that it does not need to prove the existence of a human rights violation or other wrong to recommend exclusion of a company.

Reference to complicity is unnecessary, in any case. As indicated earlier, the Ethical Guidelines do not mention complicity.[119] And, indeed, in formulating criteria for the exclusion of a company, the Council on Ethics itself included the term only in passing:

> Based on the preparatory work to the guidelines the Council accepts as a fact that the Fund, through its ownership interests in companies, can be said to contribute to companies' complicity in states' human rights violations. The guidelines are principally concerned with *existing* and *future* breaches of the ethical guidelines, although earlier breaches might give an indication of future conduct. The point is that there must exist an unacceptable risk of breaches taking place in the future. Complicity includes actions carried out to protect or to facilitate the company's activities, and refers to circumstances which are under the company's control or circumstances which the company could have been in a position to countervail or to prevent. Based on the guidelines' preparatory work, the Council lists the following criteria which constitute decisive

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the basis that "the Fund contributes to … Severe environmental damage." Ethical Guidelines, *supra* note 33, §4.4. The Council observed, confusingly, that it "assumes that the Fund, through its ownership interests in companies, can be said to contribute to companies' complicity in severe environmental damage." Council on Ethics, Exclusion of Freeport McMoRan, *supra* note 55, §2.4.

[116] Ten Principles, *supra* note 24, Principle 2.

[117] *Id.*, Principle 2.

[118] Council on Ethics, Recommendation on Total, *supra* note 58, §3.2 (citing ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 165 (2003)).

[119] *See supra* note 107 and accompanying text.

elements in an overall assessment of whether there exists an unacceptable risk of the Fund contributing to human rights violations:

- There must exist some kind of linkage between the company's operations and the existing breaches of the guidelines, which must be visible to the Fund.
- The breaches must have been carried out with a view to serving the company's interests or to facilitate conditions for the company.
- The company must either have contributed actively to the breaches, or had knowledge of the breaches, but without seeking to prevent them.
- The norm breaches must either be ongoing, or there must exist an unacceptable risk that norm breaches will occur in the future. Earlier norm breaches might indicate future patterns of conduct.[120]

These four criteria make clear the pragmatic approach that is to be adopted, focusing on the risk of *contributing to* a potential violation rather than being *complicit in* a wrong. The distinction is comparable to that between a risk assessment for the purpose of insurance estimation or intelligence analysis, and evidence produced in a criminal trial. In the first case, no formal judgment is made about the propriety of the conduct being examined and the focus is on the significance of that risk analysis — for present purposes its significance for the fund.

For this reason, reference to complicity also appears to be unhelpful because it imports a quasi-legal standard that runs the risk of setting too high a threshold for exclusion, or else implicitly asserting that a wrong has been perpetrated without the obligation to prove that it has. This is an understandable response to the problem of holding multinationals to account, described in Part II. But the Council does not provide an adequate alternative forum to supplement such legal forms of accountability — if it pursued the complicity line to its natural conclusion, the Council would not merely depart from its position that the recommendations are not judgments of the company in question — it would also be making a judgment about every other investor in that company.

The foundational problem appears to be the theoretical sleight of hand that made creation of the Council possible. In contrast to the active ownership rights that are to be exercised by Norges Bank, reflecting the teleological ethical framework that seeks to bring about good outcomes, the Council embodies the deontological school of ethics that seeks to do that which is right, or to avoid doing that which is wrong. In practice, however, deontology has imported law to justify determinations of right and wrong, with the result that the Council has focused on the unacceptable risk of contributing to a *legal* wrong. This substantially narrows its ability to protect Norway from complicity in conduct that is not *ethical*, but demonstrates the difficulty of keeping law, ethics, and politics distinct.

IV. LAW, ETHICS, AND POLITICS

The virtue of law as a means of regulating behavior is clarity; the virtue of politics is flexibility. The principled use of disinvestment stems from an ethical commitment on the part of Norway to avoid participation in a wrong, but exercise of that discretion has demonstrated a discomfort with doing so on what might be seen as an arbitrary basis. One mechanism through which the Council

[120] Council on Ethics, Recommendation on Total, *supra* note 58, §3.3.

has sought to avoid arbitrariness is through reference to "complicity." A second manifestation of arbitrariness is less obvious and yet may be, in the end, even desirable.

Quite apart from the uncertain use of complicity as a touchstone of exclusion, discussed earlier, a second set of concerns relate to the link between the "*unacceptable risk* that the Fund contributes to … violations"[121] and an implication of a need to prove actual or potential causation:

> The acts or omissions must constitute "an unacceptable risk of (the Fund) contributing to…". This means that it is not necessary to prove that such contribution will take place — the presence of an unacceptable risk suffices. The term unacceptable risk is not specifically defined in the preparatory work. NOU (Norwegian Official Report) 2003: 22 states that "Criteria should therefore be established for determining the existence of unacceptable ethical risk. These criteria can be based on the international instruments that also apply to the Fund's exercise of ownership interests. Only the most serious forms of violations of these standards should provide a basis for exclusion." In other words, the fact that a risk is deemed unacceptable is linked to the seriousness of the act.
>
> The term risk is associated with the degree of probability that unethical actions will take place in the future. The NOU states that "the objective is to decide whether the company in the future will represent an unacceptable ethical risk for the Petroleum Fund." The wording of paragraph 4.4 makes it clear that what is to be assessed is the likelihood of contributing to "present and future" actions or omissions. The Council accordingly assumes that actions or omissions that took place in the past will not, in themselves, provide a basis for exclusion of companies under this provision. However, earlier patterns of conduct might give some indications as to what will happen ahead. Hence it is also relevant to examine companies' previous practice when future risk of complicity in violations is to be assessed.[122]

The Council thereby also avoided defining unacceptable risk, but qualified its examination by finding that acceptability is linked to the gravity of the harm — thus a one percent chance of arbitrary killing might be less acceptable than, say, a thirty percent chance of arbitrary detention.

In addition to the components of probability and gravity, however, there is a third implicit variable: unacceptable *to whom*? This is distinct from the general question of what ethical framework is adopted as it relates not merely to the determination of wrongs but to the tolerance for risk. The answer would appear to be linked to Norwegian sensibilities as well as to market constraints. To be absolutely certain of avoiding complicity in any wrong Norway could disinvest from *all* companies. This would clearly be unsatisfactory — and would undermine key economic functions that the fund is intended to play.[123] It would also be self-defeating if that line were drawn at the other extreme of precluding investment only where actual proof of a legal wrong could be established.

It is, nevertheless, important to draw a line somewhere and it is possible to do so in a non-arbitrary way. As the Council demonstrated in *Freeport*, certain harms can be ranked and the unacceptable probability determined accordingly.[124] The problem lies in how that line is

[121] Ethical Guidelines, *supra* note 33, §4.4.
[122] Council on Ethics, Recommendation on Total, *supra* note 58, §3.1.
[123] *See supra* notes 16-17 and accompanying text.
[124] Council on Ethics, Exclusion of Freeport McMoRan, *supra* note 55, §2.2 ("the company's acts or omissions must constitute an *unacceptable risk* of the Fund contributing to severe environmental damage (point 4.4). The preparatory work preceding the Guidelines does not explicitly define the term 'unacceptable risk', but states that: *'Criteria should be established for determining the existence of unacceptable risk. These criteria can be based on the international instruments that also apply to the Fund's exercise of ownership interests. Only the most serious forms of violations of these standards should provide a basis for exclusion.'* Hence, the unacceptability of the risk is

justified to the company in question, and to third parties who may be adversely affected by the decision to disinvest. If one abandons complicity as a tool for justifying disinvestment on the basis that the company and all other investors must also be said to be complicit in the wrong, how is that line to be justified?

This became a particular issue in the case of the fund's disinvestment from Wal-Mart.[125] The decision drew a sharp protest from the U.S. ambassador, Benson K. Whitney, who accused Norway of a sloppy screening process and unfairly singling out U.S. companies.[126] In a subsequent speech to the Norwegian Institute of International Affairs, he outlined a more nuanced critique:

> I respectfully ask the Norwegian government and people to fully recognize the seriousness of what Norway is doing with divestment decisions like these. Norway is not just selling stock — it is publicly alleging profoundly bad ethical behavior by real people. These companies are not lifeless corporate shells. They represent millions of hard working employees, thousands of shareholders, managers and Directors, all now accused by Norway of actively participating in and supporting a highly unethical operation. The stain of an official accusation of bad ethics harms reputations and can have serious economic implications, not just to the company and big mutual funds, but to the pocketbooks of workers and small investors.[127]

These accusations are not without merit. Indeed, the practice of disinvesting prior to making decisions public[128] implicitly acknowledges the harm that disinvestment will cause. One solution would be to avoid public justification altogether. If the purpose of the Council on Ethics is genuinely and solely to reduce the risk of Norwegian complicity in unethical activities, it could make disinvestment recommendations secretly, implemented with discretion by the Norges Bank as part of the regular trading undertaken by its investment arm.[129] There might be speculation as to why the fund is moving assets, but as the fund is limited to owning at most five percent of the voting rights in any one company[130] this is unlikely to have major consequences. If the Council on Ethics eschews disinvestment either as a tool to change behavior[131] or as a form of punishment,[132] the need for public scrutiny of such decisions is not justified as an element of natural justice: if a company is not being penalized or accused directly of wrongdoing, it has no right to hear charges against it or be given an opportunity to rebut them.

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linked to the seriousness of the act and how severe the environmental damage is.").

[125] Council on Ethics, Exclusion of Wal-Mart, *supra* note 54.

[126] Mark Landler, *Norway Keeps Nest Egg From Some U.S. Companies*, N.Y. TIMES, May 4, 2007.

[127] Benson K. Whitney, *Pension Fund Divestment: Meeting Norwegian Fairness Standards?* (Oslo, Norway, Norwegian Institute of International Affairs (NUPI), Sept. 1, 2006), *at* http://norway.usembassy.gov/embassy/ambassador/speeches/disinvestment.html.

[128] *See supra* note 40 and accompanying text.

[129] Norges Bank Investment Management (NBIM) is responsible for investing the fund's international assets.

[130] Regulations on Management of the Government Pension Fund – Global, Laid down by the Ministry of Finance on Dec. 22, 2005 pursuant to the Government Pension Fund Act (no. 123 of Dec. 20, 2005), §6, *at* http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/Management_of_the_government_pension_fund.pdf.

[131] *See supra* note 36 and accompanying text.

[132] Graver Committee Report, *supra* note 22, §2.2 ("A third ethical perspective emphasises retribution. Evil actions should be punished, doing good should be rewarded. In the view of the Committee, striving to achieve justice by using the Fund to penalise or reward is beyond the obligations that should be imposed on the Fund. In practical terms, this means that the Committee will not propose an approach whereby the Fund withdraws its investment from a company that has acted unethically in response to the unethical action. It is the opinion of the Committee that if the Fund withdraws its investment, it must do so because withdrawal is considered necessary to avoid complicity in unethical actions in the future.").

Secrecy is proposed here only hypothetically — apart from anything else, public scrutiny of how Norwegian public funds are invested is appropriate — but is intended to highlight that the Council on Ethics should not be seen as a substitute for a legal regime that *is* intended to change the behavior of multinational corporations. Indeed, there is a danger that Norway, a good global citizen, may feel that by adopting these guidelines it is doing "its bit" to promote good corporate behavior. It may well be doing more than most countries, but the structure of the disinvestment regime is clearly intended to be more of a political framework than a legal regime, and with domestic rather than international consequences.

An alternative, also proposed hypothetically, would be to use this political framework explicitly to change behavior of multinationals. If one takes seriously the international impact of Council recommendations, the real influence lies not in the nominal punishment of disinvestment, but the *threat* of disinvestment and the possibility of further investment. In other words, whereas the law typically operates as a stick, Norway's oil wealth may be more appropriately used as a carrot. At it most extreme, one could conceive of an effort to link the Council's work with the active ownership rights exercised by the Norges Bank: when confronted with a company operating unethically, one way of changing its behavior would be not to sell but to *buy*.[133]

V. CONCLUSION

The appearance of regulation may, in some circumstances, be worse than no regulation at all. The turn to ethics as a means of improving behavior 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.

The Norwegian Council on Ethics demonstrates both tendencies. The tendency to conceive its work in quasi-legal terms, justifying disinvestment decisions by reference to complicity in wrongs, suggests where its work may lead — even as those terms perhaps overstate how much has already been achieved. At the same time, however, the artifice of a trial in which a company's conduct is examined and judged without serious consequences may create the illusion of accountability and thus reduce the demand for actual change.

These tensions will, eventually, need to be resolved. How they are resolved will depend on whether the ethical precepts on which the Council bases its recommendations are dismissed as Scandinavian self-righteousness, in which case their publicity and wider significance are suspect, or as the precursor to a wider adoption of normative constraints on corporate entities operating in jurisdictions without the capacity to control their behavior. In the latter case, the Council's work may serve as this new regime's foundational jurisprudence.

[133] This is, of course, a highly unlikely scenario. Apart from the caps on investment in any one company (*see supra* note 130), the ability to acquire a controlling stake in a large company would strain the resources even of a large pension fund.

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