



**Sovereign Wealth Funds and the Quest for Sustainability:  
Insights from Norway and New Zealand**

by

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## 1 Introduction

An impressive trend in global financial markets is the growth of sovereign wealth funds (SWFs), some of which purport to invest ethically by considering the social and environmental impact of their financing. Yet, like private investors, these funds primarily view themselves as financial institutions interested in enhancing investment returns. A significant tension, therefore, may emerge between the ethical and financial expectations of SWFs. This article investigates two contrasting cases, the Norwegian Government Pension Fund - Global (NGPF-G) and the New Zealand Superannuation Fund (NZSF), in order to evaluate how they address any tensions between being both virtuous and prosperous. These SWFs have legislative mandates to invest ethically, and have been hailed by some researchers as having among the most progressive approaches in this area.<sup>1</sup> But neither fund yet manages its entire portfolio comprehensively to promote sustainable development.

Increasingly, nation-states are establishing SWFs in a trend that seemingly defies an era in which many governments have sought to deregulate or otherwise limit their hand in the market.<sup>2</sup> In their governance, formally SWFs are public institutions but functionally they are generally expected to be private actors. They invest large pools of state-owned assets in the market to meet macro-economic policy objectives,<sup>3</sup> such as to buffer the sponsoring state's budget and economy against swings in international markets, or to build savings to meet future financial burdens such as pension payments. SWFs are typically funded through either commodity-based earnings, such as from a country's natural resources sector, or by non-commodity-based resources, such as foreign exchange reserves and general taxation revenue.<sup>4</sup> The NGPF-G is a commodity-based fund, built on Norway's large oil reserves, while the NZSF is supported by non-commodity financing.

Such concentration of wealth has made SWFs, an institutional phenomenon that began in the mid-1950s, influential actors in the global economy.<sup>5</sup> According to the Sovereign Wealth Fund

<sup>1</sup> United Nations Environment Program - Finance Initiative (UNEP-FI) Asset Management Working Group and UK Social Investment Forum (UKSIF), *Responsible Investment in Focus: How Leading Public Pension Funds are Meeting the Challenge* (UNEP-FI, 2007), 7.

<sup>2</sup> Ashby H.B. Monk, *Sovereignty in the Era of Global Capitalism: The Rise of Sovereign Wealth Funds and the Power of Finance* (School of Geography, Oxford University, 2010); Roland Beck and Michael Fidora, "The Impact of Sovereign Wealth Funds on Global Financial Markets," *Intereconomics* (2008) 43(6): 349.

<sup>3</sup> Adrian Blundell-Wignall, Yu-Wei Hu and Juan Yermo, "Sovereign Wealth and Pension Fund Issues," *OECD Working Papers on Insurance and Private Pensions* (2008) 14: 4.

<sup>4</sup> Rumu Sarkar, "Sovereign Wealth Funds as a Development Tool for ASEAN Nations: From Social Wealth to Social Responsibility," *Georgetown Journal of International Law* (2010) 41: 621, at 623.

<sup>5</sup> *Ibid.*, 631.

Institute, as of May 2011 there were 52 SWFs worldwide, with assets of some US\$4.3 trillion.<sup>6</sup> A recent survey by the Monitor Group, published in July 2011, put Norway's SWF as the largest (with US\$560 billion in assets), while New Zealand's was ranked 20th (valued at US\$15.8 billion).<sup>7</sup> With SWFs' assets expected to at least double within the next decade,<sup>8</sup> and growing awareness of their economic clout and capacity to project state political power, international efforts to create voluntary behavioural codes for such funds have grown. The principal achievement to date is the Santiago Principles,<sup>9</sup> which emphasise transparency, clarity, and equivalent treatment with private funds similarly operated.

In addition to these issues, the socially conscious goals of some SWFs has stirred debate about the wisdom of mixing ethical investment with wealth maximisation goals, and attempting to influence corporate social and environmental behaviour.<sup>10</sup> SWFs share several characteristics which might lead them more than private sector financiers to invest in sustainable development. Their ownership or control by a state can enmesh them in the machinery of government, and thereby render them instruments of public policy. Further, because of their sheer size and government backing, SWFs tend to have higher risk tolerances and might therefore bear investment strategies eschewed by private financiers. Thirdly, SWFs tend to have longer-term financial considerations than the private sector, which may encourage investing that is mindful of threats such as climate change.

However, few states so far have obliged SWFs to invest ethically. While regulations to encourage socially responsible investment ("SRI," as ethical investment is sometimes known) in the private sector are appearing, such as taxation incentives and corporate governance reforms, explicit duties to practice SRI have only been imposed on public financial institutions.<sup>11</sup> The first precedents were adopted in the 1980s by some states and municipalities in the United States, which restricted government pension funds from investing in firms operating in the

<sup>6</sup> Sovereign Wealth Fund Institute, <http://www.swfinstitute.org>.

<sup>7</sup> Monitor Group, "SWF Assets Under Management" (7 July 2011), <http://www.monitor.com/tabid/202/L/en-US/Default.aspx>. In local currency, the NZSF valued its assets as NZ\$18.8 billion in March 2011 (see <http://www.nzsuperfund.co.nz/index.asp?PageID=2145855927>), while the NGPF-G valued its at NOK 3,007 trillion (Norges Bank Investment Management (NBIM), *Annual Report 2010* (NBIM, 2010), 1).

<sup>8</sup> International Monetary Fund, "Norway's Oil Fund Shows the Way for Wealth Funds," *IMF Survey Magazine: Policy* (9 July 2008).

<sup>9</sup> International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds, Generally Accepted Principles and Practices: Santiago Principles* (October 2008), available at <http://www.iwg-swf.org/pubs/gapplist.htm>.

<sup>10</sup> Gordon L. Clark and Ashby Monk, "The Norwegian Government Pension Fund: Ethics Over Efficiency," *Rotman International Journal of Pension Management* (2010) 3(1): 14, 17; Larry C. Backer, "Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment," *Georgetown Journal of International Law* (2010) 41(2): 425.

<sup>11</sup> Benjamin J. Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (Oxford University Press, 2008), 303-75.

discriminatory milieu of South Africa<sup>12</sup> or Northern Ireland.<sup>13</sup> Since 2000, the SWFs of Sweden, Norway, New Zealand and France have been subject to legislative direction to invest ethically, with more comprehensive and ambitious obligations than the American precedents.

Ethical investment by SWFs is controversial. Some observers believe that investment should be based only on economic and financial grounds and, especially in the case of SWFs, there is further concern that SRI could be a means for sponsoring states to insinuate their social and environmental policies globally.<sup>14</sup> For instance, a 2009 survey of 146 asset managers having routine dealings with SWFs reported that most “did not think governments should have any influence over investment decisions despite the fact that SWFs are managing governments’ money.”<sup>15</sup> But such concerns misunderstand the changing rationale and aims of SRI.

A long-standing movement that once had few adherents,<sup>16</sup> SRI is attracting investors who are reassessing the financial relevance of social and environmental behaviour. No longer is SRI pursued largely as a matter of ethical compulsion, as in the 1970s divestment campaign led by religious groups against South Africa’s apartheid regime,<sup>17</sup> and their earlier admonitions against investment in tobacco, alcohol and other “sin” stocks.<sup>18</sup> Rather, many social investors today, in both the institutional and retail sectors, take a more comprehensive view of business conduct through the lens of sustainable development.

Sustainable development (or “sustainability” as the concept is sometimes known) is an ideal widely endorsed in theory as a goal of states, international bodies and businesses, and has been enshrined as an objective of the European Union treaty.<sup>19</sup> It seeks to curb unfettered economic

<sup>12</sup> Patricia McCarroll, “Socially Responsible Investment of Public Pension Funds: The South Africa Issue and State Law,” *Review of Law and Social Change* (1980-81) 10: 407; Grace Jubinsky, “State and Municipal Governments React Against South African Apartheid,” *University of Cincinnati Law Review* (1985) 54: 453.

<sup>13</sup> See Christopher McCrudden, “Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?” *Oxford Journal of Legal Studies* (1999) 19(2): 167; Neil J. Conway, “Investment Responsibility in Northern Ireland: The MacBride Principles of Fair Employment,” *Loyola of Los Angeles International and Comparative Law Review* (2002) 24: 1.

<sup>14</sup> Clark and Monks, *supra* note 10; Backer, *supra* note 10.

<sup>15</sup> Gordon L. Clark and Ashby Monk, “The Oxford Survey of Sovereign Wealth Funds’ Asset Managers,” (School of Geography and the Environment, University of Oxford, 2009), 1.

<sup>16</sup> In Western Europe and North America, some surveys estimate that between 10 to 20% of all investment portfolios are now managed for ethical, social and environmental purposes, although these surveys use very broad definitions and certainly over-estimate the amount of effective SRI: European Social Investment Forum (Eurosif), *European SRI Study* (Eurosif, 2010); *US Social Investment Forum (SIF), Socially Responsible Investing Trends in the United States* (SIF, 2010).

<sup>17</sup> Christopher Coons, “Divestment Steamroller Seeks to Bury Apartheid,” *Business and Society Review* (1986) 57: 90.

<sup>18</sup> Russell Sparkes, *Socially Responsible Investment: A Global Revolution* (John Wiley & Sons, 2002), 71.

<sup>19</sup> Art. 11, Consolidated Version of the Treaty on the Functioning of the European Union, O.J. C 83/47 (30 March 2010), (2008) O.J. C 115/47, states: “Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting

exploitation of nature by ensuring consumption of renewable resources within their rate of regeneration, limiting waste and pollution to the assimilative capacity of the biosphere, and conserving the biodiversity of the planet.<sup>20</sup> Some investors recognise the financial materiality of sustainability, such as when corporate polluters create financial risks or, conversely, firms pioneer innovative environmental technologies and services.<sup>21</sup> Although, often the nexus between environmental and financial returns is misunderstood or overlooked by financiers.

For large institutional investors, including SWFs, the sustainability imperative has mostly fluently been theorised through the concept of the “universal owner.” Hawley and Williams hypothesise that institutional investors who invest widely across the market will benefit financially by taking into account the social and environmental externalities in their portfolios.<sup>22</sup> As economy-wide investors, they should “have no interest in abetting behavior by any one company that yields a short-term boost while threatening harm to the economic system as a whole.”<sup>23</sup> Acting as a universal investor implies that any “externality” at the level of an individual company may result in a costly “internality” for an investor’s global portfolio.

Such sentiments have underpinned the proliferation of codes of conduct for SRI,<sup>24</sup> such as the United Nations Principles for Responsible Investment (UNPRI)<sup>25</sup> and the Equator Principles.<sup>26</sup> Although adherence to such benchmarks is ostensibly voluntary, they have garnered many signatories, including the NGPF-G and the NZSF, and thereby helped standardise and

sustainable development.” On the lack of consistency between the European Treaty and the level of secondary law in company and business law, see Beate Sjøfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law* (Kluwer Law, 2009).

<sup>20</sup> Herman Daly, “Toward Some Operational Principles of Sustainable Development” *Ecological Economics* (1990) 1: 1; Marie-Claire Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford University Press, 2005).

<sup>21</sup> Matthew J. Kiernan, *Investing in a Sustainable World: Why Green is the New Color of Money on Wall Street* (AMACOM Books, 2009). Such sentiments are reflected in reports of the influential United Nations Environment Programme – Finance Initiative (UNEP-FI), such as: *Show Me the Money: Linking Environmental, Social and Governance Issues to Company Value* (UNEP-FI Asset Management Working Group, 2006).

<sup>22</sup> James Hawley and Andrew Williams, *The Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic* (University of Pennsylvania Press, 2000).

<sup>23</sup> Stephen Davis, Jon Lukomnik and David Pitt-Watson, *The New Capitalists. How Citizen Investors are Reshaping the Corporate Agenda* (Harvard Business Press, 2006), 18.

<sup>24</sup> See Kate Miles, “Targeting Financiers: Can Voluntary Codes of Conduct for the Investment and Financing Sectors Achieve Environmental and Sustainability Objectives?” in *Critical Issues in Environmental Taxation, volume 5*, eds Nathalie Chalifour, et al. (Oxford University Press, 2008), 947; Deborah Leipziger, *The Corporate Responsibility Code Book* (Greenleaf Publishing, 2003).

<sup>25</sup> <http://www.unpri.org>.

<sup>26</sup> <http://www.equator-principles.com>.

disseminate SRI norms and practices.<sup>27</sup> Some interesting research has begun to measure the cost of environmental externalities to universal investors. A report prepared for the UNPRI Secretariat evaluated the price of environmental damage worldwide to which the companies in a representative investment portfolio contribute, and estimated these in 2008 to be US\$6.6 trillion or 11% of global GDP.<sup>28</sup> The report expects such costs by 2050 to grow to US\$28.6 trillion (18% of projected global GDP).<sup>29</sup>

The rest of this article takes up these themes by examining the SRI policies and practices of the Norwegian and New Zealand SWFs. In comparing how they attempt to reconcile their ethical and financial aspirations, the article highlights the importance of governance frameworks. While there are some salient differences in how each SWF is governed, each has, especially in their early years, focused on avoiding *complicity* in unethical conduct or social and environmental harm. This stance represented a rather narrow approach to ethical investment, which limited the capacity of these SWFs to promote environmentally sustainable development. More recently, both funds have begun to accept the business case for SRI, and reconceptualised ethical investment as a means of promoting long-term financial returns. But neither the NGPF-G nor the NZSF is mandated to actively *promote* sustainable development or to seek improvements in corporations' sustainability performance. In the future evolution of SWFs, the creation of explicit duties to invest in sustainability is perhaps the next logical step if they are to influence benignly the global economy.

## 2 Norwegian Government Pension Fund - Global (NGPF-G)

### 2.1 Institutional and legal structure

The NGPF-G (*Statens pensjonsfond – Utland*) is a sovereign fund that invests proceeds from Norway's petroleum industry that has prospered since oil was discovered in the North Sea in 1969. Originally known as the Petroleum Fund, it was established in 1990 through the *Act of the Government Petroleum Fund (Lov om Statens petroleumsfond)*. The Fund did not receive any capital until 1996, when a sufficient government budget surplus arose. The Fund's statutory framework was overhauled in December 2005,<sup>30</sup> which resulted in it being renamed the "Government Pension Fund - Global," to reflect that it is intended to meet future pension costs (although it does not yet directly have any such liabilities). The accompanying regulations

<sup>27</sup> Benjamin J. Richardson, "Financing Sustainability: The New Transnational Governance of Socially Responsible Investment," *Yearbook of International Environmental Law* (Oxford University Press) (2007) 17: 73.

<sup>28</sup> Principles of Responsible Investment (PRI) Association and UNEP-FI, *Universal Ownership: Why Externalities Matter to Institutional Investors* (PRI Association and UNEP-FI, 2010), 2.

<sup>29</sup> The majority of these costs are attributed to greenhouse gas emissions and unsustainable use of water.

<sup>30</sup> *Act of the Government Pension Fund (Lov om Statens pensjonsfond)*, no. 123 (2005).

for governance of the NGPF-G have periodically been revised, most recently in March 2010.<sup>31</sup> While the government mandates the NGPF-G to operate like a private investor, it is expected to fulfill two broad policy goals of the state. Firstly, as a vehicle for long-term savings, the Fund should ensure that a reasonable share of Norway's petroleum wealth benefits future generations of Norwegians. Secondly, it should avoid investments that would make it complicit in unethical or harmful social and environmental practices. Investing only in foreign assets so as to avoid overheating the domestic economy, the NGPF-G has grown immensely to reach almost NOK 3,100 billion at the beginning of 2011.<sup>32</sup> Its sister fund, the Government Pension Fund Norway, invests just in Norway and other Scandinavian countries.

In contrast to some SWFs including New Zealand's, the NGPF-G is closely tied to the government. Its administration is divided among three governmental entities. The Norwegian Ministry of Finance retains ultimate responsibility for the policy and management of the NGPF-G, including ethical investment decisions such as to exclude a company. The Norges Bank (Norway's central bank) has operational control, and through its ownership rights in companies it handles corporate engagement. The Bank has devolved many of its responsibilities to Norges Bank Investment Management (NBIM)<sup>33</sup> and external fund managers. Thirdly, a government-appointed Council on Ethics advises on ethical investment decisions relating primarily to the exclusion of companies. The activities of all three entities are overseen by the Norwegian Parliament (Storting), which approves the NGPF-G's investment strategy, and scrutinises annual reports of the Ministry of Finance and its ethical investment guidelines.

While the NGPF-G functions under a legal framework that reflects a "public commitment to procedural democracy,"<sup>34</sup> and which encourages practices that are broadly reflective of the values of Norwegian society, the general public itself has few opportunities to participate directly in the fund's governance except circuitously through their elected Storting representatives. The NGPF-G decision-making, at least, is highly transparent. All recommendations of the Council are publicly disclosed, with detailed reasons.<sup>35</sup> The Norges Bank consults with the public before submitting to the Ministry its plans for exercise of active

<sup>31</sup> The regulations are consolidated as the *Management Mandate for the Government Pension Fund*, available at [http://www.regjeringen.no/Upload/FIN/Statens%20pensjonsfond/mandat\\_spu\\_eng.pdf](http://www.regjeringen.no/Upload/FIN/Statens%20pensjonsfond/mandat_spu_eng.pdf).

<sup>32</sup> Norwegian Ministry of Finance, *The Management of the Government Pension Fund in 2010* (Report No. 15 (2010-2011) to the Storting, 2011), 20.

<sup>33</sup> See <http://www.nbim.no>.

<sup>34</sup> Clark and Monk, *supra* note 10, at 15.

<sup>35</sup> The Council's Guidelines oblige it to justify its recommendations, including "the Council's assessment of the specific basis for exclusion and any comments on the case from the company", and it shall, insofar as possible, rely on evidence that "can be verified": *Guidelines for Observation and Exclusion from the Government Pension Fund Global's Investment Universe* (2010), s. 5(4); available at: [http://www.regjeringen.no/en/sub/styret-rad-utvalg/ethics\\_council/ethical-guidelines.html?id=425277](http://www.regjeringen.no/en/sub/styret-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277).

ownership in the NGPF-G's portfolio companies,<sup>36</sup> and it must inform the public about its work in active ownership and integration of environmental and social issues.<sup>37</sup> Another transparency mechanism is the annual reporting by the Ministry of Finance to the Storting on the operations and performance of the NGPF-G.<sup>38</sup> While no citizen may judicially challenge a decision of the Council or the Ministry (exclusion of a company is not open to judicial appeal), procedures allow public input into their decisions. The Council meets annually with nongovernmental organisations to discuss its policies and practices; attendance is on an invitational basis, but is routinely granted to groups that have been in recent contact with the Council. Informal channels of complaint also exist, including that any individual or group may write to the Council or the Ministry to voice concerns.<sup>39</sup>

## 2.2 The turn to ethical investment

The NGPF-G lacked any SRI mandate until 2001. The Norwegian Government then established on a three-year trial a dedicated "Environment Fund" within the larger Petroleum Fund (as it was then known) for investing in companies in emerging economies that met environmental performance criteria.<sup>40</sup> Concomitantly, because it is a SWF, with the potential for its decisions or omissions to be attributed to Norway as a matter of state responsibility under international law, the Fund as a whole would sometimes consider issues of human rights or environmental protection. Its first ethical screenings were guided by an Advisory Commission on International Law appointed by the Ministry of Finance in 2001.<sup>41</sup> The Commission responded to enquiries from the Ministry regarding whether specific investments might conflict with Norway's international legal obligations. For example, in April 2002 the Ministry directed the Fund to divest from Singapore Technologies Engineering because of its links to production of anti-personnel mines, contrary to Norway's obligations under the Ottawa Convention on Anti-Personnel Mines.<sup>42</sup>

<sup>36</sup> *Guidelines for Norges Bank's Work on Responsible Management and Active Ownership of the Government Pension Fund Global* (2010), s. 2(3), available at: <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-GPFG.html?id=594253>.

<sup>37</sup> *Ibid.*, s. 4.

<sup>38</sup> See, e.g., Norwegian Ministry of Finance, *The Management of the Government Pension Fund in 2009* (Report No. 10 (2009-2010) to the Storting, 2010).

<sup>39</sup> One example is when the Rainforest Action Group lobbied the NGPF-G to exclude some extractive industries.

<sup>40</sup> In 2004, the Environment Fund was integrated into its parent Fund, whose entire investment portfolio became subject to an ethical mandate.

<sup>41</sup> The Advisory Commission was replaced by the Council on Ethics in 2004.

<sup>42</sup> 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*

In 2002 Norway moved to develop regulations to create a normatively and procedurally clearer approach to ethical investment by the Fund. It appointed a committee chaired by Professor Hans Peter Graver for this purpose.<sup>43</sup> While the Graver Committee did not believe the Fund should have an overriding mission to leverage its resources to improve corporate social and environmental behaviour, it stressed “sustainable economic development is essential to a long-term return on a broad-based financial portfolio.”<sup>44</sup> Thus, the Committee concluded:

The requirement for a long-term return gives rise to ethical obligations in relation to the requirement for sustainable development in a longer-term perspective. Sustainable development is a precondition for return on the Petroleum Fund’s financial investments in the long term.<sup>45</sup>

In addition, the Graver Committee rationalised ethical investment on the ground that the Fund should avoid *complicity* in gross or systematic breaches of ethical norms relating to human rights and the environment:

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 gross 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 ... Fund and the company, and that the question of whether or not to invest in a company is a matter of free choice.<sup>46</sup>

In identifying a broad, democratic basis to support SRI decisions, the Graver Committee sought to rely on international agreements on environmental protection and human rights that Norway supports, rather than defining a separate basis rooted in Norwegian culture or national

*Obligations* (22 March, 2002), citing the Ottawa Convention, which stipulates that States Parties should not “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.” The Ottawa Convention is officially known as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction, I.L.M. (1997) 36: 1507.

<sup>43</sup> Norwegian Ministry of Finance, *The Report from the Graver Committee* (2003), available at: [http://www.regjeringen.no/en/dep/fin/tema/statens\\_pensjonsfond/ansvarlige-investeringer/graverutvalget/Report-on-ethical-guidelines.html?id=420232](http://www.regjeringen.no/en/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/graverutvalget/Report-on-ethical-guidelines.html?id=420232).

<sup>44</sup> *Ibid.*, s. 1.

<sup>45</sup> *Ibid.*, s. 3.1.

<sup>46</sup> *Ibid.*, s. 2.2.

policy.<sup>47</sup> The Committee reasoned that while most international legal obligations apply only to states, companies may aggravate or facilitate human rights and environmental violations committed by states, and the NGPF-G might contribute to companies' misdeeds through its stock ownership.

While excluding companies from the NGPF-G might influence their behaviour, in addition to any influence achieved by corporate engagement, the Graver Committee focused on exclusion as a means of *avoiding* the Fund's own complicity in ethically problematic activities. By contrast, the former Environment Fund was conceived as a mechanism to promote sustainable development and leverage environmental improvements in the targeted economies.

In November 2004, regulations inspired by the Graver Committee were adopted and a Council on Ethics took charge to evaluate potential investments for compliance.<sup>48</sup> The five members of the Council on Ethics, each appointed by the Ministry of Finance, blend practical and theoretical expertise. Presently, it comprises two academics, a former government diplomat, a professional scientist and an investment manager. The Council submits recommendations to the Ministry, which makes final decisions on exclusion of companies. The Council nearly always makes its recommendations on a consensual rather than majoritarian basis. It has wide discretion in passing judgement on serious human rights violations, gross corruption, severe environmental damage and general violations of fundamental ethical norms. In assessing investments on these grounds, it relies not only on international treaties ratified by Norway, but also soft law standards approved by Norway such as the UN Global Compact and the OECD Guidelines for Corporate Governance and for Multinational Enterprises.<sup>49</sup>

### 2.3 NGPF-G's revised ethical guidelines

The NGPF-G's current ethical guidelines were adopted in 2010 following a major review in 2008 of the legal mandate and practices of the Council on Ethics conducted by the Ministry of Finance. The review included a separate commissioned report, written by the Albright Group and Professor Simon Chesterman.<sup>50</sup> The results were mainly procedural rather than normative

<sup>47</sup> Norwegian Ministry of Finance, *The Report from the Graver Committee* (11 July 2003), available at: <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/The-Graver-Committee~documents/The-Graver-Committee-and-Ethical-Guideli.html?id=434926>.

<sup>48</sup> Regulations on the Management of the Government Pension Fund – Global (Forskrift om forvaltning av Statens pensjonsfond utland (2006), s 8(1).

<sup>49</sup> UN Global Compact: <http://www.unglobalcompact.org>. OECD Guidelines for Corporate Governance and for Multinational Enterprises: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

<sup>50</sup> The Albright Group and Simon Chesterman, *Assessment of Implementation of Articles 3 and 4 of the Ethical Guidelines for the Government Pension Fund – Global* (Report submitted to the Norwegian Ministry of Finance, May 2008).

changes. The review concluded that the ethical guidelines had proven to be generally robust, but recommended more engagement with companies, particularly with firms under scrutiny.<sup>51</sup> It also recommended that tobacco production be singled out as a new criterion for investment exclusion. The Albright and Chesterman report recommended greater collaboration between the Council and NBIM, more attention to climate change, more opportunities for public submissions and dialogue with companies, and improved disclosure of implementation of the ethical guidelines.<sup>52</sup>

Consequently, in March 2010 the Ministry of Finance issued two standards that were accepted by the Storting: the *Guidelines for Observation and Exclusion from the Government Pension Fund Global's Investment Universe*<sup>53</sup> (hereafter Guidelines I), and the *Guidelines for Norges Bank's Work on Responsible Management and Active Ownership* (hereafter Guidelines II).<sup>54</sup> The Norwegian Ministry of Finance also initiated a complementary programme for active environmental-related investment, focusing on firms pioneering climate-friendly energy efficiency, carbon capture and storage, water technology, and waste and pollution management. The programme is worth about NOK 20 billion (equivalent to less than 1% of the value of the NGPF-G portfolio) invested between 2010 and 2015.<sup>55</sup> Many of these targeted investments are in environmental bonds for financing eco-friendly projects, such as the World Bank's Green Bonds.<sup>56</sup>

The guidelines continue the exclusion mechanism for companies that engage in unethical activities, and strengthen the NGPF-G's use of active shareholding and exertion of responsible influence in its portfolio companies with a view to promoting sustainable development. Guidelines I allow the Ministry, on the advice of the Council on Ethics, to exclude companies from the NGPF-G portfolio:

if there is an unacceptable risk that the company contributes to or is responsible for:

- a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation;
- b) serious violations of the rights of individuals in situations of war or conflict;
- c) severe environmental damage;

<sup>51</sup> Norwegian Ministry of Finance, *On the Management of the Government Pension Fund (GPF) in 2008* (Report no. 20 (2008-2009) to the Storting, 2009).

<sup>52</sup> The Albright Group and Chesterman, *supra* note 50, at 5-7.

<sup>53</sup> See *supra* note 35.

<sup>54</sup> See *supra* note 36.

<sup>55</sup> Norwegian Ministry of Finance, *supra* note 51, at 11.

<sup>56</sup> World Bank Green Bonds, <http://treasury.worldbank.org/cmd/htm/WorldBankGreenBonds.html>.

- d) gross corruption;
- e) other particularly serious violations of fundamental ethical norms.<sup>57</sup>

From the yardstick of sustainable development, however, the Guidelines' threshold of "severe environmental damage" is too high. Much environmental degradation such as climate change is piece-meal and only significant cumulatively. Consequently, the NGPF-G must rely on other mechanisms if it wishes to address environmental issues more comprehensively.

The Guidelines I elaborate factors that the Ministry may take into consideration, which include "the probability of future violations of ethical norms, the severity and extent of the norm violations, the connection between the norm violations and the company in which the Fund is invested, and whether the company does what may reasonably be expected to reduce the risk of future violations of norms within a reasonable time frame."<sup>58</sup> Positive actions taken by a company to safeguard the environment may also be taken into account,<sup>59</sup> and companies excluded may be readmitted to the Fund if their behaviour improves. The Guidelines I also require, on the advice of the Council, exclusion of companies that produce tobacco, produce weapons that violate fundamental humanitarian principles, or sell weapons or military material to pariah states.<sup>60</sup> Importantly, the Ministry may use other measures before excluding a company, such as active engagement or close observation of a firm.<sup>61</sup> Companies proposed for exclusion must be warned and given reasons, with an opportunity to respond.<sup>62</sup> The revised Guidelines also contain provisions to improve communications between the Council on Ethics and the Norges Bank to ensure any contact with companies is coordinated.<sup>63</sup>

Guidelines II, which is directed to the work of the Norges Bank, reflects assumptions of the "universal investor" thesis, in which long-term financial returns hinge on maintenance of healthy social and environmental returns.<sup>64</sup> Thus, while Guidelines II requires Norges Bank to manage the NGPF-G in order to achieve the "highest possible return,"<sup>65</sup> this objective is qualified as "dependent on sustainable development in economic, environmental and social terms [and] well-functioning, legitimate and effective markets."<sup>66</sup> Relatedly, Guidelines II obliges

<sup>57</sup> Guideline I, s. 2(3).

<sup>58</sup> *Ibid.*, s. 2(4).

<sup>59</sup> *Ibid.*, s. 2(5).

<sup>60</sup> *Ibid.*, s. 2(1)-(2).

<sup>61</sup> *Ibid.*, s. 3.

<sup>62</sup> *Ibid.*, s. 5(3).

<sup>63</sup> *Ibid.*, s. 6.

<sup>64</sup> The Norwegian Ministry of Finance has explicitly endorsed this thesis: *supra* note 38, at 133-36.

<sup>65</sup> Guideline II, s. 1(1).

<sup>66</sup> *Ibid.*

the Bank to integrate good corporate governance, environmental and social issues in its investments,<sup>67</sup> and to contribute actively to good international standards in responsible management and active ownership.<sup>68</sup>

As a result of the 2010 revisions to the NGPF-G's governance, with more emphasis on the economic case for ethical investing, the criticisms of some commentators that "the process supporting the ethical mandate actually constrains the fund's functional efficiency," and that it "may pay a high price for its ethical policies over the long-term,"<sup>69</sup> are perhaps less valid, if ever they were. The NGPF-G achieved average annual returns in the decade since January 2000 of 3.02%, above the government's expected benchmark investment performance of 2.40% per year.<sup>70</sup> While many SRI practitioners believe that engagement is preferable to exclusion, as both a means of retaining a properly diversified portfolio and to retain influence within targeted companies as a shareholder or bondholder,<sup>71</sup> the NGPF-G shows that these strategies are not mutually exclusive. Corporate engagement can occur in the lead-up to exclusion, and afterwards; for example, after Rio Tinto was excluded it sought re-admission and began dialogue with the NGPF-G about how it could redeem itself.

## 2.4 Norwegian ethical investment in practice

Traditionally, the primary strength of the NGPF-G's approach to ethical investment has been its ability to scrutinise individual companies meticulously and to inflict tangible sanctions. But targeting individual entities is necessarily highly selective in a portfolio of over 8,000 companies, and thus does not ensure a systematic, portfolio-wide approach. The NGPF-G has recently diversified its tools for promoting SRI, as a result of several initiatives including: changes to the Fund's governing regulations, its new program for positive environmental investment, publication of its "expectations" documents on climate change and other concerns, and greater collaboration with other institutional investors. The NGPF-G therefore has, in theory, become better positioned to take a more comprehensive approach to sustainable development.

<sup>67</sup> *Ibid.*, s. 1(2).

<sup>68</sup> *Ibid.*, s. 3.

<sup>69</sup> Clark and Monk, *supra* note 10, at 14 and 17.

<sup>70</sup> Norges Bank Investment Management, *NBIM Performance Results* (NBIM, 2010), 8, available at [http://www.nbim.no/Global/Reports/2010/GIPS%20report/GIPS%20Report%20Final\\_update%2020100811.pdf](http://www.nbim.no/Global/Reports/2010/GIPS%20report/GIPS%20Report%20Final_update%2020100811.pdf).

<sup>71</sup> Doug Watt, "Why SRI Funds Aren't a Monolithic Group," *Morningstar* (23 April 2009), available at <http://www.morningstar.ca/globalhome/Industry/News.asp?Articleid=288065> (referring to the policy of Ethical Funds).

In making recommendations to the Ministry, the Council on Ethics follows a sequence of procedures for gathering information, reviewing evidence and applying ethical guidelines. In considering specific cases, the Council may act on its own volition or at the request of the Ministry. The Council is not a legal tribunal and is not bound by rules of evidence or other judicial-like formalities, although its recommendations resemble rudimentary court judgements in their evaluation of evidence and justification of decisions.<sup>72</sup> It uses a “quasi-legal” process, following its precedents and allowing companies to hear allegations and respond to them.<sup>73</sup> But the Council is not obliged to prove occurrence of an environmental violation or other wrong to recommend exclusion of a company. Indeed, much of its work addresses the “unacceptable risk of breaches taking place in the future,” rather than ongoing or past breaches.<sup>74</sup>

The Council’s advice is generally persuasive, as nearly always the Minister for Finance accepts its recommendation.<sup>75</sup> So far, the Minister has rejected the Council’s advice only twice. One involved the German company Siemens, which is suspected of corruption, and remains on the Council’s watch list. The second case involved Monsanto, which through its subsidiaries allegedly exploits child labour in India’s cotton seed industry. The Ministry and the Norges Bank opposed singling out Monsanto for exclusion, favouring instead an engagement process that would involve many companies in this troubled economic sector.<sup>76</sup>

With a support staff of eight and an annual budget of NOK 11 million (as at the end of 2010),<sup>77</sup> the Council is able to scrutinise closely just a small fraction of the NGPF-G’s investment portfolio. Such “resource constraint[s],” suggest some commentators, “forces it to make subjective decisions about ethical targets.”<sup>78</sup> To overcome such hindrances, the Council increasingly relies on external consultants to monitor companies and provide it with monthly reports, which it uses for selecting firms for investigation.<sup>79</sup> The NBIM also plays a key role in discharging the NGPF-G’s ethical investment policy, as it exercises the Fund’s ownership rights through sponsoring and supporting shareholder resolutions, proxy voting, and informal corporate engagement. In 2007, for example, the NBIM voted on more than 38,000

<sup>72</sup> Simon Chesterman, “The Turn to Ethics: Divestment from Multinational Corporations for Human Rights Violations – The Case of Norway’s Sovereign Wealth Fund,” *American University International Law Review* (2008) 23: 577 at 605.

<sup>73</sup> *Ibid.*, 594.

<sup>74</sup> Recommendation from the Norwegian Ministry of Finance, *The Petroleum Fund’s Council of Ethics on Total S.A.* (14 Nov. 2005), s. 3.3

<sup>75</sup> Clark and Monk, *supra* note 10, at 16.

<sup>76</sup> John Acher, “Norway Fund Drops Rio Tinto on Ethical Grounds,” *Reuters* (9 September 2008), <http://www.reuters.com/article/2008/09/09/us-norway-fund-riotinto-idUSL872852220080909>.

<sup>77</sup> Council of Ethics for the Government Pension Fund Global, *Annual Report 2010* (2010), 8.

<sup>78</sup> Clark and Monk, *supra* note 10, at 17.

<sup>79</sup> *Ibid.*, 7.

shareholder proposals in more than 4,200 companies.<sup>80</sup> But, as with the Council, the NBIM has limited institutional capacity and has elected to engage mainly with the largest (but not necessarily the most problematic) companies.

The NGPF-G investment regulations do not instruct how to resolve any trade-offs between ethical and financial considerations, although they postulate that a long-term synergy between financial returns and sustainable development exists.<sup>81</sup> In practice, the NGPF-G is increasingly governed on the premise that it can be both virtuous and prosperous.<sup>82</sup> The Norwegian Ministry of Finance affirmed in its 2010 annual report that “[s]olid financial returns over time depend on a sustainable development in economic, environmental and social terms,”<sup>83</sup> and it regards the NGPF-G as a “universal owner” exposed to environmental and social externalities that should be addressed.<sup>84</sup> Nonetheless, the Norwegian Ministry of Finance has acknowledged that:

In some cases, the concerns of ensuring long-term financial returns and taking widely shared values into account will coincide, but not always. For example, the Fund will not invest in companies that are in gross breach of fundamental ethical norms, regardless of the effect this will have on returns.<sup>85</sup>

The NGPF-G presently screens companies using the services of several consultancy firms. From this information, the Council on Ethics maintains a short-list of some 200 - 300 companies that warrant greater scrutiny. It pays close regard to international law in judging companies, although its ethical guidelines mandate it to go beyond international law. A company thus does not have to formally breach any international treaty to be recommended for exclusion; indeed, as companies are not true international legal personalities who can be prosecuted in an international court, instances of companies incurring international legal sanctions are very rare. Thus, the Council routinely looks for other evidence of ethical violations, including breaches of national law and disregard for soft law standards such as the UN Global Compact.

<sup>80</sup> Anita M. Halvorssen, *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* (University of Oslo Faculty of Law Legal Studies, Research Paper Series, No. 2010-06), 29. See also Anita M. Halvorssen, “The Norwegian Sovereign Wealth Fund’s Ethical Guidelines: A Model for Investors,” *European Company Law* (2011) 8(2-3): 88.

<sup>81</sup> Guidelines II, s. 1.

<sup>82</sup> Norwegian Ministry of Finance, *supra* note 38, at 11, 16; see also Secretary General Tore Eriksen, “The Norwegian Petroleum Sector and the Government Pension Fund - Global” (Ministry of Finance, June 2006), 23; available at [http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/The\\_Norwegian\\_Petroleum\\_Sector\\_te.pdf](http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/The_Norwegian_Petroleum_Sector_te.pdf).

<sup>83</sup> Norwegian Ministry of Finance, *supra* note 32, at 3.

<sup>84</sup> *Ibid.*, 12.

<sup>85</sup> Norwegian Ministry of Finance, *supra* note 38, at 15.

Based on recommendations of the Council on Ethics, the NGPF-G has divested from companies producing cluster bombs (eg, Lockheed Martin) and nuclear weapons components (eg, Boeing), breaching human rights and labor standards (eg, Walmart), and causing severe environmental damage (Freeport-McMoRan Copper & Gold). One of its most publicised divestments was US\$400 million of Wal-Mart shares in March 2006, which led to protests from the US Ambassador to Norway.<sup>86</sup> As of May 2011, the NGPF-G had divested from or excluded 51 companies, a tiny number compared to the some 8,300 companies currently in its portfolio.<sup>87</sup> The Fund has also excluded one state, Myanmar (Burma), by refusing to buy its government bonds. Divestment has usually occurred after dialogue and engagement strategies have failed.<sup>88</sup> The NGPF-G has also occasionally readmitted formerly excluded companies following new evidence presented by the Council of improved behaviour.<sup>89</sup>

Whereas the mandate of the Council on Ethics is to recommend *exclusion* of companies, *engagement* rests with Norges Bank. Exclusion tends to be applied against the worst offenders, while companies whose behaviour needs improvement and is considered redeemable may be engaged. The NGPF-G presently has an average ownership stake of about 1 per cent in its 8,300 companies,<sup>90</sup> and only engages with a miniscule fraction of its portfolio at any one time. Engagement may occur as a prelude to recommending exclusion. When the Council envisions recommending exclusion, it sends a draft recommendation to the company's management for response.<sup>91</sup> This process may trigger some dialogue with the firm, and persuade it to make changes (eg, selling-off part of the business or cancelling a project) in order to avoid exclusion.<sup>92</sup>

In 2009, the Norges Bank picked six strategic priority areas for corporate engagement and other forms of active ownership, of which three are explicit sustainability issues: climate change, water management and children's rights.<sup>93</sup> Climate change, the gravest environmental threat, presents a moral dilemma for NGPF-G managers. Black-listing companies that contribute to global warming would put Norway in an awkward position as the NGPF-G has been financed from proceeds of the country's fossil fuels. The Council on Ethics believes that since virtually

<sup>86</sup> Mark Landler, "Norway Keeps Nest Egg From Some U.S. Companies," *New York Times* (4 May 2007), available at <http://www.nytimes.com/2007/05/04/business/worldbusiness/04norway.html>.

<sup>87</sup> Norwegian Ministry of Finance, "Companies Excluded from Investment Universe," <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u.html?id=447122>.

<sup>88</sup> Norges Bank Investment Management, *Annual Report 2006* (Norges Bank, 2007), s. 4.2.

<sup>89</sup> Norwegian Ministry of Finance, *supra* note 38, at 75.

<sup>90</sup> *Ibid.*, 65

<sup>91</sup> Gro Nystuen, "Etikk og kritikk," *Dagens Naeringsliv* (11 September 2006), 4.

<sup>92</sup> This option is not available for companies liable to be excluded because of the very *nature* of their business (eg, producing tobacco) rather than the *way* they operate.

<sup>93</sup> Norwegian Ministry of Finance, *supra* note 38, at 125.

everyone is a contributor to climate change in a world that ubiquitously depends on fossil fuels, climate change itself is unsuitable as a rationale to exclude any specific entity. Therefore, instead of excluding oil and coal businesses as demanded by some environmental groups, the NBIM has released an “expectations” document on companies' management of risk factors relating to climate change.<sup>94</sup> The expectations include having:

strategies for managing both physical and economic climate effects, to measure its emissions and set targets for reducing them, to explore and exploit opportunities to develop new products and services that will help the transition to a low-carbon economy, and to develop a strategy for dealing with climate change risk in the supply chain.<sup>95</sup>

Such measures, in turn, should enable the NGPF-G to manage its own climate change risks, which the Ministry of Finance recognises as “a long-term investor with a broad portfolio.”<sup>96</sup> The Ministry has also collaborated in an international research project with other major institutional investors to foster a deeper understanding of the financial risks of climate change.<sup>97</sup> Unusually, the Norges Bank has also written to some American companies to express its concerns how they campaigned against the imposition of carbon caps.<sup>98</sup> Together, these strategies to address companies and issues on a portfolio-wide basis could provide important means for the NGPF-G to act as an ethical, universal owner.<sup>99</sup>

### 3 New Zealand Superannuation Fund (NZSF)

#### 3.1 Legislative and institutional framework

New Zealand (NZ), renowned for some of the most progressive environmental and social legislation in the world,<sup>100</sup> has, like Norway, begun to consider whether and how to use public

<sup>94</sup> Norges Bank Investment Management, *NBIM Investor Expectations: Climate Change Management* (Norges Bank, 2008). See generally, Halvorsen, *supra* note 80.

<sup>95</sup> As summarised by the Norwegian Ministry of Finance, *supra* note 38, at 126.

<sup>96</sup> *Ibid.*, 126.

<sup>97</sup> Norwegian Ministry of Finance, *supra* note 32, at 15.

<sup>98</sup> Norges Bank Investment Management, *Government Pension Fund – Global Annual Report 2008* (Norges Bank, 2009), 54.

<sup>99</sup> Scholars have advocated such measures: see, e.g., Ola P.K. Gjessing and Henrik Syse, “Norwegian Petroleum Wealth and Universal Ownership,” *Corporate Governance: An International Review* (2007) 15(3): 427.

<sup>100</sup> Notable examples include the *Environment Act*, 1987 and the *Resource Management Act*, 1991.

financial institutions to promote sustainable development and ethical policy. The New Zealand Superannuation Fund (NZSF) is the country's first major step towards this goal.

The NZSF was established in 2001 to ease the future financing burden of the country's pension payments. NZ's retirement income scheme is financed from general taxation revenue, where residents over the age of 65 receive a pension irrespective of their personal wealth. Because the country's population is ageing, there is significant pressure on public revenue to sustain NZ superannuation.<sup>101</sup> The Fund was created by the *New Zealand Superannuation and Retirement Income Act* of 2001 to invest NZ Government contributions to address this growth in demand for pensions. Since the Fund began operations in September 2003, it has grown rapidly to about NZ\$19 billion of assets, as of early 2011,<sup>102</sup> with investments principally in shares in global and NZ companies, real estate, commodities, and fixed interest.

The legislative framework prescribes arrangements for the management and operation of the NZSF in order to limit political interference. The Fund is administered by a separate entity called the Guardians of New Zealand Superannuation,<sup>103</sup> which enjoys a broad plenary power to invest subject only to specified statutory restrictions.<sup>104</sup> While the NZSF holds assets belonging to the NZ Government, the legislation declares that the Guardians "are not a trustee."<sup>105</sup> The effect of this rider presumably is to avoid implying any common law fiduciary standards in the management of the Fund, and to limit its governance strictly to the terms of the enabling legislation. However, the Guardians are presumably still subject to judicial review, which would enable courts to issue remedies to ensure that the NZSF is administered in accordance with its legislative mandate and procedures.

The Guardians' Board consists of between five to seven members, appointed by the Cabinet on the recommendation of the Minister of Finance, after nominations from an independent nominating committee and consulting with representatives of other political parties.<sup>106</sup> Only persons with "substantial experience, training, and expertise in the management of financial

<sup>101</sup> See K. Dunstan and N. Thomas, *Demographic Aspects of New Zealand's Ageing Population* (Statistics New Zealand, 2006).

<sup>102</sup> NZSF, "Investment Performance," <http://www.nzsuperfund.co.nz/index.asp?PageID=2145855927>.

<sup>103</sup> Section 48(1).

<sup>104</sup> Section 49(4), with specified restrictions in ss 58, 59 and 64. While the Minister of Finance can give directions to the Guardians in regard to the Government's expectations to the Fund's performance, the Minister cannot give any direction that is "inconsistent with the duty to invest the Fund on a prudent, commercial basis" (s. 64(1)).

<sup>105</sup> Section 51(2).

<sup>106</sup> Sections 54(1), 56.

investments” may be Board members.<sup>107</sup> While the Guardians exercise overall control over the Fund, they have, like the NGPF-G, outsourced much work to external fund managers.<sup>108</sup>

The Act includes a qualified obligation to invest ethically, which is considerably less prescriptive than Norway’s regulations. The Guardians’ primary duty is to:

invest the Fund on a prudent, commercial basis ... in a manner consistent with (a) best-practice portfolio management; and (b) maximising return without undue risk to the Fund as a whole; and (c) avoiding prejudice to New Zealand’s reputation as a responsible member of the world community.”<sup>109</sup>

The legislation does not define this terminology, and offers no guidance on reconciling any conflicts between these goals. While the Guardians therefore have ample discretion to implement their mandate, they must prepare a statement of investment standards and procedures which, inter alia, “cover ... ethical investment, including policies, standards, or procedures for avoiding prejudice to New Zealand’s reputation as a responsible member of the world community,”<sup>110</sup> and the “retention, exercise, or delegation of voting rights acquired through investments.”<sup>111</sup> The Fund must report annually to the NZ Government on its performance.<sup>112</sup>

In governance arrangements, the NZ approach to ethical investment diverges from Norway’s in several interesting ways. Firstly, the ethical investment duty is comingled with other legislative goals relating to financial considerations. By contrast, Norway’s ethical screening Guidelines are placed in separate instrument to which compliance is not constrained by or conditional on the NGPF-G adhering to other legal norms. While Guidelines II relating to the Norges Bank’s active ownership obliges it to seek “the highest possible return,” this objective is stated to be “dependent on sustainable development in economic, environmental and social terms.”<sup>113</sup> Secondly, the NZSF lacks an ethics council to provide advice; decisions about ethical investment are ultimately the responsibility of the Guardians’ Board, a body without special expertise in such matters. Thirdly, while the NZSF must avoid prejudicing NZ’s reputation internationally, active consideration of social and environmental issues, and promotion of improved corporate behaviour, is not explicitly required. Indeed, the legislation has been

<sup>107</sup> Section 55(1)(a).

<sup>108</sup> Controller and Auditor-General, *Guardians of New Zealand Superannuation: Governance and Management of the New Zealand Superannuation Fund* (New Zealand Government, May 2008), para. 5.8.

<sup>109</sup> Section 58(2)(c).

<sup>110</sup> Section 61(d).

<sup>111</sup> Section 61(1).

<sup>112</sup> Section 68(e)-(f).

<sup>113</sup> Section 1(1).

interpreted by NZ Treasury staff as simply requiring the NZSF “to have a policy regarding ethical investment: it does not prescribe any particular approach to or emphasis on ethical investment.”<sup>114</sup> This laissez-faire approach contrasts with other NZ legislation relating to natural resources management and environmental protection<sup>115</sup> that is much more prescriptive regarding sustainable development and related goals.

### 3.2 Guardians’ ethical investment policies and practices

The Guardians’ broad discretion to determine the NZSF’s ethical investment has enabled it to establish a range of processes and policies. A Responsible Investment Committee was appointed to draft ethical policies, monitor their implementation and generally to advise the Guardians’ Board on SRI matters. But it was disestablished in October 2009 when the Board assumed direct oversight of ethical policies as part of an avowed commitment to embed SRI considerations throughout its decision-making.<sup>116</sup> Its *Responsible Investment Policy* is a relatively brief document that sketches the NZSF’s main ethical standards and methods.<sup>117</sup> The Guardians rely on external agencies such as Innovest Strategic Value Advisors and Institutional Shareholder Services to monitor the majority of the NZSF’s portfolio for compliance with its ethical policy.

As in the Norwegian approach, the Guardians rely on both exclusion and active ownership as means of ethical investment. Lately, they have also incorporated environmental and social risk analysis into their due diligence procedures and, like the NGPF-G, initiated positive investment measures to deliver “strong environmental or social returns in addition to sufficient investment returns.”<sup>118</sup> In practice, however, there are some marked differences between these SWFs’ approaches.

The Guardians were slow to fulfill their ethical mandate, being initially for two years without in-house SRI experts and lacking a formal policy. Their current policy of exclusion is mainly determined by a company’s economic sector rather than its individual practices. While the NGPF-G also excludes sectors, such as tobacco producers, its ethical mandate also requires

<sup>114</sup> Brian McCulloch and Jane Frances, “Governance of Public Pension Funds: New Zealand Superannuation Fund,” in *Public Pension Fund Management: Governance, Accountability, and Investment Policies*. eds A.R. Musalem and R.J. Palacios (World Bank, 2004), 157, 189.

<sup>115</sup> E.g., the *Resource Management Act*, 1991, s. 5.

<sup>116</sup> Guardians of New Zealand Superannuation, *Annual Report 2010* (Guardians of New Zealand Superannuation, 2010), 133.

<sup>117</sup> NZSF, *Statement of Responsible Investment Policies, Standards and Procedures* (Guardians of New Zealand Superannuation, October 2009).

<sup>118</sup> *Ibid.*

evaluation of firms' specific conduct. The Guardians have adopted policies since 2006 to exclude entities involved in whaling, the manufacture of tobacco, cluster mines or anti-personnel mines, and the production and testing of nuclear explosives.<sup>119</sup> As of June 2009, it had ousted 12 companies that manufacture such mines or nuclear explosives, and excluded one whaling business and 20 tobacco companies.<sup>120</sup> The Guardians rationalise any exclusion decisions on considerations of international law, and NZ law and government policy. For instance, the Guardians' exclusion of producers of cluster mines was triggered by the NZ Government's pending ratification of the Convention on Cluster Munitions.<sup>121</sup>

Another ostensible difference between Norway and NZ is that the Guardians' SRI strategy focuses "on acting as a responsible shareholder and fostering transparent corporate governance rather than necessarily excluding shares or securities."<sup>122</sup> In the 12 months until June 30, 2010, the Guardians had engaged on 345 occasions with companies concerning various social and environmental issues.<sup>123</sup> Share exclusion is considered "a last resort for the Guardians," only used if they "cannot bring about a positive outcome through exercising their shareholder rights."<sup>124</sup> However, in practice to date, the Guardians have used exclusion only for entities in a few designated economic sectors and not only as a "last resort."

Although environmental matters are encompassed in its *Responsible Investment Policy*, in April 2009 the Guardians released a separate environmental policy statement and action plan that champions four issues: minimising waste, efficient use of energy, green procurement, and reducing greenhouse gas emissions.<sup>125</sup> Much of this effort centres on reducing the environmental footprint of the NZSF's in-house operations (eg, use of physical offices and staff travel), in addition to addressing any environmental impacts and risks from its portfolio companies.<sup>126</sup>

As for the NGPF-G, the economic threat posed by climate change has galvanised some action in NZ. In the 12 months to June 30, 2010, the Guardians engaged on 250 occasions with companies on climate change issues, representing the substantial majority of its corporate

<sup>119</sup> Ibid., 138.

<sup>120</sup> See the Guardians' Responsible Investment in Practice Reports, available at <http://www.nzsuperfund.co.nz/index.asp?pageID=2145855970>.

<sup>121</sup> NZSF, Responsible Investment in Practice Report (Guardians of New Zealand Superannuation, 2009), 10. The text of the convention is at ILM (2009) 48: 354.

<sup>122</sup> Controller and Auditor-General, *supra* note 108, at para. 3.62.

<sup>123</sup> Guardians of New Zealand Superannuation, *supra* note 116, at 134.

<sup>124</sup> Ibid., para. 3.67.

<sup>125</sup> NZSF, Responsible Investment in Practice Report (Guardians of New Zealand Superannuation, 2009), 12.

<sup>126</sup> NZSF, *supra* note 117, at 140.

engagement activity.<sup>127</sup> As a signatory to the Carbon Disclosure Project (CDP), the NZSF is able to collaborate with institutional investors including the NGPF-G to advocate corporate disclosure of climate-related impacts and policies.<sup>128</sup> In 2008 the Guardians wrote to every company in the NZX 50 Index (NZ's premier stock market index) to encourage replies to CDP disclosure requests. According to the Guardians, the response-rate increased to 50% from 38% in the previous year, partly as a result of the Fund's presence.<sup>129</sup> Furthermore, the Guardians see their participation in the CDP as "important in raising awareness amongst NZ companies that investors globally are interested in the economic impacts of climate change and its potential effect on long-term shareholder value."<sup>130</sup> The NZSF is also a member of the Investor Group on Climate Change, a club of 20 Australian and NZ investors concerned about the potential financial impact of global warming.<sup>131</sup>

While the NZSF has made great strides in its ethical investment policy and practices since 2006, it still tends to trail its Norwegian counterpart and has been dogged by criticisms for alleged complicity in some unethical or unsustainable businesses. Some criticisms have been rationalised on the basis that the NZSF continues ties with companies blacklisted by Norway.<sup>132</sup> Some of the most vituperative objections have come from Investment Watch Aotearoa, a national network campaigning for ethical investment to be a duty of all NZ public funds.<sup>133</sup> It once accused the NZSF of "invest[ing] large amounts of our taxpayer money in companies who ... prop up murderous regimes and commit mass environmental destruction,"<sup>134</sup> and more recently has excoriated the NZSF for allegedly investing in corporations "complicit in the Israeli occupation" of asserted Palestinian territories.<sup>135</sup> In August 2011 the NZSF was accused of investing in a Chinese tobacco producer, contrary to the Fund's policies.<sup>136</sup> Also, the NZSF's reluctance to use the divestment option more widely has troubled the Green Party,<sup>137</sup> a growing political force in NZ politics. When the Green Party denigrated the NZSF for investing in

<sup>127</sup> *Ibid.*, 133.

<sup>128</sup> CDP: <https://www.cdproject.net/en-US/Pages/HomePage.aspx>.

<sup>129</sup> NZSF, *Responsible Investment in Practice Report* (2009), 9.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, 9-10.

<sup>132</sup> Russel Norman, *Betting the Bank on the Bomb* (Green Party of Aotearoa, 2007), 3.

<sup>133</sup> Investment Watch: <http://investmentwatch.wordpress.com>.

<sup>134</sup> Investment Watch, "NZ Super Fund Invests Our Money in Mass Murder," (18 March 2007), <http://www.indymedia.org.nz/article/73329/nz-super-fund-invests-our-money-mass-mur>.

<sup>135</sup> Investment Watch, "NZ NGOs Call for Superfund Divestment from Israeli War Crimes," (3 December 2009), <http://investmentwatch.wordpress.com>.

<sup>136</sup> Daniel Brooksbank, "NZ Super Fund Facing Questions Over Stake in Tobacco-Linked Chinese Conglomerate," *Responsible-Investor.Com* (12 August 2011).

<sup>137</sup> Green Party of New Zealand, "Super Fund Must Stop Investing Our Taxes in Nuclear Bombs" (9 February 2007).

ExxonMobil, a company derided by many as a “climate change skeptic,”<sup>138</sup> then NZSF Chief Executive, Paul Costello, retorted that there was no basis to exclude it because his Fund’s policy was to divest only from those companies whose products or activities are illegal in NZ.<sup>139</sup> Robert Howell, head of the NZ Council for Socially Responsible Investment (NZCSRI), has also criticised the ambiguity of the world reputation clause in the governing legislation as failing to prevent the NZSF from investing in “companies with unacceptable or questionable human rights behaviour or environmental impacts, such as Nike, Walmart, BJ Services (operating in Myanmar), and Exxon Mobil.”<sup>140</sup>

The NZ Government’s own Auditor-General has weighed into the debate, with its 2008 report concluding that “overall, the Guardians have taken an appropriate and pragmatic approach to responsible investment,” but “a number of challenges still face the Guardians in managing their responsible investment risk.”<sup>141</sup> These include that, because “the Fund is not a substantial shareholder in any entity in its own right,” and the Guardians depend on collaboration from other investors whose decisions “are consistent with their ‘avoid prejudice’ requirement.”<sup>142</sup> The Auditor-General further cautioned that “[i]dentifying which companies to exclude can present challenges and requires a specialist screening agency (for example, checking for a company’s involvement in landmine manufacture),” and “it is not always possible for the Fund to identify all activities in pooled investment structures such as unit trusts.”<sup>143</sup> The Auditor-General also found that the Guardians’ investment screening process is limited to equity positions and sovereign securities held by the Fund, thus exposing it to ties to an excluded entity through other financial relationships such as by holding corporate bonds.<sup>144</sup>

#### 4 Becoming Marathon Investors for Sustainability

Both the Norwegian and New Zealand SWFs resemble institutional chameleons in the conflicting expectations they face. They operate like *private* investment vehicles for maximising shareholder value, while encumbered with *public* responsibilities to fulfil the ethical policies of

<sup>138</sup> David Adam, “ExxonMobil Continuing to Fund Climate Sceptic Groups, Records Show,” *The Guardian* (1 July 2009).

<sup>139</sup> “Greens Urge Super Fund to Dump Exxon,” *New Zealand Herald* (6 October 2006).

<sup>140</sup> Robert Howell, “The New Zealand Crown Financial Institutions’ Non-Financial Investment Criteria” (presentation to the NZCSRI Conference, *Reward, Risk and Reputation - Rethinking the Investment Role of Crown Financial Institutions in New Zealand’s Growth*, Auckland, 2 December 2005), 1.

<sup>141</sup> Controller and Auditor-General, *supra* note 108, at paras. 3.68, 3.73.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*, para. 3.74.

their state. While ethical considerations of course are not necessarily only *public* in nature, and indeed a vibrant SRI market has evolved in recent years while states have increasingly opted for business-friendly policies,<sup>145</sup> in the private realm ethical considerations have tended to be more vulnerable to usurpation by market pressures. Some commentators thus see tensions between SWFs' financial and non-financial ambitions, and fear some SWFs might "serve as a covert mechanism for extending state power."<sup>146</sup>

Socially responsible investment does not necessarily entail any irresolvable trade-offs between public and private interests, or financial and ethical goals. While commercial considerations do not always coincide with ethical ones, over the very long-term they should give ecological constraints to infinite economic growth. In the near term, countervailing business motivations to fund unethical behaviour certainly can prevail because of underlying market and regulatory failures, or because investors perceive no financial value in ecological assets such as biodiversity that cannot be monetised.<sup>147</sup> In the long-term, meaning at least several decades, the economic case for environmentally sustainable development solidifies. Take climate change, for example. The UK's Stern Report of 2007 calculated that global warming if left unabated will by the middle of this century cut world GDP by between 5 to 10% annually, but only 1 to 2% of GDP if we act expeditiously.<sup>148</sup> Other commentators such as Monbiot, Flannery, and Homer-Dixon predict even grimmer economic costs if business-as-usual continues.<sup>149</sup> Financial markets can make investors myopic and inclined to ignore future costs, such as because institutional fund management is commonly devolved to specialists hired on short range contracts and financial accounting metrics heavily discount distant costs and benefits.

To become marathon investors, the Norwegian and New Zealand SWFs must not only avoid companies that harm the environment or violate human rights, they should actively promote sustainable development. Traditionally, the notion of *complicity* has been a touchstone for their ethical investment policies. The Albright Group's and Chesterman's review of the NGPF-G observed that a "central tension within the Guidelines is the question of whether they are intended simply to avoid Norwegian complicity or influence the behaviour of others. The

<sup>145</sup> See, e.g., Ronen Shamir, "Corporate Social Responsibility: Towards a New Market-Embedded Morality?" *Theoretical Inquiries in Law* (2008) 9(2): 371; Robert Hahn and Robert Stavins, "Economic Incentives for Environmental Protection: Integrating Theory and Practice," *American Economic Review* (1992) 82: 464.

<sup>146</sup> Backer, *supra* note 10, at 176.

<sup>147</sup> Benjamin J. Richardson, "Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability," *Journal of Business Ethics* (2009) 87(4): 555, 556-57.

<sup>148</sup> Nicholas Stern, *Stern Review on the Economics of Climate Change* (H.M. Treasury, 2007).

<sup>149</sup> George Monbiot, *Heat: How to Stop the Planet Burning* (HarperCollins, 2005); Timothy Flannery, *The Weather Makers* (Atlantic Monthly Press, 2006); Thomas Homer-Dixon, *The Upside of Down: Catastrophe and Renewal and the Renewal of Civilisation* (Alfred A. Knopf, 2006).

former is closer to the truth.<sup>150</sup> Some of the Council on Ethics' recommendations view divestment as necessary in order to avoid the complicity of the Fund (and thus Norway) from human rights violations or environmental damage committed by companies in which the Fund invests.<sup>151</sup> Somewhat similarly, the NZSF's legislation, which obliges it to avoid "prejudice to New Zealand's reputation,"<sup>152</sup> implies avoiding the stigma of profiting from unethical companies.<sup>153</sup> And commentators and activists who have scrutinised the NZSF's investments often couch their concerns in this language.<sup>154</sup> Neither SWF, however, relies on a strict legal conception of complicity,<sup>155</sup> but rather views complicity in an ethical and pragmatic sense.

Complicity is not a sufficient yardstick for promoting sustainability. Firstly, in the context of resource constraints that limit comprehensive screening, an ad hoc rather than a portfolio-wide approach consistent with universal ownership may disappointingly ensue. Secondly, it places the threshold for divestment too high, such as gross violation of human rights or severe environmental damage; however, much social injustice and ecological damage stems from incremental actions or omissions that viewed in isolation might seem trivial. Thirdly, complicity as an ethical and legal concept is conceptually confusing and imprecise regarding the degree of necessary knowledge or assistance required to trigger consequences.<sup>156</sup>

While a commitment to sustainability sanctions divestment from the worst businesses, it requires other strategies. These include *positive* investment in companies that are environmental leaders, broad portfolio-wide policies on key sustainability issues such as climate change, biodiversity conservation and pollution management, and public policy advocacy to promote better social and environmental regulation at national and global levels. While the NGPF-G

<sup>150</sup> The Albright Group and Chesterman, *supra* note 50, at 11. The NBIM rejected that such tension exists and believes both goals are equally valid and achievable simultaneously through divestment and engagement strategies: NBIM, "Comments on the report by The Albright Group and Simon Chesterman on the Implementation of the Ethical Guidelines" (NBIM, 6 June 2008).

<sup>151</sup> Chesterman, *supra* note 72, at 607.

<sup>152</sup> *New Zealand Superannuation and Retirement Income Act*, s. 58(2)(c).

<sup>153</sup> While the Fund's legislation and policies do not refer to "complicity," as a supporter of the UN Global Compact which does, the NZSF has indirectly endorsed this stance: Principle 2 of the Global Compact expects signatories to "make sure they are not complicit in human rights abuses".

<sup>154</sup> See, e.g., Auckland University Students for Justice in Palestine and Global Peace and Justice Auckland, "NZ Taxpayer Funded Murder Results in Protests at Rakon AGM," Media Release (31 August 2006).

<sup>155</sup> Regarding legal conceptions of "complicity" for international wrongs, see James G. Stewart, "The End of 'Modes of Liability' for International Crimes," *Leiden Journal of International Law* (2012): *forthcoming*,

<sup>156</sup> Complicity, as a legal principle, can be defined in various ways in order to attribute liability to actors, such as direct complicity (where an actor knowingly assists another to commit a legal violation) and beneficial complicity (where an actor benefits directly from the violation committed by someone else): see Sanford H Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine," *California Law Review* (1985) 73: 323; see also Stewart, *ibid*

and NZSF undertake some of these measures, they are not done comprehensively; for example, less than 1% of the NGPF-G's portfolio is earmarked for positive environmental investment, and both only engage with a minuscule fraction of companies in their vast portfolios. Fundamentally, both funds are biased to seeing how sustainability contributes to investment value, rather than how investment value may contribute to sustainability.

Conceivably, if each SWF made *sustainability* a priority, they would be justified in divesting from a vast number of entities. Yet, because very few companies in the world presently meet rigorous sustainability standards,<sup>157</sup> such an approach would be unworkable for the SWFs. Therefore, rather than divesting, they would need to rely mainly on a mix of corporate engagement and positive investment in environmental programs. Such strategies allow maintenance of a broadly diversified portfolio without compromising financial returns. But they would only be influential if undertaken on a much larger scale, and by SWFs acting in concert and with other investment institutions to achieve a critical mass of influence.

Legislative change is likely needed to spur such a change, coupled with additional resources to allow screening, risk assessment, engagement and positive investment on a much greater scale. Legislation could minimise fund managers' discretion to deviate from sustainability goals and to promote a cultural shift in their decision-making. Such reform has already been proposed in NZ, but without success. In 2006 and 2010 the NZ Parliament debated a Private Member's Bill, which sought to strengthen the ethical investment framework of the NZSF and apply similar standards to other NZ Crown financial institutions.<sup>158</sup> The Bill included a duty on the NZSF Guardians "to promote socially responsible and environmentally sustainable development,"<sup>159</sup> and that investment policies must take into account international norms and conventions supported or ratified by the New Zealand government.<sup>160</sup> Such an ambitious duty would have needed supplementary rules to provide meaningful direction regarding sustainability indicators and investment time-frames, as well as more administrative resources to enable effective implementation. NZ already has similar duties in its environmental and planning legislation, and a substantial body of judicial case law and administrative practice, which could help guide elaboration of a sustainability goal for investment purposes.<sup>161</sup>

Reforming the governance of the NGPF-G and NZSF alone is unlikely to be sufficient to make either a role model for marathon investing. Halvorssen argues that "sustainable development

<sup>157</sup> Paul Shrivastava and Stuart Hart, "Creating Sustainable Corporations," *Business Strategy and the Environment* (1995) 4: 154, 163.

<sup>158</sup> *Ethical Investment (Crown Financial Institutions) Bill*, 2006. It was reintroduced to the NZ Parliament in 2010, but was voted against.

<sup>159</sup> *Ibid.*, s. 9.

<sup>160</sup> *Ibid.*, s. 10.

<sup>161</sup> Claire Freeman, "Sustainable Development from Rhetoric to Practice? A New Zealand Perspective," *International Planning Studies* (2004) 9(4): 307.

needs to be incorporated into the SWFs' General Accepted Principles and Practices (Santiago Principles or GAPP)."<sup>162</sup> She recommends that the Principles should explicitly require SWFs to take into account climate change as a key environmental issue. Such a reform would render the Santiago Principles ahead of some of the existing SRI international codes such as the UNPRI. A formal international treaty for SWFs that prioritises sustainability might be even more beneficial, but of course faces greater political hurdles.

Without further legislative changes, the NGPF-G will likely remain ahead of the NZSF in promoting ethical investment owing to several institutional and structural differences between the funds. The NZSF is managed solely by the Guardians who enjoy relatively broad discretion in interpreting and implementing their ethical mandate. The NGPF-G is supported by a Council on Ethics, whose institutional separation from the Norges Bank and Ministry allows the Council to focus purely on ethical issues without being distracted about the financial implications of its recommendations. In administering the NGPF-G, the Ministry and Norges Bank are subject to ethical guidelines that are much more extensive and detailed than those of the NZSF's. The NZSF perhaps faces greater pressure to meet financial returns,<sup>163</sup> as it must provide for the future funding of NZ pension payments, which are forecast to grow substantially; by contrast, the Norwegian fund invests abundant surplus oil wealth without any overt or indirect financial liabilities.<sup>164</sup> The NGPF-G is also considerably larger than the NZSF, giving it greater leeway to "indulge" in ethical issues alongside financial returns. Finally, the NGPF-G only invests outside its national borders, while the NZSF invests both abroad and domestically. Because it would be problematic for the NZSF to exclude NZ companies' on the basis of their social and environmental practices, which are already subject to NZ regulation, it faces greater constraints to making its own judgements regarding ethical behaviour.

Both the NGPF-G and NZSF have much to gain by engaging with one another and collaborating with other socially conscious SWFs and institutional investors. In recent years, there have been periodic meetings and consultations among SWFs and other major institutional investors such as CalPERS<sup>165</sup> and Dutch pension funds to promote SRI. As one of the world's preeminent SWFs, and with the resources on the ground to check how companies behave, the NGPF-G is best placed to exert leadership on SRI. Companies excluded or engaged

<sup>162</sup> Halvorssen, *supra* note 80.

<sup>163</sup> The NZSF is expected to *exceed* the risk-free rate of return (the interest rate on NZ Treasury bills) by at least 2.5% per year over rolling 20 year periods: NZSF, "Our Expected Rate of Return," <http://www.nzsuperfund.co.nz/index.asp?PageID=2145855927>. The NGPF-G is expected over the long term to achieve an annual real return of 2.7% on its bond investment, 3.5% on real estate and 5.0% of equities: Norwegian Ministry of Finance, *supra* note 38, at s. 8.

<sup>164</sup> That oil wealth, of course, is not ever-lasting and the industry is subject to market fluctuations and potential constraints in a future low carbon economy.

<sup>165</sup> The California Public Employees' Retirement System (CalPERS) is the largest pension fund in the United States: <http://www.calpers.ca.gov>.

by the NGPF-G are more likely to subsequently be treated similarly by other funds interested in SRI.

The urgency of the need for change is growing. Basic assumptions of our development path and the impact of financial markets must be reconsidered for the sake of the planet and thus humanity's own long-term prosperity. In 2005, the Millennium Ecosystem Assessment Board warned "human activity is putting such strain on the natural functions of the Earth that the ability of the planet's ecosystems to sustain future generations can no longer be taken for granted."<sup>166</sup> Ethical investment, if practiced widely by SWFs, could help alleviate such problems.

<sup>166</sup> Millennium Ecosystem Assessment Board (MEAB), *Living Beyond Our Means: Natural Assets and Human Well-Being*. Statement from the Board (MEAB, 2005), 5.