



HUMAN RIGHTS IN TRANSNATIONAL INVESTMENT POLICY AND PRACTICE

A case study of Norway's Sovereign Wealth Fund and the Marlin mine

by

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DECLARATION FORM

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work, has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed Kelly Then Date 01 November 2015

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ABSTRACT

Conflict between extractive industries and indigenous peoples has become commonplace. What is novel in the case of the Marlin mine is activists appealing to a corporate shareholder in a third country -- Norway's Sovereign Wealth Fund. I attribute, not exhaustively, the phenomenon to factors in global political economy: the amoral character of the corporation, the impact of extractive industries on indigenous peoples' rights, state failure to protect human rights, and the rise of Sovereign Wealth Funds (SWFs).

Among SWFs, Norway's is exceptional for ostensible incorporation of ethical considerations such as human rights in its investment decisions. In the case of the Marlin mine, Norwegian and Guatemalan activists collaborated to appeal to the Fund, but were unsuccessful.

I study the Fund to understand how a large sovereign wealth fund factors human rights considerations into its investment decisions. It seems to occur primarily through two mechanisms: its advisory Council of Ethics and the fund manager's mandate. Although the former has been the focus of philosophical, legal, political and economic academic discussion, I discovered incidentally that Norwegian civil society organisations have been campaigning and advocating for human rights to be an expanded priority in the latter.

From a broader perspective, the Fund's responsible investment approach has implications for corporate conduct and mimetic influence on institutional investors in Norway and abroad. It may be worth considering such institutional shareholders as an avenue for defence of human rights. However, the presence or absence of (democratic) accountability in the owner may constrain potential for leverage.

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1 INTRODUCTION

Norway has a cultivated international reputation as an advocate of peace, democracy and human rights, most prominently through public diplomacy, international fora, and developing aid/cooperation. Naturally, my interest was piqued when a Norwegian civil society organisation, Studentenes og Akademikernes Internasjonale Hjelpfond (SAIH), campaigned in 2014 to raise awareness of Norway's sovereign wealth fund's foreign investments in extractive companies which allegedly violate the human rights of indigenous peoples and Afro-descendants.

SAIH published a report (Studentenes og Akademikernes Internasjonale Hjelpfond 2014), as part of the campaign, describing the detrimental impact (including human rights violations) of mines owned by various companies, owned in turn by the fund. One of the cases described was that of GoldCorp's Marlin mine in Guatemala.

The Fund was informed by Norwegian and Guatemalan activists about the situation in Guatemala in 2011. Yet it stays invested in the mining corporation. It would seem incongruent for a fund of its ethical reputation to be invested in a corporation which violates the human rights of indigenous peoples.

The case study involves many, different actors in a global political economy. It represents typical contentions in international fora. Such cases are submitted as complaints to treaty bodies and special procedures in the UN system.

Although there are numerous actors in this case, my research is focussed on actors in Norway. This case study is a means to understand how a large sovereign wealth fund manages ethical aspects of its foreign investments and how local actors respond. Thus, this dissertation is both descriptive and normative.

First, I describe the context of the case and the significance of this research. I describe the actors in focus: the Fund and a Norwegian civil society coalition, and the research questions in relation to them.

Next, I survey relevant literature on the nature of the corporation, extractive industries and indigenous peoples, sovereign wealth funds, transnational advocacy mechanisms and the boomerang effect.

Fourth, I explain the methodology, highlight issues which arose and lessons learnt.

Finally, I outline the main findings and discuss their implications in an analysis.

The conclusion and recommendations naturally follow.

2 CONTESTING THE GOLD

To paraphrase Coerwinkel, defining the actors are necessary in defining the problem (2007:65). Establishing the significant actors and their influences was an exercise in itself, because of the number of actors and the sometimes oblique nature of influence. The case of the Marlin mine involves simultaneous national and trans-planetary connections between the multiple actors. The following is contextual background.

2.1 THE GUATEMALAN STATE AND INDIGENOUS PEOPLES

The Guatemalan state affirmed the rights of its indigenous peoples, in principle. The Constitution includes the right of consultation. The State has ratified international treaties key to indigenous rights such as International Labour Organisation Resolution 169, the UN Declaration on the Rights of Indigenous Peoples, International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights (Anaya 2010).

In contrast, history between indigenous peoples in Guatemala and the state has been violent (Imai, Mehranvar, and Sander 2007). A UN-sponsored Commission found that during its civil war, the state was responsible for “93% of the human rights violations” and it had “committed acts of genocide against groups of the Maya people” (Imai, Mehranvar, and Sander 2007:1083). Since then, relations between government authorities and indigenous peoples are characterised by a “high level of mutual distrust” (IWGIA 2014:83).

Furthermore, the state contests ownership of the sub-surface minerals (Imai, Mehranvar, and Sander, 2007:125) in indigenous residential areas.

With the Marlin mine, what compounds alleged human rights violations is the alleged complicity of authorities “intent on acting in favour of the companies” (ibid). The state is economically vulnerable to its reliance on natural resources (ibid:128). For a sense of scale and power, Goldcorp had assets worth more than half of Guatemala’s GDP in 2006 (Imai, Mehranvar, and Sander 2007:118). Furthermore, Guatemala’s Constitutional Court found that “the state had no mechanisms for complying with the consultation requirements of ILO

Convention 169” (ibid). The state also has no capacity to monitor corporate obligations (ibid). Therefore, although states are conventionally regarded as primary duty-bearers in an international human rights regime, many factors suggest that indigenous peoples in Guatemala cannot rely on the state to protect their human rights.

2.2 GOLDCORP AND THE MARLIN MINE

A Canada-based transnational corporation, Goldcorp, owns the Marlin mine. It operates in the San Miguel Ixtuacan and Sipacapa municipalities in Guatemala, where Mam and Sipakapense indigenous peoples reside. They allege that the mine operates without their free, prior and informed consent (FPIC). Mayan communities in the Sipacapa municipality were concerned about the environmental impact of the mine and “favoured alternative development proposals controlled by the community” (Imai, Mehranvar, and Sander 2007:110). Indigenous communities held “well-organized, orderly” (ibid) ‘consultas’, communal decision-making assemblies channelled through existing community governance structures. They voted overwhelmingly in opposition of the mine asserting community will in the face of ostensible attempts by the mining company to discredit and to obstruct the indigenous governance process. To them, legitimate authority arose from indigenous governance structures and processes, not state legislation (ibid:109-118).

Despite the results, the mine continued operating, claiming that it operated only in areas where it had received express consent. This was to the communities a clear violation of rights because no individual had sole ownership rights to the territory; instead, the community should decide (ibid:118). Moreover, any support which Goldcorp obtained was deemed to be based on unclear or incomplete information about potential impact and mitigation (ibid:121), casting doubt on the legitimacy of the consent.

Subsequent community complaints about the mine include groundwater contamination (including that from the use of cyanide leaching), animal deaths, vast water consumption resulting in wells drying up, lesions and rash on children, and cracks on the walls of their houses (Imai, Mehranvar, and Sander 2007; Anaya 2010; Studentenes og Akademikernes Internasjonale Hjelpfond 2014; Rønneberga 2011b; Haines, Haines, and Sherburne 2013).

Complicating the situation, some residents are employed by the mine and have been in conflict with other residents who oppose the mine, resulting in internal community strife. Private contractors and former employees of the mine are also alleged to engage in violence

and threats against mine-opposing residents and leaders (Imai, Mehranvar, and Sander 2007:124,127). The company has complained to the authorities about the activists, resulting in their arrests (ibid).

A post-hoc human rights assessment commissioned by Goldcorp and others corroborated their concerns. Top on the list were: “conflict”, benefits from the taxes, water quality, the role of the state, negative impacts, health, information disclosure, land pollution and “basic work conditions” (On Common Ground Consultants Inc 2010:7).

The state is obtaining only 41.5% of mine revenues (Zarsky and Stanley 2011:27), “substantially below best-practice in global mining operations” (Goodland 2012:18) and “local communities receive only about 5%” (ibid).¹ What compounds the situation is academics concluding that “environmental costs are likely to swamp economic benefits in the long run” and that the mine, “and mining in general, are contributing little to sustainable development in Guatemala” (Zarsky and Stanley 2011:43).

2.3 THE ‘OIL FUND’

The ‘Oil Fund’ is a shareholder of Goldcorp. The Fund’s investment in Goldcorp is a total of almost 389 million NOK², comprising 0.34%³ ownership of the company.

The Fund’s official name in English is ‘Government Pension Fund Global’ or Statens pensjonsfond - Utland in Norwegian, but it is colloquially referred to as ‘Oljefondet’. It is considered an SWF because it is owned by the Norwegian state, comprising revenues derived from oil extraction in Norway.

Why does the Fund merit attention? Apart from its owner’s reputation, it is one of the largest Sovereign Wealth Funds (SWF) in the world, having a value of 7018 billion NOK, of which more than 60% are invested in equities from “75 countries, holding 9,000 companies and 1.3% of the world’s listed companies”⁴.

It derived mainly from the 78% corporate tax levied on the petroleum and gas industries (Holden 2013:875). Many politicians viewed the revenue “as antithetical to the traditional Norwegian values of equity and egalitarianism” (Vasudeva 2013:1665). Hence, the Fund’s

¹ By contrast, Norway obtains 78% of revenue from oil.

² As of 1 November 2015

³ Most of its holdings are less 1% ownership

⁴ as of 6 April 2015; reported on <http://www.nbim.no/en/the-fund/>, where there is an ever-increasing ticker.

purpose was at least two-fold. One was “economic stability”, to provide an outlet for petroleum-based revenue without causing economic upheavals. Another was “intergenerational equity” (Chesterman 2008:583), preventing contemporaneous generations from spending all of the revenue and to enforce budgetary discipline (Clark and Monk 2009:3).

Among SWFs, it is unusual for taking a responsible investment approach. The Fund is a signatory of the UN Principles on Responsible Investment (PRI) and produces annual Transparency Reports (PRI Association n.d.). It is regarded as an exemplar for other SWFs (Backer 2013; Rönneberga 2011a; Sovereign Wealth Fund Institute 2013).

2.4 NORWEGIAN CIVIL SOCIETY ORGANISATIONS

In this case study, the agents for resistance and change are civil society organisations (CSOs) in Norway, Guatemala and Canada. Although my initial focus was on the Fund itself, I found during my research that a coalition of Norwegian CSOs came to play an important role.

3 RESEARCH SIGNIFICANCE

Within the context of globalisation, research on the human rights policy and practice of transnational actors has focussed on the first order of responsibility, that of States, as duty-bearers.

As multi-national/transnational corporations grew in size and power, they drew greater attention with a parallel growth in human rights complaints about their corporate practices, especially those in extractive industries violating the human rights of indigenous peoples.

Instead of relying on the Guatemalan state, Guatemalan and Norwegian activists have cooperated to strategically appeal to a level above that of the mining company, to one of its corporate shareholders, the Fund. This implies that they attribute the Fund with a measure of responsibility, possibly of a second order. It raises many questions, beginning with: what are the responsibilities of an SWF such as the Fund? Are perceptions of responsibility shared by activists and the Fund?

Given the power and influence of an actor such as the Fund, it is worth considering them as an avenue for change in defence of human rights. In order to explore this potential, I seek to discuss the nature of SWF governance and civil society responses.

3.1 FOCUS ON NORWEGIAN ACTORS

I chose to focus on actors in Norway because they are less-studied in the literature and because I was located in the country for the duration of the research.

3.2 RESEARCH QUESTIONS

3.2.1 The Fund

Most of the literature about the Fund has been laudatory, which is understandable as there are few sovereign investors which practise socially responsible investment. Does the praise bear closer scrutiny?

My first research area is about the Fund's application of human rights. The questions following from that are:

- a. What is the Fund's mechanism for incorporating human rights into investment decisions?
- b. Are indigenous rights considered (e.g. UNDRIP, ILO R169)?
- c. What are the other considerations?
- d. What happens in practice?
- e. How does the Council of Ethics function?
- f. What is the decision-making process?
- g. How are the fund's ethical guidelines implemented?
- h. What are the Council's methods of obtaining data about ethical violations?
- i. How does the ethical complaint mechanism function?
- j. How do the claims of activists from the affected communities interact with the current mechanisms?
- k. What was the decision in the case of GoldCorp?
- l. Is there a gap between policy and practice?
- m. Taking the example of the Global Fund, what duties or ethical obligations do Sovereign Wealth Funds have in terms of human rights?

I hypothesise that the claims of human rights violations in this case have arisen from under-specification in the Fund's ethical guidelines and/or discrepancies between policy and practice.

3.2.2 Norwegian civil society organisations

Another hypothesis is that such ethical claims resonate in Norwegian society and present avenues for change. The role of Norwegian CSOs are then of interest and my questions would be:

- a. How is this perceived by Norwegian civil society organisations (CSOs)?
- b. How do Norwegian CSOs respond to these claims?
- c. What were their objectives?
- d. What are their strategies?
- e. Have they been effective in terms of their objectives?
- f. How does the Fund respond to activist claims?
- g. How may their responses be analysed and interpreted?
- h. Were any unintended consequences? If so, what were they?

4 LITERATURE REVIEW

4.1 THE CORPORATION IS AMORAL

In this section, I describe the historical origin of the modern corporation, its existential imperative, its rise in power facilitated by neoliberalism, followed by implications for structure, accountability and ethics. This knowledge may moderate expectations of corporations self-regulating their conduct and justify instead, interventionist approaches.

Historically, the corporation emerged from a need for capital to finance high-risk, trans-oceanic trade voyages, and often military expansion. Profits could take many years to realise. Ownership was thus divided into shares which could be held by unrelated individuals and were heritable. The corporation was “designed to be permanent” (O’Brien and Williams 2013:61). Unlike family-owned businesses, the corporation is impersonal. The separation of ownership and management also facilitated separation of ‘investment from ethics’ (Nystuen, Follesdal, and Mestad 2011:64).

The corporation’s sole existential imperative is thus to generate maximum wealth for its shareholders through growth in profits and/or share values. In contemporary corporations, the profit horizon has shortened considerably. Chief executives for instance, have contract durations of a few years and their remuneration packages depend partly on annually-declared

profits, putting them under pressure to report profits within their short tenure, regardless of long-term consequences for which they may not present. Financial intermediaries such as banks, have a similar short-run bias due to compensation structures (Sethi 2005:99). Specifically, “per-deal bonus compensation” makes frequent transactions lucrative, even when it undermines long-term shareholder value (Ho 2012:38). It entails that shareholder and intermediaries’ interests may not be aligned, even if they were expected to be so.

4.1.1 The role of neoliberalism

It is predictable that corporations with a singular financial imperative would seek minimal restraint on its profit-seeking activities. This expectation is fulfilled with the rise of neoliberalism as an economic ideology to become a hegemony. By persuading political leaders that corporate and economic growth were symbiotic and necessary, corporations succeeded in lobbying governments to “repeal, weaken, or narrow the scope of existing regulations” and to prevent the introduction of new regulations (Bakan 2004:61).

Neoliberalism thus liberated the corporation from regulatory constraints on its conduct, increasing its power.

4.1.2 Structure creating distance from accountability

Shareholders, executives and employees as individuals may not typically be held legally liable for harm caused by the corporation’s conduct. In contrast with a business owned by a family which lives in the area of its operations and which employs its neighbours, a transnational corporation’s shareholders and employees experience neither the pressures from being in the same social proximity nor the ecological consequences.

At the individual level, corporate executives may “compartmentalise” work from the private lives that they lead, allowing to distance themselves from potential guilt resulting from ethically contentious choices and actions at work (Bakan 2004:55). This is facilitated by corporate discourse being typically indifferent, secretive or hierarchical, preventing empathy (Roddick, cited in *ibid*) with those who might bear negative repercussions from corporate actions, such as dispossessed indigenous peoples, third-party contracted workers and end-users.

Then there are double standards between individual criminal liability and corporate liability. If for example a person were to cause death, disability and illness to hundreds, they would probably be prevented from ever having the opportunity again. Yet corporations who do the

same, would be asked to make financial reparations (which may not materialise, such as in the Bhopal chemical disaster) and be allowed to continue operating. It may not have consequences for their operations in other locations either.

Therefore, the very structure of a corporation creates perceived and actual, social distance between those responsible for its conduct and ethical consequences. One may wonder then if accountability is diffused.

4.1.3 Ethical implications

The financial imperative embeds deep roots in the organisational culture, making it an ethic which may become unconscious. This is its fundamental decision metric, regardless of social and ecological costs to others which economists call ‘externalities’. The corporation is thus described as ‘an externalising machine’ (Bakan 2004:57). A 2008 UN report based on a sample of human rights violations characterises corporations as having a cascading effect on “the full range of human rights” of employees and communities, some connected to environmental damage and corruption (Wright 2008).

On the other hand, reputational loss may have negative impact on access to funding and operations in other countries. To enhance their reputation, most corporations now have Corporate Social Responsibility (CSR) initiatives.

There may be a parallel between states which ratify human rights conventions and companies which adopt human rights policies and conduct human rights impact assessments, to enjoy reputational benefits, but thereafter, act contrary to their commitments. One might call it organised hypocrisy -- CSR is tolerable only as a means to growing corporate wealth (Friedman, cited in Bakan 2004:54). To paraphrase Friedman in Orwellian fashion: hypocrisy is virtue.

Given the corporation’s inherent design, existential imperative and track record, it would seem unduly optimistic to expect it to self-regulate in a manner consistent with respect for human rights, especially those of indigenous peoples who may have conflicts of interests.

4.2 EXTRACTIVE INDUSTRIES AND INDIGENOUS PEOPLES

4.2.1 Human rights violations linked to ecological impact

“Global demand has transformed the mining industries ... into some of the most important” and “human rights due diligence” is being “rapidly globalized”, e.g., applied to mineral

mined in conflict situations (Taylor, cited in Centre for Sami Studies 2012:22–26). Despite this, a UN-sponsored survey of Fortune Global 500 companies, extractive industries reported “a human rights incident” rate higher than other sectors (Human Rights Council 2007:3). A report on the Canadian mining industry’s activities in Latin America characterises their effects in terms of “environmental impact, forced displacement, community division and breakdown of social fabric, criminalisation of social protest, adverse economic effects, violent deaths and serious injuries to mineworkers and opponents, adverse health consequences and fraudulent acquisition of property” (Working Group on Mining and Human Rights in Latin America n.d.).

Much of these effects are typically experienced by indigenous peoples who may have been already driven to territorial margins by colonialism and/or elites. Indigenous peoples are particularly vulnerable, often because of their low socio-economic status and ignorance of their deep cultural differences. Extractive corporations’ violations of indigenous human rights typically begin with a failure to obtain free, prior and informed consent (FPIC). It then cascades in a range of consequential harm to individuals and communities.

Licences to explore and to operate mines are granted by a host state. However, states often fail to account in relevant policy and planning, for the economic, social and cultural value of resident indigenous peoples’ traditional livelihoods such as agriculture, fishing, foraging, hunting and animal husbandry – which sometimes outlasted extractive operations in the same areas.

A mine’s impact extends beyond the mine, because it requires the development of vast industrial infrastructure and utilities (power supply, water, roads, railway lines, residences, waste management) to support it. Ecological effects of extractive operations may not be containable. For example, high water consumption may cause changes in groundwater levels which may then affect geological stability. Disposal of tailings on land or water bodies in the vicinity may pollute or poison them to the detriment of resident sentient life. This is especially complex with nomadic pastoralism and fishing, where different areas may be used in different years to allow sustainable regeneration from prior usage.

4.2.2 Self-determination: from dialogue to Impact-Benefit Agreements

An indigenous activist described the mines as “development and enrichment for one, and a curse for the other” (Centre for Sami Studies 2012:86). In most countries where there are conflicts between extractive industries and indigenous peoples, a sense that “indigenous

peoples have no alternative to dialogue” prevails (Centre for Sami Studies 2012:86). They feel compelled to spend a large amount of time engaged in dialogue, e.g., a Sami representative from Sweden reports communities being “asked to take part in 30-50 meetings each month” (ibid:88). Unlike public or corporate officials, they are not compensated for their time engaged in dialogue and may sacrifice income in order to participate. It betrays an unfair presumption that they should voluntarily participate because it concerns their welfare, even if the interest in their territories was completely unsolicited and unwanted in the first place.

To effectively participate in negotiations, indigenous peoples need to understand fully the effects of extractive operations on individuals, communities and ecology. Therefore, beside material capacity, another predicate for effective participation may be education, which may not be available.

Unlike mostly negative experiences in other countries, Fidler described Impact Benefit Agreements (IBA) as an innovation growing in use and acceptance by indigenous communities, governments and corporations operating in Canada. They may consist of “equity ownership, royalties, foundations, trusts and funds”, employment, training and educational opportunities, and environmental protection based on traditional knowledge and cultural heritage”. Extractive industries in what seems like best-case scenarios in Canada apparently incorporate indigenous concerns into project design and planning (ibid), i.e. before commencement. This is contingent upon genuine participation such as in the environmental assessment, to build community trust, and through a “clear delineation of roles and responsibilities” between governments and extractive companies (Centre for Sami Studies 2012:48–50). It seems thus possible to develop new models include partnerships where indigenous peoples who want mines have “significant/controlling shares”, or “develop their own extractive business enterprises”, because self-determination is “not a binary choice” between current model or no extraction (ibid:12–17).

4.2.3 Recalling imperialism

The mining industry attracts state support because it provide employment and theoretically, its economic contributions (e.g. through taxes) could help to fund public services and social welfare. The industry provides for manufacturing consumer products which have an ever-growing demand.

The contrast between Canadian extractive operations in Latin America versus IBA models in Canada illustrate double standards. Without consistent corporate policies and governance by the home state, outcomes differ greatly from one case to another.

Furthermore, capital export was as a “key instrument in the development of imperialism” (O’Brien and Williams 2013:88). If the benefits in a resource extraction model accrue to local elites and powerful non-residents whereas costs are borne mainly by autochthonous inhabitants, might it not be regarded as neo-imperial? Investors of these corporations who benefit from this model may be considered complicit.

4.3 RESPONSIBLE SOVEREIGN INVESTMENT

The literature on SWFs has explored their practices through mainly legal, economic and political science approaches.

4.3.1 Global economic financialisation

Globalisation has meant “de-territorialisation”: space-time compression, new social relations and new centres of authority (O’Brien and Williams 2013:27), resulting a polycentricity of governance (Scholte 2013; Backer 2013). Capital has become more mobile, facilitated by deregulation and a growth in communications technology. At the same time, “self-referential commodification” of finance has meant that that their values grow through transactions, dwarfing production of actual goods and services (Scholte 2013:130–132). A great many intellectual resources are attracted by high remuneration prospects to the financial industry. Together, these trends contribute to a “financialisation” of the global economy (O’Brien and Williams 2013:27), increasing the “structural power of capital” (Gill and Law 1993; cited in *ibid*:180).

4.3.2 Overstated decline of sovereignty

A common perspective of global political economy is that growth in capital mobility entails competition between states to attract capital, typically in the form of transnational corporations. The competition between states would make them reluctant to impose regulations, taxes and constraints on corporations, leading to a weakening of sovereign power. They even provide tax benefits and other material incentives to compete for foreign investment, hoping to increase domestic employment and to receive trickle-down benefits in the longer run. Transnational corporations would then be “policy shoppers” among states

which are “policy peddlers” (Follesdal 2007:428). This hyperglobalisation thesis – a single convergence toward liberalisation – therefore predicts a “race to the bottom in terms of social and environmental standards” (Ravenhill 2014:259). The prospects for human rights protection, traditionally conceived as dependent on sovereignty, then appear bleak.

Low wages are but one factor which attracts capital⁵. Analysis of empirical data by Cooke and Noble (cited in Ravenhill 2014:273) suggests that Foreign Direct Investment prefers destinations where it has “direct access or geographical proximity to a substantial, affluent market“, where labour costs are low or where education and skills are high. Capital mobility “is perhaps the most effective as a threat” because of sunk costs (Ravenhill 2014:260), investments already made.

This may reflect a need or advantages for countries to act concertedly. Developing countries could cooperate to regulate and to tax transnational corporations, rather than compete in deference for their perceived benefits. Economic communities⁶ could provide platforms for such agreements. In the spectacle of capitalism, it would be premature to predict the death of sovereignty.

4.3.3 Return of sovereign power

Sovereign Wealth Funds (SWFs) are an increasingly popular investment vehicle for wealthy states, many of them wealthy from oil and gas exports. They are a perceptible form of wealth redistribution from industrialised countries to developing countries, and from private to public owners (Tencati and Perrini 2011:101–102). 12 have been established since 2005 and the sector grows at a rate of about \$1 trillion per year (Tencati and Perrini 2011:100). From a sovereign perspective, they have many ostensible functions, such as economic leverage and intergenerational equity.

Structurally, they are an odd child of private and public enterprise. The Norwegian Fund for example is “structured as a governmental entity operating autonomously but not incorporated as either a private or public corporate entity” (Backer 2013:13). In fact, “whether a particular entity qualifies as a ‘state’ organ is a highly uncertain field of international law” (Nystuen, Follesdal, and Mestad 2011:200).

⁵ Swedish economist, Kjell Nordström, describes the low-cost competitive advantage as “an ice cube in the desert” at <https://newbons.wordpress.com/2011/09/19/innovation-economics-and-creativity-kjell-nordstrom-and-chris-barez-brown/> and other lectures.

⁶ The trend of countries grouping to form economic regions, such as the European Economic Area and ASEAN

Their sheer scale makes their market movements noticeable and yet, there can be considerable secrecy in terms of their “management, assets, liabilities or investment strategies” (Tencati and Perrini 2011:108). The secrecy fuels uncertainty about their intentions, and anxiety about their effects on economies and enterprises abroad. Academic literature is rife with discussions about whether they are instruments of geo-political interests.

4.3.4 Responsible investment

Backer takes a structural view, that responsible investing comprises “public policy, incorporation of international standards, active participation in developing them, active ownership principles and ethical guidelines.” (2013:24) The hope is that international standards and norms (e.g. responsible investment principles), together with market transactions, influence the conduct of corporations and have the potential to curb their excesses.

4.4 TRANSNATIONAL ADVOCACY NETWORKS

Another phenomenon facilitated by the speed and affordability of communications technology in globalisation are the growth of transnational advocacy networks. This may be relevant to accounting for the influence of Guatemalan and Norwegian activists on the Fund.

Networks are communicative structures, where there are ‘voluntary, reciprocal, and horizontal exchanges of information and services’ (Keck and Sikkink 1999:200). In Castells’ concept of a network society, ‘people organize themselves through networks rather than hierarchies’, constructing direct links, instead of working through a bureaucracy (O’Brien and Williams 2013:100).

A Transnational Advocacy Network (TAN) can be recognised by the centrality of values or principled ideas, an underlying belief in individual’s potential to effect change, creative use of information, employment of sophisticated political campaign strategies (Keck and Sikkink 1998:2). It is “particularly useful where one state is relatively immune to direct local pressure and linked activists elsewhere have better access to their own governments” (ibid:200).

They use politics of information, symbolism, leverage and accountability (ibid:16-25,200-201). Information tactics rely on testimony, credibility, drama, statistical and technical information, and reputation for credibility among media. Leverage may be material or moral. Accountability politics exposes the “distance between discourse and practice” (ibid:24).

4.5 THE BOOMERANG EFFECT

A TAN of actors working across borders frame issues to construct a shared understanding and to influence norms for a cause. It is a form of political entrepreneurship (ibid:14). Actors may use their understanding of political opportunity structure (ibid:7) to ‘shop’ for venues (ibid:18) to induce the ‘boomerang effect’ (Keck and Sikkink 1999:89–93), so named because it ‘curves around local state indifference and repression’ (ibid:200), seeking to bring pressure on states and private actors from the outside. ‘Countries that are most susceptible to network pressures are those that aspire to belong to a normative community of nations’ (ibid:29) although, ‘even repressive regimes depend on a combination of coercion and consent to stay in power’ (ibid:206). TANs may undermine ‘absolute claims to sovereignty’ by seeking international allies and by implying that states are not entirely trustworthy (ibid:36).

Their stages of influence are typically: agenda-setting, securing discursive commitment, procedural change, policy change and behavioural change (in practice, de facto) (Keck and Sikkink 1998:25). Their effectiveness depends on their ability to create a short and clear “causal story”. Issue characteristics -- bodily harm and legal equality of opportunity tend to resonate more (ibid:27). Actor characteristics in terms of density of connections between actors, regular, reciprocal information exchange (ibid:28) matter as well.

5 METHODOLOGY

5.1 CASE STUDY

I chose to do a case study as a means of understanding a complex system, taking a vertical slice across different layers of national and transnational activity. For the choice of case and methods, I considered financial and time resources, availability of information in the public domain, potential access to the actors, time constraints and my location⁷.

5.2 SCOPE (DELIMITATIONS)

With regard to the alleged discrimination, I was not attempting to verify the validity of any party’s claims, especially since I did not conduct field work with Canadian or Guatemalan parties. My objectives were more epistemological than ontological. I sought to understand

⁷ since I did not have additional funds for travel

how the Fund works and how Norwegian CSOs are approaching it, instead of evaluating one party's claims against another's.

5.3 SOURCES

My data sources were data from interviews conducted in person, reports from major Norwegian and Guatemalan media (e.g., Afterposten, Prensa Libre), official organisational documents and webpages.

5.4 DOCUMENT REVIEW

The first stage of my research was descriptive. I conducted a document review of relevant media and organisational publications in the public domain to establish the context and fundamental information about the case. The strength of document review as a method is that it is unobtrusive. Documents in the public domain are universally accessible and thus have a public relations function. Studying the public documents was a means of “understanding the preferred self-image” (Nader 1969:308) of their creators.

5.5 POWER ANALYSIS

To understand the interactions of the actors within the complex system, I drew a diagram (in figure 1 of the Findings section) with those for which I could find documentation of influence. As I drew and re-drew the diagram, it seemed that the more arrows an actor had linking it to others, the more powerful it could be. In that sense, **influence is visibly currency**. Such diagrams could be a useful tool for power analysis.

5.6 STUDYING ‘UP’

It is typical (in the field of human rights) to study those who experience human rights violations, those with less privilege. Whereas it is doubtless important to empower them by bringing attention to their representation, it is also worth studying elites who influence the status quo. In this vein, Nader highlighted the importance of “studying up” -- studying powerful institutions in society to understand how power exercises influence: “If one's pivot point is around those who have power/responsibility, then the questions change.” (1969:290) Furthermore, as Frankenburg observes, the “techniques of power are rendered invisible” when their experiences become normative (Ho 2012:34), such that ‘normal’ becomes conflated with ‘natural’. If, for example, eliminating extreme wealth were a global goal,

instead of eliminating extreme poverty, it would invert the gaze and influence social norms. The poor may be less blamed for their plight and the extremely wealthy would instead be expected to justify their accumulation and its sources.

The distance between the actors in this case could be an index of “‘lack’ of power and imagined social distance”, instead of physical remoteness (Ho 2012:32). Distance is described by Gupta and Ferguson as “a consequence of uneven power relations forged and measured by colonialism, race, gender, capitalism”, etc. Therefore, the risk of *not* studying elites is that their interests could become normative and their techniques “rendered invisible” (Frankenburg, cited in Ho 2012:34).

I chose to study actors in Norway because I saw them as actors with the potential to effect change. Discovery of how the Fund practises responsible investment can facilitate democratic access by others, such as activists.

5.7 INTERVIEWS

Semi-structured interviews were a means of obtaining data which may not be available in documents due to their sensitivity. Interviews may help discern *what is meaningful* amidst abundant information and *where power lies* in organisational structures and dynamics -- which may differ from the appearance. For example, whereas philosophical, legal, political and economic academic literature has focussed on the Council, how it works and whether it is effective, after speaking with Christian from SAIH (Bull 2015), I realised that the CSO coalition focussed on the fund manager, NBIM. Their focus implied where they felt the power and potential for change lie.

A disadvantage of interviews was that when requests were rejected, no⁸ data could be obtained therewith. During interviews, participants could be inhibited or evasive when responding. The candour of a participant may be affected by anticipated personal, political and professional consequences for them, the social setting of the field and (conscious or unconscious) reactions to ascribed characteristics of the interviewer.

Interviews functions to examine face value, truth claims, and self-representations (Ho 2012:36). Researchers must be cautious about reproducing the norms of the powerful (ibid) however, because participants influence the (re)definition and structure of the situation

⁸ Rejections may provide a little information, but not if requests are simply ignored.

(Dexter 2012:19). Furthermore, there are cognitive biases at play to which anyone is prone and can be impossible to eliminate. They include: selective memory, social desirability, overgeneralisation, selective observation, halo effect (Neuman 2014:4–5), confirmation bias, false consensus, and more. Hence, triangulation of document review and interviews was essential to formulating my analysis.

My original plan was to interview participants who were involved in the case from the Ministry of Finance, Norges Bank, the Council of Ethics, SAIH, Framtiden, NorWatch, Kirkens Nødhjelp, a Guatemalan expert on indigenous peoples, and the Guatemalan activists who had visited Norway.

Despite certain events occurring within the last five years, some of those involved had already left the organisations or retired. NorWatch ceased to exist. I could only interview others who continued the work, but were not present during the events in question. I called NBIM and was directed to their Global Head of Ownership Strategies, who told me to wait for their email response, which never came. During our phone conversation, he said that they receive a large volume of requests, so it may be that mine was not deemed sufficiently important. I could not reach the relevant Director-General at MoF on the phone. In the end, I managed to interview only the Council and SAIH.

Each interview lasted about an hour and was digitally recorded with their consent. During the interviews, I noticed “nuances and turns of phrase” which “indicated orientations and relationships” (Dexter 2012:55) between different parties in the system. Questions about this turned out to be valuable for constructing a power analysis.

The disadvantage of interviewing someone as an organisational representative is that they may be reluctant to share their personal, especially negative, responses or feelings out of loyalty to the organisation (Ryan and Lewer 2012:83). Participants were willing to speak more candidly off the record.

Later, I learnt that it should be made clear which questions address the ‘collective’ you and which, the personal ‘you’, because there is otherwise a tendency to speak as an organisational representative (Ryan and Lewer 2012:83).

5.7.1 Challenges and lessons learnt

I learnt belatedly that there is social science literature about ‘elite interviewing’. In it, there were many tips for securing interviews, such as: ask through an intermediary, a personal

contact or researchers who had prior access; the intermediary should provide a general introduction in request, but not interpret the project, especially in detail (Ryan and Lewer 2012:76); executives tend to evaluate interview requests based on public relations cost (ibid:77). It is thus important to address their motivation by framing it in terms of potential benefits.

Secrecy and confidentiality can be obstacles in studying elites (Nader 1969:302). In the case of the Fund, its various entities have their own reasons for secrecy/confidentiality. For example, the Council would not publicly disclose all its investigation procedures or evaluations to avoid compromising future investigations (Jervan 2015). Stock investment or divestment is usually conducted with a certain amount of prior secrecy because stockholders would not wish for prices to be negatively affected.

5.7.2 Analysis

In analysing the interviews, I examined vocabulary and categorisation, participants' interests (Magnusson and Marecek 2015) in the rhetorical context (ibid:37). I looked for "comprehensibility, plausibility and consistency" (Dexter 2012:19) in the statements, taking into account "style, manner, experience" and "leadership positions" (ibid:20).

There was a constant negotiation of meaning or consensus within the conversation of implied norms, such as what 'ethical' meant to the Fund, through discussing of issues of contention, comparison and contrast between different cases (ibid:41). "Extreme case formulations" indicated sensitivity (ibid:42). Metacommunication -- commenting on their own stories or statements (ibid) also provided insight.

5.8 LIMITATIONS

The sampling of interviewees, sample size, researcher bias, whether participants are representative of the institutions, and participant reactivity to researcher are all potential limitations of this research. It was also a challenge to keep track of developments as they continue even after my data collection period.

5.9 LANGUAGE

I had to rely on machine translation in the first instance when I was browsing Norwegian and Guatemalan data. This means that there may be cultural nuances and implications which I have missed.

It was more difficult to build rapport with interview participants, without speaking their native language of Norwegian, and working in their second language. I observed from my year of living in Norway that people are much more comfortable speaking freely in Norwegian than in English⁹.

On the other hand, being located in Norway in “physical proximity” to the participants helped me to better understand Norwegian cultural and social contexts, and develop “psychological involvement” (Nader 1969:305).

5.10 ETHICS

I obtained voluntary, informed consent from the interview participants, and endeavoured to ensure that participants experience no physical or psychological harm, unnecessary anxiety and stress, loss of self-esteem (Neuman 2014:148). There was a tension between informed consent and not wishing to induce defensiveness in participants. Hence, I formulated my interview request as neutrally as possible.

I also provided options of anonymity and confidentiality for participants by using pseudonyms in any publication of their responses if they so prefer. The interview participants consented to being identified nevertheless.

5.10.1 Unplanned participant observation

I became active as a volunteer with SAIH early in 2015 out of personal interest. Consequently, I learnt more about the organisation as an insider, such as from where it obtains funding¹⁰, how campaigns are developed and what developments are occurring in political advocacy. The knowledge was useful for as a background. After considering that there would be no negative implications for the organisation, I include contextual information where relevant.

⁹ With the latter, they become very self-conscious and their speech becomes stilted. Despite a technically high level of proficiency in the language, many seem to lack confidence due to infrequent oral practice.

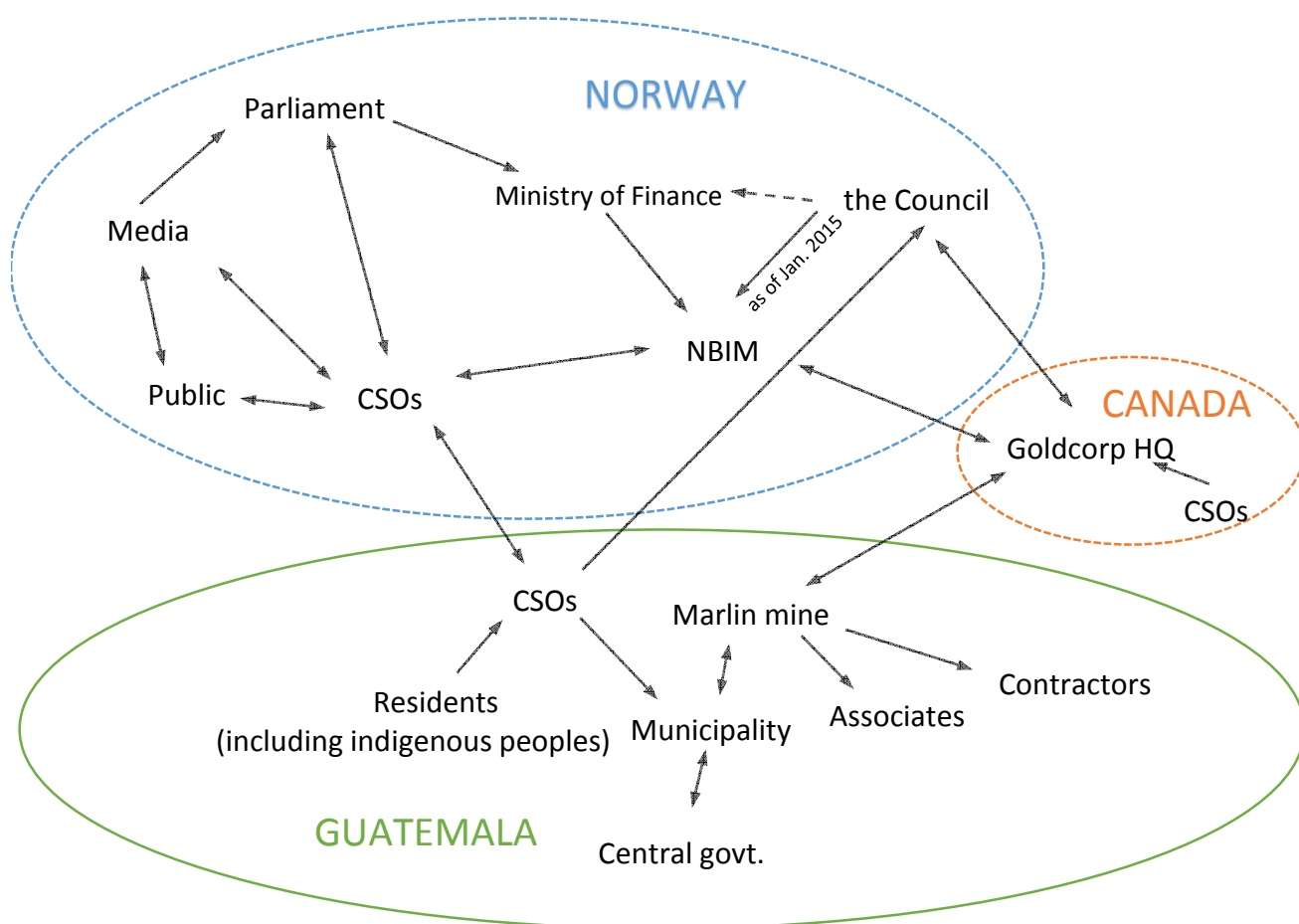
¹⁰ Voluntary contributions from university/university college students as part of their semester fees

6 FINDINGS

The first part of my research involved identifying the relevant parties and which have influence on others. An overview is presented in the following diagram. The diagram is not exhaustive; the arrows indicate influence which I found in my research.

6.1 MAIN CATEGORIES OF ACTORS AND THEIR INFLUENCE

Figure 1: Mains actors and influence in Norway, Canada and Guatemala



6.2 HOW THE FUND APPLIES HUMAN RIGHTS

The Fund has a multi-layered governance structure. It applies human rights through a combination of entities, documents and processes.

6.2.1 Values, motivations and legitimacy

Teleological (e.g., utilitarianism) and deontological (e.g., Kant's categorical imperative) sources of ethics were considered in the development of the Fund's ethical approach (Ministry of Finance 2003; Chesterman 2008:587–588). The Graver Committee which proposed the Fund's original approach wrote that “deontological ethics will dictate that certain investments must be avoided under any circumstances, while teleological ethics will lead to the avoidance of investments that have less favourable consequences and the promotion of investments that have more favourable consequences.” This corresponds to the types of exclusions in the Ethical Guidelines and Management Mandate.

Responsible investment may bring Norway non-financial benefits in terms of its ability to influence global governance, despite the financial opportunity costs which it incurs (Backer 2013:105). Reputation can be an asset (Clark and Monk 2009:22); it facilitates access to funding and operations in other countries.

The Fund's ethical approach has been described as “expression of values” to avoid complicity (Follesdal 2007:430), an “expression of Norway's commitment to global justice” (Clark and Monk 2009:2) and the Council's recommendations are seen as representing “public values” (ibid:24).

The Fund's legitimacy derives from the political process (Backer 2013:20). Costs are “willingly borne by the public” because they prioritise accountability and shared values (Clark and Monk 2009:3–4), their consent is implied (ibid:7) since they have the freedom to dissent.

6.2.2 the Council on Ethics

The Ministry of Finance appoints an advisory Council for Ethics (hereafter, the Council) to make recommendations on the Fund's investment decisions with close reference to established Ethical Guidelines, where human rights are incorporated (Ministry of Finance 2010).

Most of academic literature to-date about the Fund's ethical investment has focussed on the Council. It does negative screening of two kinds: (1) sector-based exclusion based on humanitarian principles of proportion and distinction related to weapon use (Nystuen, Follesdal, and Mestad 2011:8); (2) conduct-based exclusion. Conduct-based exclusion is the kind relevant to the discussion.

If the Council receives an instruction from the Ministry to investigate a complaint about a company whose stocks are held in the Fund's portfolio, it begins to investigate. Likewise, if a complaint is submitted by a third party. The Council conducts its own investigations by engaging third parties to collect information and collecting responses from relevant parties. It may then draft a recommendation for the investigated company to be placed under observation or for the Fund to divest. The Council is obliged to send its draft recommendation to the company under investigation, for the company to respond. This stage of the process may already trigger the company to take actions to address the allegations (Jervan 2015), regardless of whether their response is sincere. The Council's eventual recommendations must be made public (Nystuen, Follesdal, and Mestad 2011:9). However, public disclosure may be circumvented if no recommendation is made (Jervan 2015).

The whole process is "quasi-judicial" (Backer 2013:24). The Council functions "like an administrative court with a broad political mandate"; some members are lawyers (Council on Ethics 2014b), but "understand their role as essentially political" (Backer 2013:29).

According to Nystuen, Follesdal, and Mestad (2011:10), each stage of the process: fact-finding and deliberation, communications with the company, political processing (i.e., discussions within relevant ministries), could take weeks to months. It can be deduced that the entire process usually takes about a year, and CSOs such as SAIH have this impression (Bull 2015).

Regardless of the Council's recommendation, the final authority about divestment lay with the Minister of Finance¹¹ (Clark and Monk 2009:16). One may infer that where there is a conflict between corporate ethical conduct as defined by the Guidelines, and financial returns or other political considerations, the Ministry makes the final decision.

6.2.2.1 Ethical Guidelines

The Ethical Guidelines (Etikk Radet 2014) which the Council works with was originally formulated by the Graver Committee (Ministry of Finance 2003). It identified an "overlapping consensus of ethical values ... consistent over time" (Chesterman 2008:585). The guidelines' construction process was "inclusive and participatory" comprising academic, government and industry members; aligned with "internationally accepted code of conduct", to create a "consensus-based institution" (Vasudeva 2013:1665). The Guidelines are based on the

¹¹ Before January 2015

political notion that “private actors have public obligations” which apply even to “private market activities” (Backer 2013:19). Globalisation has made the connection more obvious.

When the Council screens corporate conduct for violations, it considers the **severity** of violations, the **likelihood of recurrence**, whether there is a **direct connection** between the company and the perpetrator, to serve the company’s interest, and the extent of **mitigation or remediation** (Backer 2013:21,27–28; Follesdal 2007:424; Chesterman 2008:609). The Council looks for linkage between a company’s operations and breach of the Ethical Guidelines for its own interests; signs of the company’s knowledge or contribution to the breach, and an ongoing or unacceptable **risk of recurrence** (Nystuen, Follesdal, and Mestad 2011:34; Leys, Vandekerckhove, and Van Liedekerke 2009).

Nystuen, former chairperson of the Council, interprets the severity criteria as targeting the “worst case companies within the different categories” (Nystuen, Follesdal, and Mestad 2011:9), whereas Chesterman (2008:611) links the unacceptability of the risk of future violations to the severity of the violation.

6.2.2.2 Complicity: corporate and investor

The notion of ‘complicity’ is that the company has contributed to the act or omission in some way (Nystuen, Follesdal, and Mestad 2011:28), that it was foreseeable and within the influence of the company, even if it were involuntary and post-hoc (ibid:66). It distinguishes between ‘association’ and ‘causality’ (Clark and Monk 2009:20).

Corporate complicity may implicate investors, which is the Fund’s preoccupation. Distinct from a retrospective, penal orientation, the Council has a prospective orientation (Nystuen, Follesdal, and Mestad 2011:34). The aim of the Council “to avoid present and future complicity, not to punish companies” (Nystuen, Follesdal, and Mestad 2011:27). The threshold for complicity is “political compromise” resulting from “parliamentary consensus” at the time of the Guidelines’ formation (Nystuen, Follesdal, and Mestad 2011:9).

6.2.2.3 Information sources

From where does the Council derive information for its evaluations then?

The companies in the Fund’s portfolio are “screened electronically on a daily basis against specific search criteria and databases” (Nystuen, Follesdal, and Mestad 2011:9). RepRisk, a private multinational firm which supplies data relating to environmental and social

governance, is contracted by the Council to scan media and public domain documents for relevant news related to the companies on the investment portfolio.

To evaluate specific cases, the Council collects information from “special interest groups, local and national authorities, international organizations, local and international experts, the company itself” and field visits for cases such as child labour, labour conditions and environmental damage from mining (Backer 2013:28; Follesdal 2007:423; Nystuen, Follesdal, and Mestad 2011:9–10).

The quality and reliability of information must be verifiable, emphasised the Council secretariat representative during an interview (Jervan 2015). Another former Council member (van der Walt) was separately quoted saying “we always check the quality of the information ourselves” (Backer 2013:28).

6.2.2.4 Evaluations and disclosure

Ultimately, the Council can, on request or its own discretion (Etikk Radet 2014; Backer 2013:25–26), recommend any of the following actions to the Fund:

- Monitor the company
- Place company under observation
- Exclude (i.e. divest from the company)

It may also not recommend exclusion, without disclosing its evaluation or rationale. The Council has a discretionary policy of secrecy about its investigation process and outcomes (Jervan 2015) because its recommendations may be “stock-sensitive information” (ibid) and it does not wish to be seen as endorsing any companies which it does not condemn outright. Therefore, evaluations which do not recommend divestment or which recommend observation may not publicly disclosed. Others have noted that the Council “limits disclosure ... to dampen speculation and political manoeuvring” (Clark and Monk 2009:19).

6.2.3 Norges Bank Investment Management and the Management Mandate

The Ministry of Finance (MoF) is the trustee of the fund and oversees the fund management by an arm of the central bank, Norges Bank Investment Management (NBIM), in accordance with its Management Mandate. NBIM exercises the Fund’s shareholder rights based on a Management Mandate, which is in turn based on the United Nations Global Compact (UNGC), and OECD Guidelines for Corporate Governance and Multinational Enterprises

(OECD CGME). The mandate has six foci: “equal treatment of shareholders, shareholder influence and board accountability, well-functioning, legitimate and efficient markets, children’s rights, climate change risk management and water management” (Ministry of Finance 2015).

The choice of foci suggests a typical corporate perspective, where human rights is embedded within a regime of Environmental Social and Governance (ESG) risk management. The first three foci are related to corporate governance and the last two to environmental risks which are connected to human rights indirectly. Only children’s rights are the nominal human rights considered and there is no mention of indigenous peoples’ human rights.

NBIM practises negative screening based on products¹² and uses ‘active ownership’ to influence corporate conduct (Backer 2013:20; Follesdal 2007:423; Clark and Monk 2009:15) of the companies in the Fund’s portfolio.

6.2.3.1 Active Ownership

Active ownership, otherwise known as active engagement, means that the investor use its shareholder position to influence a corporation behaviour (Nystuen, Follesdal, and Mestad 2011:193–194). In the Norwegian Fund’s case, it may exert pressure on the corporation to conform to Norwegian state policy on corporate governance and conduct (Backer 2013:8), which is in turn derived from international norms. The engagement can be discreet or public, formal or informal (Nystuen, Follesdal, and Mestad 2011:194).

According to the management mandate, the Fund may not hold more than 10% of the shares in a company and its proportion of holdings in a company make it a minority shareholder. Although the Fund does not hold a majority of shares in the companies that it holds, it could exercise its powers as a shareholder by communicating with the company directly, “voting at AGMS, shareholder proposals, dialogue with companies, legal steps, contact with regulatory authorities, and collaboration between investors”(Backer 2013:40).

Vasudeva and Backer show examples of how NBIM’s engagement has influenced more transparent and accountable corporate governance in other jurisdictions, arguing that “domestic policies” are subject to “normative coercive and competitive pressures” (2013:1679).

¹² Products such as tobacco and weapons which violate humanitarian law

In contrast, civil society organisations have criticised NBIM’s use of ‘active ownership’ for not being sufficiently open¹³, transparent and lacking ethical consideration, citing many notorious companies and sectors within the Fund’s portfolio¹⁴ (Agøy et al. 2015; Curtis 2010). Despite there being 9000 in the Fund’s portfolio by 2014’s end, only 60 companies stood on the Exclusions list¹⁵ (Norges Bank Investment Management 2014), one of which is a subsidiary. (Council on Ethics 2015:7). That is approximately 0.0067 % of its portfolio. What is not necessarily visible is *if* and *how* NBIM has engaged with these companies; even the Council is not informed (Council on Ethics 2014a:273).

NBIM fund managers are “sceptical about exclusions” stemming from the Council recommendations, because it “reduces the size of their investment universe” and their potential “financial return”. This may have the effect of motivating NBIM to be an active owner, to “pre-empt subsequent exclusion”, such that NBIM and Council “act in concert” (Vasudeva 2013:1666) albeit without intention.

6.2.4 The information problem

The sheer volume of information of the several thousand companies in the Fund’s portfolio may explain its reliance on business intelligence from a third-party provider and complaints from third parties, such as CSOs. The Council even commented that it is more cost-efficient for the Fund to divest from small holdings with “high ethical risks” (Council on Ethics 2014a:274) than to study them.

In a letter to a CSO, NBIM lamented the lack of “structured, scalable and objective information” from “evidence-based research” which could be “standardised”, “compared” and thereby integrated into their investment process (Norges Bank Investment Management 2013). Such data, notes Sethi, is “quite fragmented, collected in different and often incompatible formats, and by agencies and groups with wide disparities in quality”. (2005:109)

¹³ There is a marked contrast in the openness of the Council’s ethical evaluations compared to the opaqueness of NBIM’s work in this regard.

¹⁴ Associated with the Israeli occupation, mining, oil, agribusiness, climate change, Burma, Western Sahara and tax havens

¹⁵ As of Dec 2014

6.2.5 Power analysis

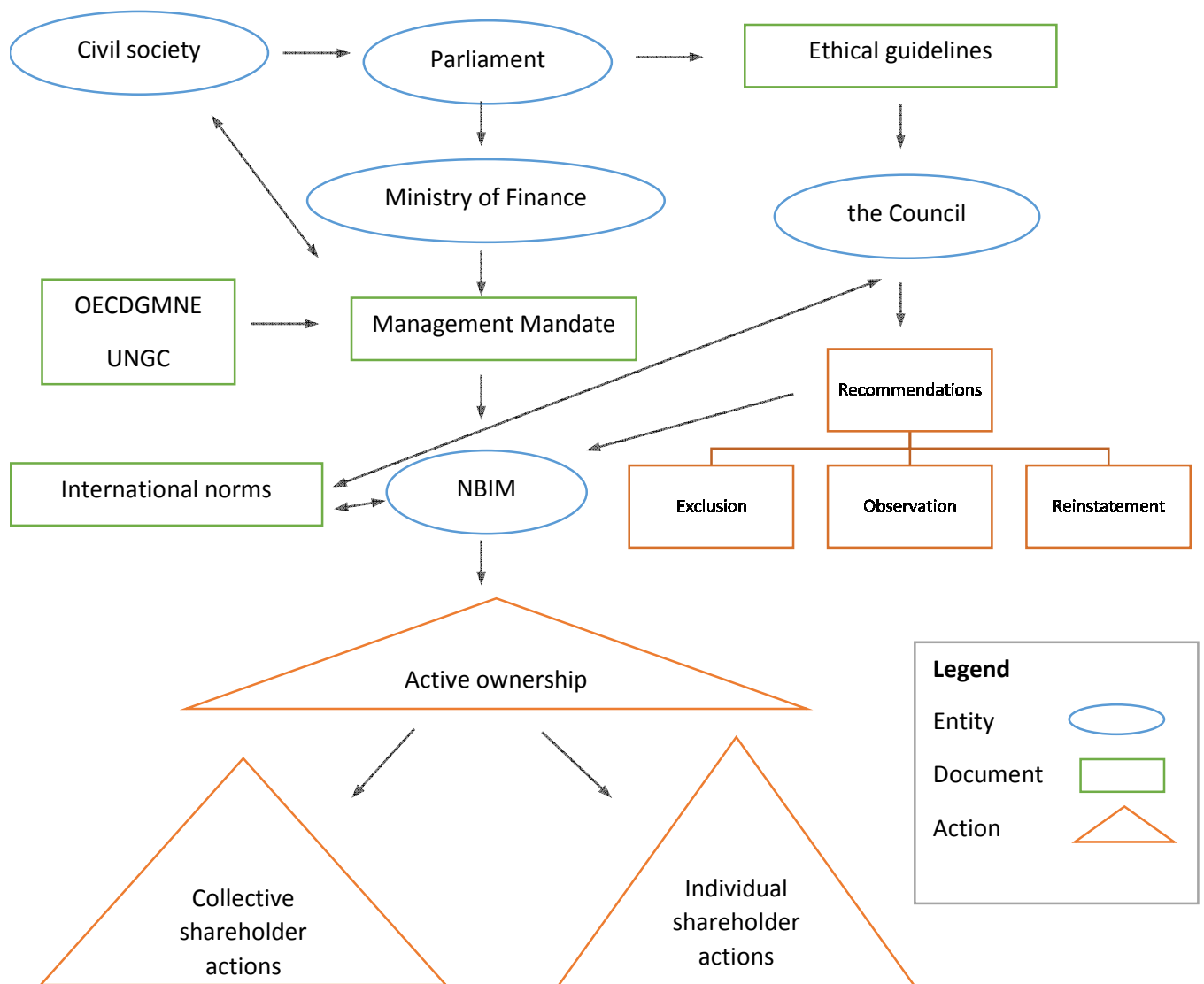
One might expect from the name of the Council that it has substantial authority in the ethical governance of the Fund. In fact, the MOF and its proxy, Fund manager, NBIM, make the final (dis)investment decisions, at times in spite of recommendations from the Council (Council on Ethics 2014a:10; Council on Ethics 2015:9). The Council sends recommendations to MOF and NBIM, but may receive little information from them in return (Council on Ethics 2014a:271–272).

As of 1 January 2015, the governance model was changed such that the Council shall advise NBIM directly, but its Executive Board makes the final decision (Norges Bank Investment Management 2015:15,75). The Council expressed doubt about this arrangement because “it is important for decisions on exclusion to be made independently of financial considerations”(Council on Ethics 2014a:277).

6.2.6 Diagram of the Fund’s ethical application in practice

The following diagram summarises my findings of how the Fund applies ethics, with human rights subsumed within, in practice. It illustrates the relationships between different parts of the Fund’s governance structure.

Figure 2 the Fund's ethics in practice



6.3 CSOs AS VANGUARDS

A significant but unexpected finding was the discovery of an informal CSO coalition lobbying for the inclusion of indigenous peoples' human rights (IPHR) in the Fund's investment decisions (Agøy et al. 2015; Bull 2015), specifically, for NBIM to include these rights in their Active Ownership Strategy.

Each coalition member played a different part. Norwegian Church Aid facilitated the visit of Guatemalan activists to address the Council directly with their complaints (Rønneberga 2011a; Rønneberga 2011b). The support of a Sami institutional representative (Agøy et al.

2015) as indigenous Norwegian was symbolic, strengthening the solidarity of their advocacy, although the Sami reportedly work more from within the government (Bull 2015). SAIH¹⁶ met all Norwegian political parties to raise the issue. None objected to the proposal for including indigenous rights (Bull 2015). The challenge, as SAIH perceives it, is that it is not a high-enough public priority, as compared to for example, concerns about investments in fossil fuels. SAIH's strategy has been to increase the profile of this issue on the public agenda through the media and public campaigns. This would then provide leverage for them to pressure politicians and through them, the Fund (ibid).

The pressure from Norwegian civil society from public campaigns and media coverage may have motivated NBIM to begin engaging activists more, making the Fund more accountable. Norwegian CSOs now have more information, a direct line of communication with the Fund and thereby access to greater influence. NBIM has started holding annual meetings with civil society (Bull 2015) and recently published its first, public, annual report on Responsible Investment (Norges Bank Investment Management 2015). The report has little human rights content and is preoccupied with corporate governance issues.

7 ANALYSIS

7.1 STRENGTHS OF THE FUND'S ETHICAL APPROACH

Responsible Investment is a driver of Corporate Social Responsibility (Solomon 2013:326–327). As a shareholder, the Fund can “project regulatory power externally” (Backer 2013:22). It could be described as “second generation extraterritoriality ... in the service of international norms but ... grounded in domestication and projection through states” (Backer 2013:103), extending “state duty to protect and corporate responsibility to respect human rights”, across borders (ibid:109). It may “contribute to long-term changes in aggregate behaviour and thus business culture” (Backer 2013:42) by removing the “corporate veil” (Chesterman 2008:601), disciplining capitalism by reforming corporations from within, not by advocating radical transformation.

¹⁶ SAIH is a student democracy which has one of its working themes indigenous and Afro-descendants' rights. It has a National Council comprising representatives from all local chapters. At a National Council meeting, it was suggested that their annual political campaign of 2014 focus on the investments of the Fund in corporations which are affecting the rights of indigenous and Afro-descendants. Thus, its advocacy on this issue arose in a democratic manner.

7.1.1 The Council's legitimacy and moral authority

It is clear that the Fund has the “resources to conduct due diligence”; it has “sophisticated ... in-house organizational capabilities” (Vasudeva 2013:1669). The Council's Secretariat has educational qualifications across sciences, law, social sciences and engineering (Council on Ethics 2015). It is meticulous in its collection and verification of information, publishing critical facts and its reasoning in its public Recommendations and Annual Reports.

Scrupulous verification of claims contributes to the Council's credibility. There is a perhaps performative element to its publications because the Council is conscious of its decisions being observed by others and its influence (Council on Ethics 2015:11; Jervan 2015).

Perceived procedural justice also contributes to its moral authority and legitimacy, derived from the state and the electorate.

7.1.2 Influence on companies

The Council believes that it has “contributed to the development of international norms” (ibid), because “thorough, public explanations of the Fund's exclusions set standards” (Council on Ethics 2014a:276). It has reportedly been told in dialogue with companies that “they wish to avoid being excluded --- not least due to reputational considerations” (Council on Ethics 2014a:275). Companies have also pre-emptively contacted the Council to “discuss planned activities” subsequently (Council on Ethics 2014a:276). Its “real influence” may lie in the “threat of divestment” (Chesterman 2008:614).

Kutz argues that it is inevitable that investments are linked to some form of wrongdoing or other and that it is impossible to insist on ethical purity (and preclude companies with past wrongdoing). Moreover, the potential for re-association (with investors and more) makes reform attractive to wrongdoers (Nystuen, Follesdal, and Mestad 2011:74).

On the other hand, exclusion entails that an opportunity to influence the company's conduct is “weakened” and exclusion “does not in itself contribute to improve the state of the world” (Nystuen, Follesdal, and Mestad 2011:42).

7.1.3 What happened with Goldcorp?

As the Council would not comment on individual cases apart from what is published publicly, I can only speculate about the possible reasons that there was no public recommendation issued on Goldcorp and divestment was not recommended. It is possible that that the Council did not consider the human rights violations either be within the purview

of the guidelines or of a sufficient severity to warrant a Recommendation. As the Council's evaluation has a future orientation, it may have judged Goldcorp's actions after the complaint sufficient to mediate the risk of future violations.

7.1.4 Norm entrepreneurship and mimetic influence

The Fund's responsible investment approach has had a mimetic influence on Norwegian institutional investors. An analysis of "cross-border equity investments made by 437 Norwegian firms from 1999 to 2010" showed that they imitated the Fund's investments (Vasudeva 2013:1663). Private Norwegian institutional investors such as Sorebrand and KLP have established their own the Council and guidelines, with professional staff for evaluation, "modelled after" the Fund (Vasudeva 2013:1666).

It influences other Norwegian institutional investors by encouraging the professionalisation of responsible investment and through the visibility/publicity of its exclusions (Vasudeva 2013:1662, 1666), creating new norms. One institutional investor reports clients asking about whether they were aligned with the Fund (ibid). At the time of writing, another Norwegian institutional investor announced that they would adopt the same international norms (OECD MNE CG guidelines and UN PRI) (Fløttum 2015). For other investors, the normative pressure may be motivated by "legitimacy" and "perceived benefits" (Vasudeva 2013:1669,1679), because "the ability of a firm to survive and succeed is also contingent on the degree to which the surrounding social structure approves of its actions" (ibid:1669).

The Fund has similarly considerable influence on other sovereign wealth funds as well (Ministry of Finance 2003; Sovereign Wealth Fund Institute 2013; Curtis 2010).

7.2 LIMITATIONS OF THE FUND'S ETHICAL APPROACH

The text of the Ethical Guidelines and the Management Mandate could be perceived as a form of ethical relativism, with an emphasis on severity of violations and specific rights (e.g. children's) being prioritised over others. This recalls the Graver report (Ministry of Finance 2003; Alm 2007:35) where the committee proposing the Fund's original ethical guidelines interpreted Rawls' notion of 'overlapping consensus' thus: "a heterogeneous population can allegedly only agree on a very narrow field" ... "the worst forms of accomplice responsibility¹⁷". Taken to a logical conclusion, does it imply that political consensus forged

¹⁷ Or perhaps, complicity

upon pluralism necessarily results in the lowest common denominator, i.e. minimal ethical standards? How can ethical relativism be justified cross-culturally? To what extent does it undermine the indivisibility of human rights and solidarity in them?

7.2.1 Weak referent frameworks

The international frameworks referred to in the Fund's Guidelines and Management Mandate are the UNGC, OECDGME and UN Principles on Responsible Investment (UNPRI).

The UNGC is held as the "most 'official' expression" of CSR on the global level (Nystuen, Follesdal, and Mestad 2011:2). It relies on "public accountability, transparency and the enlightened self-interest of companies, labour and civil society" (Chesterman 2008:603). Its principles signal intentions, but their general phrasing do not lend them to implementation and monitoring.

In the UNPRI, human rights are only referred to indirectly¹⁸. They are subsumed under the Principle 3 about asking companies for information regarding "adoption of adherence to relevant norms, standards, codes of conduct or international initiatives (such as the Global Compact)" (Nystuen, Follesdal, and Mestad 2011:4). Active engagement, shareholder resolutions and reporting are recommended investor conduct; "incorporation of ESG in analysis and decision-making process" (ibid). However, "it is possible to read the whole set of principles and actions to be without sanctions in the form of investor divestment" regardless of corporate conduct (ibid). Perhaps the dilution in the text is make it palatable to powerful states which do not accept human rights discourse, but it demonstrates the potential impotency of such consensus-based international norms.

7.2.2 Lack of important human rights frameworks

The human rights content and international frameworks referred to the Fund's ethical approach have not changed since they were created more than a decade ago and have not kept up with relevant developments. International standards (e.g., UN Treaties, Conventions, Guidelines, Declarations), flawed and profuse as they may be, are evolving instruments for human rights application. Key documents which could inform from the Fund's ethical approach are missing in reference.

¹⁸ "the impression is that it would have been better if human rights issues were avoided altogether" (Nystuen, Follesdal, and Mestad 2011:2)

7.2.3 Poor coordination

The Council has been critical of the vague “allocation of responsibility” between itself and NBIM, as well as the lack of coordination between both in dialogue with companies (Council on Ethics 2014a:272). It believes that NBIM has done little to speak with individual companies (ibid). There has been “no systematic synergies” between NBIM’s active ownership and the Council’s recommendations (ibid).

7.2.4 Practical constraints

With “limited time, expertise and institutional capacity”, large companies tend to be monitored (Clark and Monk 2009:19). Furthermore, the whole process from the commencement of an investigation to the Ministry’s decision about inaction, observation or exclusion took a long time admits the Council itself (Council on Ethics 2014a:271), albeit less than using the UN system in most cases. “Companies remain in the Found for too long” after the Council’s recommendations (ibid). The long duration could be a reflection of institutional capacities or of reluctance to make what might be perceived as politically difficult decisions, weighing ethics against profit.

7.2.5 Further critique

Owning 1% of the world’s equities, the Fund has a vested interest in the maintenance of the financial system’s stability, even if mainly elites are participating in the financial market and even if the system is maintaining gross global inequalities. It is unlikely to lead any radical transformation of the system.

Despite its prospects, responsible investment should not become “a substitute for a legal regime that is intended to change the behavior of multinational corporations” (Chesterman 2008:614–615). This recalls corporate flourishes under neoliberalism advocating for voluntary codes in order to deflect calls for legally-binding regulations and treaties. We should be careful that it does not deflect resources and imagination from alternatives.

7.3 DISCOURSE ABOUT A HUMAN-RIGHTS BASED APPROACH

The complex governance structure of the Fund could be for political legitimacy, separation of financial and political objectives, and to ensure proper oversight. Such institutions are often “not structured for public access” (Nader 1969:296). One should recognise the educational

and social privileges which it takes to apprehend its complexity and seek opportunities for influence.

All the actors are engaged in discourse through their communications and actions, negotiating the meaning of 'responsible' and 'ethical in this context'. They are an epistemic community.

CSOs may engage in human rights discourse, whereas corporations and NBIM engage in a discourse of environmental and social governance (ESG) risk management, where human rights is buried under "social". Do CSOs, corporations and investors even refer to the same international standards or documents when discussing the relevant rights?

Although all should in principle have equal access to communicating with NBIM, borrowing insight from Nader (1969:295), NBIM may in practice share more of a corporate discourse with corporations than with civil society organisations and indigenous peoples. Corporations could potentially seem more persuasive to NBIM.

In the event of perceived conflict of interest between profit and human rights, I would suggest that a Rawlsian ethic of mutual responsibility should prevail. Otherwise, it descends into exploitation and when it is associated with a state, smacks of the imperialism described earlier in the literature review.

7.4 CIVIL SOCIETY, TRANSNATIONAL ADVOCACY NETWORKS AND THE BOOMERANG EFFECT

The Fund is analogous to an organism which responds and adapts to environmental stimuli. Its ethics adapt to public opinion as mediated by democratic elements such as the responsiveness of political organs to their advocacy.

It can be inferred that Norwegian CSOs perceive a greater ethical duty toward human rights than is currently practised by the Fund. They believe that if it is brought to the public's attention, it will agree and seek change. To this end, the CSOs applied 'information, symbolic, leverage and accountability' tactics (Keck and Sikkink 1998:95) to influence the Fund. Their interactions can be seen as informing or transforming one another (ibid:100). With "authority and legitimacy to speak for the public" (Coerwinkel 2007:45), CSOs act as vanguards of public opinion and possess the power to inspire social change. Their "currency is influence" (Ludford and Doube 2015) and their stages of influence correspond to those described in the literature review.

Coerwinkel observes the “progressive institutionalization of NGOs¹⁹ as depositories of public opinion” in conjunction with corporations agreeing to (voluntary) codes of conduct and lobbying for deregulation and prevention of legislative governance as the outcome of a compromise between NGOs and corporations (2007:47). Coerwinkel questions whether NGOs have, beyond their roles as gap-minders and whistleblowers, the authority and legitimacy²⁰ to being the sole public representatives at a negotiation table for change. Debate is a common feature of Norwegian society and there is freedom of speech²¹. Hence, I would argue that CSO representation is respected as legitimate since people can express their views, dissent or remain silent, thereby implying their consent. After all, public scrutiny and discussion play an important role in securing the legitimacy and resonance of human rights (Sen 2005:160).

What could be (come) problematic is that CSOs control the agenda to the extent that they have influence over corporate responsibility, but they are paradoxically dependent on this influence. They could be safety valves, proposing solutions which consequently divert attention from posing a more radical challenge to the political economy. It could be a form of co-option to preserve a hegemony.

Another concern is that “ethics have become a matter of (mercantile) consumption” (Coerwinkel 2007:63), “where debates and conflicts are solved through advertising campaigns and SRI screening” (ibid:68), or where complex ethical assessments are reduced to indices for stock purchase or divestment decisions. It relates to a relevant critique based on the information economy: there is a public cost to information campaigns and they cannot be conducted on a sufficiently large scale, nor perhaps should they be, in order to change underlying paradigms. As O’Brien and Williams opine, “If market-based activity is seen as inadequate for domestic purposes, why would it prove sufficient on a global scale?” (2013:196)

Transnational advocacy is part of a socialisation process, functioning to raise moral consciousness, empower and legitimise domestic groups’ claims against norm-violating governments, creating pressure on regimes “from above” and “below” (Risse, Ropp, and

¹⁹ In this discussion, the terms ‘NGO’ and ‘CSO’ are used interchangeably.

²⁰ Coerwinkel relates authority to “recognized competence” and legitimacy to “democratic representation” (ibid:66)

²¹ Although I did not study the media’s role in this case, they were sources and could be inferred to be advocacy channels and influencers of public opinion.

Sikkink 1999:5). In this case, Guatemalan activists worked together with Norwegian CSOs to appeal to a second-order level of responsibility, that of the investor. They sought another kind of boomerang effect: for a SWF investor of a third country to intervene in a transnational corporation's operations.

The approach demonstrated by the collaboration of Guatemalan and Norwegian CSOs is of what Scholte might term a 'reformist', rather than 'transformational' vein (2013:134–135), i.e., it challenges neither neoliberal hegemonic discourse nor capitalist regimes. What could be expected at most then is a higher level of public awareness, policy concessions and "modest reforms", akin to that which CSOs have achieved with advocacy of governance in financial markets (2013:137). The potential limits of a civil society approach (Scholte 2013) might be "material capacities", "embedded social hierarchies", such that participation is predominantly that of those with structural privileges; vested interests of "change agents", and resistance from those benefitting from the situation, usually elites.

7.5 OPPORTUNITIES

If responsible investment principles are applied only to foreign investments and not to domestic ones, or other institutional investors do not have such principles, it may be "seen as unduly biased against foreign firms" (Vasudeva 2013:1666). Keck and Sikkink further caution that ethically-based intervention justifications risk "sound too much like the 'civilizing' discourse of colonial powers, and can be counterproductive, producing a 'nationalist backlash' " (1999:94). There must be coherence within government policies to promote the application of the same human rights standards across all policies, including Norwegian firms' conduct.

In a parliamentary report about promoting human rights in foreign and development policy (Norwegian Ministry of Foreign Affairs 2014), the Fund was not mentioned at all. Another of the Foreign Ministry's reports on coherence in development policy further notes "the lack of guidelines" for exercising the state's social responsibility as an investor, but its investment recommendations for the Fund address only climate change issues (Norwegian Ministry of Foreign Affairs 2008).

There are therefore opportunities for the Norwegian government to develop consistent policies across all arena.

7.6 CRITIQUE OF THE EXISTING BUSINESS AND HUMAN RIGHTS REGIME

The current regime for business and human rights regime is completely voluntary. It presumes that ethical companies would start a new norm and a virtuous cycle. This has not come to pass, as one might expect given the amoral nature of the corporation. The advantages of voluntary initiatives is that it is easier to experiment and improve (Tencati and Perrini 2011:129). However, voluntary agreements tend to have a weak, vague, human rights content to attract signatories and no punitive measures for violations. Worse, when corporate promises are broken, it may affect the credibility of the whole industry (Oskal, cited in Centre for Sami Studies 2012:87).

What can corporations operating in states unable and/or unwilling to protect human rights do? Anaya would respond that corporate responsibility is independent of States' capacities and wills, therefore, it "entails due diligence beyond compliance with domestic legislation" (Centre for Sami Studies 2012:12–17). If anything, voluntary corporate codes should be of a higher standard than legislation, they should not be a substitute for legislation.

7.6.1 A legal approach?

There is a tendency to think of a legal approach as a response to the impotency of voluntary codes and principles because law signals authority and power. From a legal perspective, there is "no common standard" for corporate accountability or responsibility across jurisdictions (Nystuen, Follesdal, and Mestad 2011:17). Although an international treaty for business and human right is being considered, there are many issues to be resolved, such as how enforcement will be imposed.

I am not recommending a legal approach because of problems inherent to it. To name a few: the legal process is usually of a long duration and relies on positivist evidence. Access to legal remedy may be limited by access to education and wealth, which are privileges of class. The norms of the powerful may in fact be embedded in the law by historical oppression, such as that based on colonialism, gender, race, and elite control for a sufficient time (Rajah 2011). It does not elude its dependence on elements such as political will. More importantly, legal approaches do not facilitate transformation of political, economic and social structures which are generate violations in the first place (Evans 2005:1067), obscuring what Farmer calls "pathologies of power" (2002:656). Scholars of "stable improvements in human rights" note

that they “usually require ... political transformation”; “enduring HR changes, therefore, go hand in hand with domestic structural changes” (Risse, Ropp, and Sikkink 1999:3).

7.7 UNINTENDED CONSEQUENCES AND REVISITING ASSUMPTIONS

A State-based and –dependent human rights regime is increasingly outdated and cannot cope with reality of the increasing power of non-State entities. A state-centric conception of human rights fails when states lack capacity or will, and there are many such states. An ineffective human rights regimes may then cause people to lose faith, and discount human rights as an instrument of elites and powerful states.

7.8 MATERIAL CHANGE?

Attempts to be ethical could have unintended consequences, such as child labourers being fired and resorting to worse activities to generate income. As Follesdal puts it, “If unscrupulous competitors rush in where more honourable corporations fear to tread, the costs may be too high for those who exist, while the oppressed only experience a change of oppressor” (2007:431).

The debate about whether active ownership or divestment is more appropriate in each case should be judged by whether they are effective in producing material change for those experiencing human rights violations. In this case, it is not clear whether the Fund’s choices have contributed to an improvement of the situation for indigenous residents at the Marlin mine.

8 CONCLUSION

In the literature review, I developed a historically-sprung understanding of the corporation as amoral, in light of which I argued that they cannot be relied upon to self-regulate in ethical matters such as human rights. This is especially acute in the context of conflict between extractive industries and indigenous peoples. It explains turning toward responsible sovereign investment as a nexus for change.

I set out to discover through this case study, how the Fund incorporates human rights into its investment decisions and found that it occurs through entities, documents and processes. The entities were the Council, NBIM; the documents being primarily the Ethical Guidelines and NBIM’s Management Mandate, informed by the OECDGMNE and the UNGC; the processes

were active ownership and exclusion, observation or reinstatement. I examined the underlying values, motivations and legitimacy of the fund, where power lies within its complex governance structure and the problems it has with information management. I find that the Fund has strong reputation and probable influence, but it is hamstrung in its human rights application because of inadequate frameworks and other practical issues.

I also examined the mechanisms by which civil society organisations collaborate both within Norway and transnationally to produce change. It is not yet clear how far the Norwegian public is willing to go if they had to trade off profit to remain conscionable, but Norwegian CSOs are trying to influence that.

The case study shows what a human rights-based approach entails for Sovereign Wealth Funds and what the limits might be. The ethical expectations appear to be a blend domestic and international norms (Backer 2013:6) with elements of international obligations, state duties and corporate social responsibility. A SWF of a democratic state appears more sensitive to political pressure. Working with CSOs in Norway could therefore be a viable avenue to seek change for those who experience human rights violations in other countries, and could be used in parallel with existing mechanisms, e.g., UN treaty bodies and special procedures.

My findings and analysis attempt to construct a theory of change based on the phenomena observed. More questions arose as a result. Does proliferation of human rights frameworks makes it difficult for organisations to implement human rights? How can the Fund or any corporation to protect human rights listed in all the key human rights documents in practice? How can those with genuine intentions be assisted in implementation?

If the fund were to exclude all companies with unethical activities or products which could be used for unethical activities e.g. surveillance equipment, how much of the investment universe would remain? Where is the root of the problem?

If the Fund were to apply human rights criteria strictly such that only companies do not violate any human rights are considered for investment, its range of choices becomes extremely narrow and we encounter the limits of the political economy. Choice is an illusion when the chooser cannot determine the choices in the range (Nader 1969:298). I invite a critique of the political economies within which the Fund invests. It should be unacceptable for us to be invested in companies that are harming individual or social wellbeing, but the profit-oriented cultural norms of capitalist societies makes it socially acceptable. A more

radical change of social norms would be required, to a political economy where an investor has more choice and not more trade-offs.

It is my hope that this research promotes access to human rights by studying a vertical slice of a complex system and elucidating what is at stake.

9 RECOMMENDATIONS

9.1 POLICY: EXPAND THE HUMAN RIGHTS REFERENCES INFORMING THE FUND'S ETHICAL APPROACH REGULARLY

An expansion is long overdue of the human rights documents which the Fund refers to in its approach. The references should be regularly updated to stay abreast of the evolution in the international human rights regime.

A relevant and important framework for business and human rights is the UN Guiding Principles on Business and Human Rights²². They have “a high level of acceptance by States and transnational business enterprises”(Anaya, cited in Centre for Sami Studies 2012:14). A draft treaty on business and human rights is being considered and may emerge in future.

More vulnerable groups besides children should be included, such as indigenous peoples who “don't migrate after capital” (Centre for Sami Studies 2012:86). The higher risks of conflict in the extractive sector entail that the Fund, which is heavily invested, should include indigenous rights in its ethical approach. Two of the key international documents for these are the International Labour Organisation Resolution 169 (ILOR169) and UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

According to ILOR169, indigenous peoples have the right to “determine their own priorities” and “make changes to proposed plans through participation in the decision-making process”, such that the state has the burden of justification any contradictory decisions (Imai,

²² The Guiding Principles were a project in a series of business and human rights framework development led by John Ruggie, an academic known for his paradigm of ‘embedded liberalism’.” As its name suggests, it privileges economic liberalisation for businesses to operate relatively freely, while the State intervenes for social purposes e.g. full employment (O'Brien and Williams 2013:93). The paradigm seems to presume that states have the will and capacity to fulfil their duties as implementers and protectors of human rights, defending its residents' against abuses. These assumptions are problematic because they are far removed from the reality in many countries, where states fail on different levels: to protect their residents from human rights abuses by other private actors; to implement public policies for the positive fulfilment of human rights; and at the lowest level, they participate in human rights abuses.

Mehranvar, and Sander 2007:130). Consultations should be “culturally appropriate and respect the institutions and customs of the community” (ibid:131). These are important pivot points to this case.

Art. 19 of UNDRIP is particularly noteworthy as it is about Free Prior and Informed Consent and relevant to this case. The principle of FPIC is not intended to be merely an outcome, but an instrumental "safeguard" for "substantive rights", such as land ownership and use rights, cultural rights, health, development (Centre for Sami Studies 2012:12–17). FPIC is as an expression of the right to self-determination. Without it, a domino effect of violations may occur.

Human rights defenders in the extractive sector are often at risk of violence. Therefore, the Fund should seek to have the Voluntary Principles on Security and Human Rights (VPSHR) adopted by its holding companies in this sector.

By the same token, institutional investors which are particularly invested in the apparel manufacturing industry should pay special attention to women, migrant and children’s rights as they tend to form the majority of workers, and investors in the seafood industry in Southeast Asia should be extra careful about the use of forced, migrant labour. Moreover, if the Fund as an institutional investor expected the companies in its portfolio to integrate human rights into their operations, the Fund should be prepared to do the same by integrating relevant international standards into its investment approach, or risk losing credibility.

9.2 POLICY: USE POSITIVE SCREENING

The Fund could also go beyond negative screening and adopt 'best in sector' investment approach, where investment is made in the companies which have the best CSR performance relative to its peers. In this regard, it would not be perceived as a restriction of its investment universe, avoiding a potential compromise of fiduciary duties by the trustees (Solomon 2013:322,338).

It could also invest in industries and companies which not only avoid harm, but promote human and often intertwined ecological wellbeing. It could target democratic, locally-owned structures such as cooperatives to develop sustainable productive capacities. Norway could regard the Fund as a part of development cooperation as well and consider its impact in that light, to make it consistent with the countr’s relevant foreign policies.

9.3 POLICY: BUILD CSO CAPACITY AND CONSULT

Inspired by Scholte (2013), the fund could integrate civil society consultations into its investment policy-making processes, increase “effective transparency” of fund management disclosures to Norwegian CSOs, such that it does not threaten the fund’s corporate interests (i.e., value of shareholdings being affected by public ethical evaluations) and the state’s political considerations, and yet facilitates democratic accountability (through Norwegian CSOs). This may entail use of plain language to explain investment decisions and/or facilitating brief academic training of activists in investment paradigms to promote their capacity to participate.

The Fund should be more accountable to the complainants and inform them of their decisions and rationale even if it entails a non-disclosure agreement.

9.4 BUSINESS POLICY AND PRACTICE

Taylor asserts however that there would be higher business compliance if there were “reasonable costs” and “social norms” (Centre for Sami Studies 2012:22–26). What businesses may wish to consider as well is that “when risks materialize, significant financial losses can be incurred and social and environmental risks become financial risks.” (Solomon 2013:335) So, it makes business sense.

Businesses which have adopted a “rights-based approach” found that it made “social and specific human rights impacts visible”. It “provided a platform” for collective deliberation about impact prevention and mitigation, a common framework for redress and for the corporation, improved risk management (Guaqueta, cited in Centre for Sami Studies 2012:18–21). Guaqueta further recommends that the use of Environmental Impact Assessment and Social Impact Assessments compatible with the UNGP (ibid).

Organisations in the public and private sectors are not usually sensitised to the needs of vulnerable populations such as indigenous peoples. Anthropologists can play an important role to play by helping to communicate their perspectives and value. An anthropological approach can be transformative, influencing practice at the policy implementation level of public and corporate governance.

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