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ARTICLE

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

SIMON CHESTERMAN*

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INTRODUCTION

The question of how to influence the human rights behavior of multinational corporations has long been a concern of non-governmental organizations,¹ scholars,² and governments.³ Their

1. See, e.g., Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423, 424-25 (2001); Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, ETHICS & INT'L AFF., March 2002, at 71, 73.

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

3. See, e.g., Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2003); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the*

efforts at mobilization, analysis, and regulation have achieved mixed results.⁴ More recently, pension funds and other institutional investors have assumed an important role in channeling such influence into a form that may exert greater leverage on the decision-making process of a multinational corporation: through its shareholders.⁵ Some companies, notably those with operations in

Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibilities in International Law, 37 COLUM. HUM. RTS. L. REV. 287 (2006); Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 J. MARSHALL L. REV. 1205 (2004); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003); Ann Marie McLoughlin, Comment, *International Trend of Multinational Corporate Accountability for Human Rights Abuses and the Role of the United States*, 33 OHIO N.U. L. REV. 153 (2007); Tracy M. Schmidt, Comment, *Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?*, 36 CAL. W. INT'L L.J. 217 (2005).

4. Cf. Peter Muchlinksi, *The Development of Human Rights Responsibilities for Multinational Enterprises*, in BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 33, 35, 36 (Rory Sullivan ed., 2003) (discussing arguments against the extension of human rights obligations to multinational corporations). See generally Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in NON-STATE ACTORS AND HUMAN RIGHTS 227 (Philip Alston ed., 2005).

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

Myanmar (Burma) and Sudan, have been punished for their ties to governments engaged in human rights abuses;⁶ a far larger number have signed onto voluntary principles and codes of conduct embracing best practice in the field of human rights.⁷ These various efforts to shape behavior through inducements and public pressure are an admission that traditional regulation through coercion for violations of specific rights is not working. Praise for “corporate social responsibility” generally assumes that traditional regulation cannot work⁸ and critics often assert that the illusion of

Davidsson, Note, *Legal Enforcement of Corporate Social Responsibility within the EU*, 8 COLUM. J. EUR. L. 529 (2002) (detailing progress of corporate social responsibility within the European Union).

6. See, e.g., *Bailing Out of Burma*, N.Y. TIMES MAG., Apr. 2, 1995, at 18 (describing early efforts to force companies to cease operations in Myanmar); Evelyn Iritani, *Effort to Divest from Sudan Picks Up Steam: Religious Groups and Mainstream Investment Firms Join the Economic Push to End the Violence*, L.A. TIMES, Apr. 11, 2007, at C1 (noting Talisman’s withdrawal from Sudan following a divestment campaign in 2002-03); Laura Smitherman, *Divestment Effort Aimed at Ending Killing in Sudan; ‘Blood Money’ Targeted as Activists Seek to Pressure Khartoum Government*, BALT. SUN, May 21, 2005, at 1A (reporting efforts to use state legislation to force public pension funds to divest from Sudan over Darfur atrocities).

7. See, e.g., Mark Turner, *Blueprint for 21st Century UN Global Compact*, FIN. TIMES, June 13, 2006, at 4 (introducing Principles for Responsible Investment, promoted under the auspices of the U.N. Global Compact).

8. See, e.g., Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 768 (2005) (arguing that corporations are in a better financial and technological position to promote human development than either governments or nonprofit organizations); Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT’L L.J. 309, 310 (2004) (illustrating that corporations have historically been immune from responsibility for human rights violations, as only States have had the legal personality necessary to claim rights or bear duties under international agreements); Claire Moore Dickerson, *Ozymandias as Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035, 1036-37 (2003) (focusing on Enron’s irresponsible investment policies in the midst of modern corporate transparency); Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207, 207-08 (2007) (reflecting upon ancient concerns for social responsibility in one’s business ventures); Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez-Machain*, 74 U. CIN. L. REV. 105, 106 (2005) (indicating multinational corporations are not inherently socially responsible entities); David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55, 55 (2005) (stating that, historically, standards for international corporate action have been relatively

accountability undermines the prospects of establishing an effective mechanism with teeth and is worse than nothing at all.⁹

Leaving aside that larger question of whether formal regulation—such as through treaty or legislation—is desirable or possible, should the investors' ad hoc efforts to shape the human rights behavior of the companies in which they own shares themselves be regulated? That is, by what standard, if any, should the activist shareholder be judged? This Article will consider this question by examining one of the most interesting recent experiments in activist shareholding: the Council on Ethics of the Norwegian Government Pension Fund – Global.¹⁰

unsuccessful); Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 77 (2005) (asserting that extra-legal enforcement is preferable to, and more successful than, legal enforcement).

9. See, e.g., Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 47 (2002) (“Both domestic governments and international organizations have danced around [the topic of enforceability of human rights norms], urging voluntary codes of conduct rather than seeking to impose binding rules of law. I argue that such circumspection is unfounded. Corporations are already bound by many core human rights norms. So-called voluntary codes that ask business entities to refrain from committing genocide or to avoid profiting from slave labor are weak concessions to the enormous economic and political power of multinational corporations.”); Thomas McNerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 183 (2007) (criticizing the assumption that economic incentives are the basis for companies to comply with norms of corporate social responsibility); cf. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 131-32 (2005) (contemplating that NGOs can play the part of an institution enforcing fulfillment of an individual duty to rescue others). Compare Rachel Kyte, *Balancing Rights with Responsibilities: Looking for the Global Drivers of Materiality in Corporate Social Responsibility & the Voluntary Initiatives that Develop and Support Them*, 23 AM. U. INT'L L. REV. 559 (2008) (relating growth in the developing world to alternative means for evincing better corporate behavior), with Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-border Legal Frameworks in a Globalized World: Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451 (2008) (putting into perspective the developmental obstacles faced by non-western nations).

10. See generally NORGES BANK INVESTMENT MANAGEMENT, 2006 ANNUAL REPORT §§ 1, 4.2 (2006), <http://www.nbim.no/Upload/NBIM/Reports/2006%20eng.pdf> [hereinafter NORGES BANK 2006 ANNUAL REPORT] (analyzing the market developments, fund reporting, corporate governance, and ethics of the Pension Fund).

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

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

The Norwegian Government Pension Fund – Global (*Statens pensjonsfond – Utland*) ("Fund") is a sovereign wealth fund that invests surplus wealth produced by Norway's petroleum sector, principally revenue from taxes and licensing agreements. Known until January 2006 as the Petroleum Fund of Norway, it is the second largest pension fund in the world with assets in excess of \$300 billion.¹¹

The Fund was created in 1990 by an act of the Norwegian Parliament (*Stortinget*).¹² Because the Fund was intended to receive money when there was a budget surplus, the government of Norway made the first transfer only in 1996 for fiscal year 1995.¹³ Subsequent years were more bountiful, however, and the Fund has now grown well beyond Norway's annual gross domestic product ("GDP"), which reached \$264.4 billion in 2006.¹⁴ The Fund is projected to reach a level of around 250 percent of GDP by 2030.

11. The largest is Japan's Government Pension Investment Fund. See Pension Funds Online, Top 100 Global Funds (2007), <http://www.pensionfundsonline.co.uk/pdfs/Top-100-Global-Pension-Funds.pdf>.

12. See NORGES BANK INVESTMENT MANAGEMENT, 1998 ANNUAL REPORT § 1 (1998), http://www.nbim.no/Pages/Report___47773.aspx (describing the creation, regulation, and management of the Fund).

13. See TORE ERIKSEN, SECRETARY-GENERAL, THE NORWEGIAN PETROLEUM SECTOR AND THE GOVERNMENT PENSION FUND – GLOBAL 7 (2006), http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/The_Norwegian_Petroleum_Sector_te.pdf (outlining the history, mechanism, organization and fiscal policy behind the Fund).

14. See CENTRAL INTELLIGENCE AGENCY [CIA], THE WORLD FACTBOOK 2007, at 432 (2007) (estimating that the Fund is valued at more than \$250 billion).

Thereafter, as oil revenues diminish, it is expected gradually to decline.¹⁵

The purpose of the Fund was, first, to avoid the wide fluctuations of economic activity caused by the petroleum sector. By limiting the impact of variable oil revenues on government spending and investing a substantial portion of those revenues abroad, the Fund reduces these fluctuations and stabilizes the exchange rate.¹⁶ Second, the Fund provides a savings vehicle for future generations of Norwegians—an aim reflected in its re-branding in 2006 as a “Government Pension” Fund.¹⁷

A. THE TURN TO ETHICS

In addition to these domestic considerations of economic stability and intergenerational equity, the government of Norway later adopted two mechanisms addressing the impact of its international investments. In 2001, it established an “Environmental Fund” within the larger Fund.¹⁸ This new instrument invested exclusively in developed markets and was restricted to acquiring equity in companies thought to have a limited negative influence on the environment. Investment targets for the Environmental Fund also had to meet specific environmental reporting and certification requirements based on analysis from the British consulting firm Ethical Investment Research Service.¹⁹

15. ERIKSEN, *supra* note 13, at 7 (projecting that by the end of 2010, the Fund will grow to 180% of mainland GDP). Crude oil production is expected to peak in 2011, while natural gas production will peak around 2013. *See id.* at 4.

16. *Id.* at 6 (requiring a phasing in of petroleum revenues to facilitate balanced development of the economy).

17. *Id.* at 6-7 (reasoning that the renaming of the Fund would also strengthen the public’s sense of ownership).

18. *See* Norway Ministry of Finance, Ethical Guidelines for the Government Pension Fund, <http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/History.html?id=434896> (last visited Mar. 7, 2008) (noting that the Environmental Fund was reintegrated into the larger Fund in 2004).

19. *See generally* COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND – GLOBAL, ANNUAL REPORT 4-5, 8-9 (2006), <http://www.etikkradet.no> (follow “English” hyperlink on the top right; then follow “Annual Reports” hyperlink on the left; then follow “Annual Report 2006” hyperlink) [hereinafter PENSION FUND, 2006 ANNUAL REPORT] (identifying sources of information from whom the Council gathers information for recommendations); NORGES BANK INVESTMENT

In the same year, the Ministry of Finance appointed an Advisory Commission on International Law for the Fund. The Commission responded to requests from the Ministry as to whether specific investments were in conflict with Norway's commitments under international law. In March 2002, the Commission responded to such a request concerning Singapore Technologies Engineering. It concluded that, as there was "a large degree of probability" that the company through a subsidiary produced anti-personnel mines, even modest investments in the company could constitute a violation of Norway's obligations under the Ottawa Convention on Anti-Personnel Mines.²⁰ Such an investment could imply a violation of the Ottawa Convention prohibition on "assist[ing]" the production of anti-personnel mines.²¹ A month later the government formally excluded Singapore Technologies Engineering from the Fund's investment universe.²²

MANAGEMENT, 2001 ANNUAL REPORT § 1 (2001), http://www.nbim.no/Pages/Report___47735.aspx (clarifying the weighing of the Petroleum Fund's equity portfolio in comparison with the Environmental Fund's portfolio); Letter from Svein Gjedrem and Harald Bøhn, Norges Bank to Norway Ministry of Finance (Aug. 30, 2000), *available at* http://www.norges-bank.no/Pages/Article___15831.aspx (proposing recommendations for how the Petroleum Fund's portfolio should be determined).

20. *See* The Petroleum Fund Advisory Comm'n on International Law, Memorandum to the Ministry of Finance: Question of Whether Investments in Singapore Technologies Engineering Can Imply a Violation of Norway's International Obligations (Mar. 22, 2002), <http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/Advisory-Commission-Documents/Advisory-Commission.html?id=413581> [hereinafter Advisory Commission Memorandum] (unofficial English translation) (finding a violation even though an investment of a modest degree would make little difference to Singapore Technologies Engineering); Convention on the Prohibition of the Use, Stockpiling, Production & Transfer of Anti-Personnel Mines and Their Destruction art. 1 (1) (b), Sept. 18, 1997, 2056 U.N.T.S. 241, 36 I.L.M. 1507 (1997) [hereinafter Mine Ban Treaty] (prohibiting States Parties from developing, producing, otherwise acquiring, stockpiling, retaining or transferring anti-personnel mines).

21. *See* Advisory Commission Memorandum, *supra* note 20 (citing the Mine Ban Treaty, which provides that States Parties should never "assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention").

22. *See id.*; *see also* Norway Ministry of Finance, Companies Excluded from the Investment Universe, <http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/Companies-Excluded-from-the-Investment-U.html?id=447122> (last visited Mar. 7, 2008)

In Fall 2002, the government appointed a committee to develop more general ethical guidelines for the Fund's investments. The committee, which was chaired by Professor Hans Petter Graver, reported on June 25, 2003. In recognition of the pluralism of Norwegian society and the fact that beneficiaries of the Fund included future generations, the foundation of the ethical guidelines was made broad and relatively vague. The Graver Report sought to identify an overlapping consensus of ethical values that were consistent over time,²³ relying largely on internationally-accepted principles rather than seeking to develop a separate basis founded on Norwegian national culture or policy.²⁴ The Graver Report specifically cited principles on protection of the environment, human rights, labor standards, and corporate governance embodied in the U.N. Global Compact²⁵ and adopted by the International Labour Organization ("ILO"),²⁶ the Organisation for Economic Co-operation

(listing the companies that have been excluded because of Council recommendations to date).

23. See Norway Ministry of Finance, *The Report From the Graver Committee* § 2.1 (July 11, 2003), <http://www.regjeringen.no/en/dep/fin/Selected-topics/andre/Ethical-Guidelines-for-the-Government-Pension-Fund---Global-/The-Graver-Committee---documents/Report-on-ethical-guidelines.html?id=420232> [hereinafter Graver Committee Report] (unofficial English translation) (recognizing that most of the people for whom the Fund is managed, such as future generations of Norwegians, cannot choose the Fund manager or the Fund's investment criteria).

24. *Id.* § 4.2 (supporting those international principles on which there is broad consensus in Norway).

25. See U.N. Global Compact, *About the Global Compact: The Ten Principles of the Global Compact*, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Mar. 1, 2008) [hereinafter Ten Principles] (deriving these principles from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption). See generally Graver Committee Report, *supra* note 23; Surya Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107, 111 (2006) (hailing the Compact as "the world's largest and most widely embraced corporate citizenship initiative"); William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501 (2001) (summarizing prior research on transnational corporations and the potential for the Global Compact to have an effect on company behavior).

26. See INTERNATIONAL LABOUR ORGANIZATION, *TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY*

and Development (“OECD”),²⁷ and the U.N. Sub-Commission on the Promotion and Protection of Human Rights.²⁸

¶¶ 33-40 (4th ed. 2006), available at <http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf> (listing work and life conditions, and rules on equality of opportunity, employment security, and industrial relations). See generally Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995) (comparing the ILO Tripartite Declaration to the OECD Code in that neither have sanctions to back up their rules); Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347 (1999) (documenting a period after the Second World War in which the ILO dominated international labor law with its focus on collective labor law); Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 223 (2007) (noting that a country's compliance with ILO standards does not *ipso facto* result in the enforcement of those standards).

27. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: REVISION 2000, at 21-25 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (including standards on disclosure, consumer interests, science and technology, competition, and taxation). See generally Elisa Morgera, *An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead Up to the 2006 Review*, 18 GEO. INT'L ENVTL. L. REV. 751 (2006) (analyzing the practical impact of the OECD guidelines on environmental protection); James Salzman, *Labor Rights, Globalization, and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769 (2000) (highlighting the role of the OECD in more than just economic areas through researching, lawmaking, and helping to set an international policy agenda); Franciose, *supra* note 2 (discussing the institutional framework behind the OECD Guidelines, including national contact points and the Committee on International Investment and Multinational Enterprises).

28. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human, Comm'n on Human Rts., *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 1, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) (laying out standards for equal opportunity, personal security, worker rights, national sovereignty, and consumer protection); see also David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 959-60, 997-98 (2004) (illustrating the role of the U.N. human rights committees in monitoring transnational corporation compliance with human rights standards); Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 751-52 (2006) (accounting for many soft law mechanisms in holding transnational companies responsible including OECD Guidelines, the U.N. Global Compact, and the ILO Tripartite Declaration); Cynthia A. Williams, *Civil Society Initiatives and*

Such a pragmatic formulation of substantive obligations was also an attempt to avoid problems of theory. The Graver Report explicitly sought to embrace both teleological and deontological schools of ethics.²⁹ Teleological ethics, such as utilitarianism,³⁰ emphasize the importance of consequences; deontological ethics, such as Kant's categorical imperative,³¹ hold that one should do the right thing not in order to achieve a goal, but simply because it is right.³² The two schools are also known as consequentialism and non-consequentialism, respectively.³³ Though the division is not quite so neat and the position of individual theorists is often far more subtle, these two broad approaches to ethics are reflected in the two investment management instruments—shareholder activism and

"Soft Law" in the Oil and Gas Industry, 36 N.Y.U. J. INT'L L. & POL. 457, 464 (2004) (questioning the impact on the oil and gas industry of incorporating the U.N. Norms into a treaty). See generally Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005) (explaining why the Commission on Human Rights declined adopt the U.N. Norms); Troy Rule, Recent Development, *Using "Norms" to Change International Law: UN Human Rights Laws Sneaking in Through the Back Door?*, 5 CHI. J. INT'L L. 325, 328 (2004) (attempting to clarify different views on the effects of the Norms on the existing body of international human rights law).

29. See Graver Committee Report, *supra* note 23, § 2.2 (opting out of a third ethical perspective emphasizing retribution, as that motive is beyond the obligations of the Fund).

30. See generally Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in THE UTILITARIANS 5, 17 (1961) (laying the foundation for the principles of utilitarianism); DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM 3 (1965) (separating utilitarianism into two basic types which are separated by the generality of judgment and the way value criteria are applied to acts); JOHN STUART MILL, UTILITARIANISM 7 (George Sher ed., 2d ed. 2001) (holding that actions are right to the extent that they promote happiness); FREDERICK ROSEN, CLASSICAL UTILITARIANISM FROM HUME TO MILL 9-11 (2003) (elucidating the relevance of utilitarianism for political and legal theorists).

31. See IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 24-25 (James W. Ellington trans., 3d ed. 1993) (1785) (defining a categorical imperative as one that represented an action as objectively necessary in itself, without reference to another end).

32. See generally DEONTOLOGY (Stephen Darwall ed., 2003) (differentiating the basic theories of deontology and consequentialism by defining the duty of one person to another based on agent-relative rather than agent-neutral values).

33. See generally CONSEQUENTIALISM (Stephen L. Darwall ed., 2003); MORAL PHILOSOPHY FROM MONTAIGNE TO KANT 462 (Jerome Schneewind ed., 1990) (comparing Bentham's rules of gauging utility of an action with the opposite theory developed by Kant).

investment screening—ultimately adopted to implement the general standards to which the Norwegian Fund would be held.

The first instrument, reflecting the teleological conception of ethics, was the exercise of active ownership rights to promote long-term financial returns, which is explicitly understood to include the protection of human rights and sustainable development. When the Ministry of Finance adopted ethical guidelines that included environmental considerations, the Environmental Fund as a separate entity was discontinued.³⁴ Those general guidelines now provide that the overall investment objective remains safeguarding the Fund's financial interests, but that the exercise of ownership rights "shall mainly be based on the U.N.'s Global Compact and the OECD Guidelines for Corporate Governance and for Multinational Enterprises."³⁵ Norges Bank, which administers the Fund, is required to report on how it has acted as owner representative and explain how it has promoted "special interests relating to the long-term horizon and diversification of investments in accordance with" the guidelines on ownership.³⁶

The second instrument is the exclusion from the Fund's investment universe, either through negative screening or divestment,³⁷ of companies that pose an "unacceptable risk" of shareholder complicity in gross or systematic breaches of ethical norms within the areas of human rights and the environment. Though exclusion may in some circumstances influence the behavior of companies, the Graver Report focused on the importance of utilizing exclusion as a means of avoiding the Fund's own complicity in ethically suspect activity, rather than as a means of influencing the

34. See NORGES BANK INVESTMENT MANAGEMENT, 2004 ANNUAL REPORT § 1 (2004), http://www.nbim.no/Pages/Report___47696.aspx#1 (recounting that the Environmental Fund investments were transferred to the Petroleum Fund portfolio after the Ministry of Finance approved certain ethical guidelines for the Petroleum Fund).

35. Norway Ministry of Finance, Ethical Guidelines: Government Pension Fund—Global § 3.1 (Dec. 22, 2005), http://www.regjeringen.no/en/sub/Styrer-rad-utvalg/ethics_council/Ethical-Guidelines.html [hereinafter Ethical Guidelines] (unofficial English translation).

36. *Id.* § 3.2.

37. Divestment or divestiture, sometimes used in this context, is a more general term meaning the reduction of some kind of asset. Disinvestment is used here to indicate the selling of assets for ethical purposes.

activity itself.³⁸ This was seen as an extension of the work of the Advisory Commission on International Law,³⁹ which was replaced in December 2004 by a five-member Council on Ethics. Reflecting the deontological conception of ethics, the focus of the Council's work is on avoiding the risk of doing the wrong thing rather than ensuring a desirable course of action is followed. Moreover, the Council's examination is focused—at least technically—on the potential for Norwegian complicity rather than the actual conduct of the company in question. As the Graver Report observed, “the Council does not have to prove that a company is guilty of unethical practices.”⁴⁰ As we shall see, for some companies this is a distinction without a difference.

Formally, the Council submits recommendations to the Ministry of Finance which makes final decisions on negative screening and exclusion of companies from the investment universe.⁴¹ These recommendations and decisions are to be made public, though there is provision for a delay in publication in order to “ensure a financially sound implementation of the exclusion of the company concerned.”⁴² This recognizes the likelihood that a recommendation or decision to disinvest may have a negative impact on the share price of the company in question; keeping that information closely held enables the Fund to sell at what would presumably be a higher share price.

38. See Graver Committee Report, *supra* note 23, § 5.1 (“The Committee does not recommend the use of exclusion as a means of exerting influence. The Committee believes that the exercise of ownership rights might be more effective in influencing a company's conduct. Disposing of holdings in a company in order to influence its conduct presupposes that the publicity around the Fund's withdrawal would result in the company changing its practices. It is not realistic to believe that by excluding a company the Fund could contribute to reducing the company's access to capital or causing demand for the company's stock to decline in such a way that the company would be compelled to change its conduct. Negative publicity, on the other hand, might influence the company.”).

39. The Council took on the Advisory Commission's task of responding to requests concerning Norway's compliance with international law. See Ethical Guidelines, *supra* note 35, § 4.3.

40. Graver Committee Report, *supra* note 23, § 5.4. See generally Ramasastry, *supra* note 2 (exploring the “historical origins” of multinational corporations' complicity in violations of international law).

41. Ethical Guidelines, *supra* note 35, § 4.1.

42. See *Id.*

The five members of the Council include three academics at the University of Oslo,⁴³ a professional scientist,⁴⁴ and a professional economist.⁴⁵ The Council is given broad power to make recommendations on its own initiative.⁴⁶ The first basis for exclusion of a company is for “production of weapons that through their normal use may violate fundamental humanitarian principles.”⁴⁷ In addition, the Council may issue a recommendation

because of acts or omissions that constitute an unacceptable risk of the Fund contributing to:

- Serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other forms of child exploitation
- Serious violations of individuals’ rights in situations of war or conflict
- Severe environmental damage
- Gross corruption
- Other particularly serious violations of fundamental ethical norms.⁴⁸

This clearly allows wide discretion on the part of the Council, which is not constituted as a court, but is nevertheless required to “gather all necessary information at its own discretion and . . . ensure that the matter is documented as fully as possible.”⁴⁹ When the Council is considering an exclusion recommendation, “the company in question shall receive the draft recommendation and the reasons for it, for comment.”⁵⁰ As might be expected, questions of burden of proof and natural justice swiftly arose.⁵¹

Finally, the Council is tasked with regularly reviewing whether the grounds for exclusion of a particular company continue to apply. If the Council receives new information that neutralizes the concerns relied upon in an original exclusion recommendation, it may

43. See PENSION FUND, 2006 ANNUAL REPORT, *supra* note 19, at 7 (listing Gro Nystuen, Chair of the Committee, along with Andreas Føllesdal and Ola Mestad).

44. See *id.* (listing Anne Lill Gade).

45. See *id.* (listing Bjørn Østbø, an economist serving as Chief Executive Officer at Vital Eiendom AS).

46. See Ethical Guidelines, *supra* note 35, § 4.4.

47. *Id.*

48. *Id.*

49. *Id.* § 4.5.

50. *Id.*

51. See, e.g., *infra* note 123 and accompanying text.

recommend to the Ministry of Finance the revocation of a decision to exclude.⁵²

B. THE COUNCIL'S RECOMMENDATIONS

In its first two years leading up to January 2007, the Council published ten recommendations, all of which were adopted by the Norwegian Ministry of Finance. Six concerned recommendations to exclude one or more companies from the investment universe: (i) Kerr-McGee for activities off the coast of the non-self-governing territory Western Sahara;⁵³ (ii) seven companies producing cluster weapons components;⁵⁴ (iii) seven companies producing nuclear weapons components;⁵⁵ (iv) Wal-Mart Stores Inc. for unacceptable working conditions in some of the company's own stores and among

52. Ethical Guidelines, *supra* note 35, § 4.6.

53. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund's Council of Ethics on Exclusion From the Government Petroleum Fund's Investment Universe of The Company Kerr-McGee Corporation (Apr. 11, 2005), <http://www.regjeringen.no/pages/1662901/KMG%20eng%2011%20april%202005.pdf> [hereinafter Kerr-McGee Corporation] (unofficial English translation) (concluding that Kerr-McGee's involvement in Western Sahara falls under the "other particularly serious violations of fundamental ethical norms" category because the company's activities aid the Moroccan government's unethical exploration of the area and bolster its claim for sovereignty).

54. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund's Council of Ethics on Exclusion of Cluster Weapons From the Government Petroleum Fund (June 16, 2005), <http://www.regjeringen.no/pages/1661742/Tilrådning%20klasevåpen%20eng%2015%20juni%202005.pdf> (unofficial English translation) (describing a cluster weapon as a canister containing explosive devices or bomblets). The companies excluded were Alliant Techsystems Inc., European Aeronautic Defense and Space Company ("EADS"), General Dynamics Corp., L3 Communications Holdings Inc., Lockheed Martin Corporation, Raytheon Company, and Thales SA.

55. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund's Council of Ethics on Exclusion of Companies That Are Involved in Production of Nuclear Weapons (Sept. 19, 2005), <http://www.regjeringen.no/pages/1661428/Tilrådning%20kjernevåpen%20engelsk%2019%20sept%202005.pdf> (unofficial English translation) (citing the Treaty on the Non-Proliferation of Nuclear Weapons as the body of international law that bans most nations from possessing these types of weapons and adding that "many would . . . argue that the use of nuclear weapons violates fundamental humanitarian principles"). The companies excluded were BAE Systems Plc., Finmeccanica SpA, Boeing Company, Honeywell International Inc., Northrop Grumman, United Technologies Corp. and Safran SA. See *id.*

suppliers;⁵⁶ (v) Freeport McMoRan Copper & Gold Inc. for environmental damage;⁵⁷ and (vi) Poongsan Corporation, also for production of cluster weapons components.⁵⁸ Two recommendations considered allegations of improper activity but did not call for exclusion of the relevant companies: the first concerned whether two weapons systems in development constituted violations of the Ottawa Convention;⁵⁹ the second concerned disinvestment from Total S.A. because of its operations in Myanmar.⁶⁰ Just over a year after it excluded Kerr-McGee, the Council revoked its decision on

56. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund's Council of Ethics on Exclusion of Wal-Mart Stores Inc. (Nov. 15, 2005), <http://www.regjeringen.no/pages/1661427/Tilråkning%20WM%20eng%20format.pdf> [hereinafter Wal-Mart] (unofficial English translation) (noting that Wal-Mart has been known to engage in gender discrimination, prevent its employees from joining trade unions, and, at least in the United States, hire illegal immigrants); see also *infra* notes 124-126 and accompanying text.

57. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund's Council of Ethics on Exclusion of Freeport McMoRan Copper & Gold Inc. (Feb. 15, 2006), <http://www.regjeringen.no/pages/1956975/F%20Recommendation%20Final.pdf> [hereinafter Freeport McMoRan] (unofficial English translation) (concluding that the company's mining operations violate not only international law but may also potentially violate Indonesia's environmental regulations).

58. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund's Council of Ethics on Exclusion of Poongsan Corp. (Sept. 6, 2006), <http://www.regjeringen.no/pages/1784693/Poongsan,%20Unofficial%20English%20translation.pdf> (unofficial English translation) (noting that the company failed to respond to Norges Bank's request for information regarding its production of cluster munitions).

59. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund's Council of Ethics Concerning Whether the Weapons Systems Spider and Intelligent Munition System (IMS) Might Be Contrary to International Law (Sept. 20, 2005), <http://www.regjeringen.no/pages/1662930/Tilråkning%20Spider%20IMS%20%20English%2020.pdf> [hereinafter Weapons Systems Spider] (unofficial English translation) (explaining that the weapon systems do not presently violate international law because they are "operator-activated systems" and, as such, they don't qualify as antipersonnel land mines prohibited under Article 2 of the Ottawa Convention).

60. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund's Council of Ethics on Total S.A. (Nov. 14, 2005), <http://www.regjeringen.no/pages/1662906/oversettelse%20T%204%20jan%2006.pdf> [hereinafter Total S.A.] (unofficial English translation) (clarifying the notion that exclusion from the Fund is not based on a company's past conduct, but on its present and future behavior, and reasoning that, despite its past actions, Total S.A. has now acquired a "visible public profile focusing on human rights and social responsibility").

the basis that the company had ceased operations off the coast of Western Sahara.⁶¹ The Council also published a decision finding that its exclusion of the European Aeronautic Defence and Space Company (“EADS”) for production of cluster munitions was no longer supportable because EADS had sold its investment in a munitions producing joint venture. However, the Council in the same recommendation kept the exclusion in place in light of EADS’s involvement in the manufacture of nuclear weapons components.⁶² By the start of 2007, nineteen companies had been excluded, leaving about 4,000 in the Fund’s portfolio.⁶³

In addition to the predictable displeasure on the part of companies publicly excluded from investment by the Fund, there has been some measure of criticism within Norway of the Council’s activity. In an article published in the newspaper *Dagens Næringsliv*, the Chair of the Council, Gro Nystuen, responded to some of these criticisms, including claims that the Council did not allow companies the opportunity to rebut accusations of improper activity and that companies that did answer accusations were excluded nonetheless. Nystuen clarified that allegations are substantiated with “concrete references to sources” and that companies being assessed for exclusion are sent a letter and invited to “comment on the allegations.”⁶⁴ Nystuen explained:

I would assume that this process represents a more or less universal method for processing allegations and accusations. Whether one wants to complain about an administrative decision, respond to a complaint from

61. See Recommendation from the Norway Ministry of Finance, The Petroleum Fund’s Council of Ethics on Suspension of Exclusion of Kerr-McGee Corp. (May 24, 2006), <http://www.regjeringen.no/pages/1957945/KMG%20May%2024%202006,%20Unofficial%20English%20translation.pdf> (unofficial English translation) (explaining that the company “had ceased its activities in Boujdour field and that the licence [sic] to conduct explorations had expired in April 2006”).

62. See Supplementary Recommendation from the Norway Ministry of Finance, The Petroleum Fund’s Council of Ethics on EADS Co. (Apr. 18, 2006), <http://www.regjeringen.no/pages/1662936/EADS%20Engelsk.pdf> (unofficial English translation) (declaring that EADS is involved in the production of the ASMP-A nuclear warhead air-to surface missile and the M51 submarine-launched ballistic missile).

63. See PENSION FUND, 2006 ANNUAL REPORT, *supra* note 19, at 10.

64. Gro Nystuen, *Etikk og kritikk [Ethics and Criticism]*, DAGENS NÆRINGS LIV, Sept. 11, 2006, at 4 (responding to criticism concerning the exclusion of companies from the Fund).

the neighbor, or challenge a criminal indictment, it is a basic requirement that the claims which are presented are concrete and that they are well substantiated and documented. It is much more difficult to respond to, or counter, vague allegations or rumors.⁶⁵

The response was suggestive of the unusual nature of the Council on Ethics. Technically, it is not a legal tribunal bound by rules of due process, and technically, it focuses on the risk of complicity on the part of the Fund rather than proof of allegations against a given company.⁶⁶ In practice, however, it has justified its decisions on quasi-legal grounds, establishing precedent and following or distinguishing prior decisions. It has also adopted a quasi-adversarial procedure, allowing companies the opportunity to hear allegations and respond to them, though without the full trappings of an official legal procedure. This begs the question of whether the Council is properly seen as an ethical or legal body, a point to which we will return in Part IV.

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

Regulating the activities of corporations that operate across national borders poses a challenge to the international legal order, which revolves around the conduct of states. The largest multinationals dwarf the economies of many countries; frequently they are also able to mobilize greater political influence.⁶⁷ As the Council noted in its *Exclusion of Wal-Mart* recommendation, Wal-

65. *Id.* (translation by author).

66. *Cf.* Total S.A., *supra* note 60, at 3.1 (explaining that the Council's role is to assess whether it would be "contribut[ing] to companies' complicity" in violations of human rights if it were to invest in them).

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

Mart's annual turnover is larger than the GDP of 161 of the world's states.⁶⁸

Nevertheless, efforts to analyze and delimit the international legal status of natural persons have had far more success than comparable efforts with respect to their juridical counterparts.⁶⁹ This is due in part to the longer history of prosecuting individuals. The Nuremberg Trials are the iconic example of this, but these trials built upon a tradition of individual responsibility at international law, most consistently with respect to pirates.⁷⁰ In addition, however, war criminals and *génocidaires* have fewer defenders in the governments of the wealthy countries that frequently drive transformations in the law.⁷¹

Evidence of this different treatment is found in the debates over whether to include corporations within the jurisdiction of the International Criminal Court. At the negotiations in Rome in 1998, the delegation of France pushed for inclusion of criminal liability of "legal persons" or "juridical persons" on the basis that this would make it easier for victims of crimes to sue for restitution and compensation.⁷² Differences in the forms of accountability of corporate entities across jurisdictions, where such entities exist at all, meant that consensus was impossible and the language was ultimately dropped.⁷³ The International Criminal Court was

68. See Wal-Mart, *supra* note 56, § 4.1.2. (adding that the company's "annual turnover is equivalent to about 2% of the Domestic Gross Product [sic] of the USA").

69. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 565 (5th ed., 1998) (explaining that individuals have faced criminal liability pursuant to international law since the mid-1800s).

70. See *generally id.* at 235-37 (providing an overview of the definition of piracy).

71. Cf. Remigius Oraeki Chibueze, *The International Criminal Court: Bottlenecks To Individual Criminal Liability in the Rome Statute*, 2 ANN. SURV. INT'L & COMP. L. 185, 196, 202, 217 (2006) (warning that developing countries often view international criminal tribunals as another instrument of western domination).

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

73. See *id.* (noting that the French delegation was in fact able to gain the support of a majority of countries with notable holdouts including the Russian Federation, Japan, and Nordic states); Albin Eser, *Individual Criminal*

ultimately created,⁷⁴ but there is no comparable regulatory framework for corporations. Instead, six months after the Rome Statute was adopted, U.N. Secretary-General Kofi Annan proposed a “Global Compact,” challenging business leaders to abide by principles on human rights, labor, and the environment that are essentially voluntary.⁷⁵

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

A. REGULATION IN THE LOCAL JURISDICTION

First, it is appropriate to regulate the activities of a corporation in the jurisdiction in which it actually operates. Wrongs committed by multinational actors will generally occur within a given jurisdiction. As such, primary responsibility for pursuing a remedy should lie with the state in which the wrong occurs.⁷⁶ This is supported by a general principle in human rights and other conventions that states parties undertake “to respect and to ensure” certain rights.⁷⁷

This will not always be effective, however. A state may be unable or unwilling to regulate the activities of an entity with far greater

Responsibility, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 779 (Antonio Cassese et al. eds., 2002).

74. See Rome Statute of the International Criminal Court art. 1, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), available at http://www.icc-cpi/int/library/about/officialjournal/Rome_Statute_120704_EN.pdf (proclaiming “jurisdiction over persons for the most serious crimes of international concern”).

75. See Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207, 211 (2007) (admitting that although voluntary codes of conduct such as the Global Compact are without enforcement mechanisms, they have an important educational value for corporations as well as developing countries). See generally U.N. Global Compact, Overview, <http://www.unglobalcompact.org/Issues/index.html> (last visited Feb. 21, 2008).

76. See Jochnick, *supra* note 67, at 65-66 (contending that a government’s responsibility to protect its citizens’ human rights requires it to pass and enforce legislation regulating transnational corporations operating within its borders).

77. See International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”).

economic and political power than the institutions of government. In some cases, the government itself may be perpetrating abuses in which a corporation is complicit. In those situations, it may be more appropriate or more effective to seek redress in other jurisdictions. The most obvious is to go to the jurisdiction in which the corporation has its base—and, more importantly, its assets.

B. REGULATION IN THE HOME JURISDICTION OF A MULTINATIONAL CORPORATION

Second, therefore, legal remedies may in some circumstances be pursued in the home jurisdiction of a multinational corporation—particularly when that jurisdiction is the United States. When it can be established that a corporation or its officers have violated the laws of the country in which it is incorporated or in which it maintains its registered offices—for example by engaging in practices that are proscribed even if they take place extraterritorially—bringing an action against the corporation in that home jurisdiction might be an attractive avenue.⁷⁸ This section will briefly consider one important barrier to such proceedings, the doctrine of *forum non conveniens*, and the most important means of avoiding it in the most important jurisdiction: the U.S. Alien Tort Claims Act.⁷⁹

Forum non conveniens is a conflict of laws principle that permits a forum technically entitled to exercise jurisdiction over a matter to forgo such jurisdiction in favor of another forum that could entertain the case more conveniently.⁸⁰ In the *Bhopal* case,⁸¹ for example, a

78. See, e.g., Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 409 (2002) (arguing that because local courts in a host state are often unable or unwilling to process a claim or rule against a powerful transnational corporation, tort action in the corporation's home state may be the most effective way to address private complaints).

79. See 28 U.S.C. § 1350 (2000) (entrusting district courts with original jurisdiction over tort cases brought by aliens where the alleged tort violated universal international law or a U.S. treaty).

80. *Forum non conveniens* rules are embodied in federal practice, for the most part, in the transfer provisions of 28 U.S.C. § 1404(a). See generally RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* (2007).

pesticide plant in India run by the subsidiary of the U.S. company Union Carbide malfunctioned. Clouds of toxic gas were released, killing thousands and crippling many more.⁸² India filed a civil suit in the U.S. federal courts against the parent company, alleging that it functioned in all material respects as the same enterprise as the Indian subsidiary and that relevant conduct occurred in the United States.⁸³ The trial judge accepted the defendant's *forum non conveniens* argument.⁸⁴ Soon after the U.S. proceedings were dismissed, a \$500 million settlement was brokered under the auspices of the Indian Supreme Court. This was a large amount by Indian standards, but far less than what a U.S. civil jury might have awarded.⁸⁵

This approach was followed in subsequent cases in the United States until the late-1990s,⁸⁶ including a large number of cases

81. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 634 F.Supp. 842 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir. 1987).

82. *See id.* at 844 (asserting that the exact number of immediate fatalities is unknown). Estimates of the number of individuals killed or injured as a consequence of the Bhopal disaster range as high as two-hundred thousand people. *See* Sean D. Murphy, *Prospective Liability Regimes For The Transboundary Movement Of Hazardous Wastes*, 88 AM. J. INT'L L. 24, 32 (1994).

83. *But see In re Union Carbide*, 634 F. Supp. at 855-56 (accepting that Union Carbide was under the "specific control" of the Indian government and that Union Carbide's involvement in the Bhopal project was limited to certain design elements).

84. *See id.* at 865-67 (concluding that India's interest in the Bhopal litigation outweighed that of the United States and that an Indian court would be better suited to apply Indian law).

85. *See* Craig Scott, *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 563, 588-89 (Asbjørn Eide et al. eds., 2001) (noting that two precedents were the "silver lining" to the relatively paltry outcome: submission of a transnational parent company to "jurisdiction in a country where it had no legal presence" and acceptance of liability by a transnational parent for harm caused by its subsidiary).

86. *See, e.g.,* *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 381-84 (5th Cir. 2002) (rejecting the argument that Mexican law provides inadequate remedies for tort victims and refusing to replace Mexican policy preferences with American ones, for fear of being imperialistic and patronizing); *Polanco v. H.B. Fuller Co.*, 941 F.Supp. 1512, 1529 (D. Minn. 1996) (yielding to defendant's home forum due to Guatemala's strong interest in redressing injury to its own citizens); *Ernst v. Ernst*, 722 F.Supp. 61, 64-68 (S.D.N.Y. 1989) (deciding that France was the proper forum for a contractual dispute because it would best serve the convenience of all parties and the "ends of justice").

against the extractive industry.⁸⁷ Wrongs alleged range from harm to the environment and harm to human health, to corporate complicity in physical brutality, including forced labor, torture, and slavery.⁸⁸ More recently, however, there is evidence that courts are moving toward reducing the bad faith use of this doctrine. Courts have, for example, conditioned the grant of *forum non conveniens* claims on an agreement by the defendant to submit to a court in the foreign jurisdiction.⁸⁹

One way of avoiding these procedural hurdles in the United States is recourse through the Alien Tort Claims Act (“ATCA”), which has become central to the recent history of such proceedings against multinational corporations.⁹⁰ ATCA was originally intended to bring pirates to justice and was enacted in 1789 at the first session of the U.S. Congress.⁹¹ ATCA authorizes civil lawsuits in U.S. district courts by aliens for torts committed “in violation of the law of nations or a treaty of the United States.”⁹² Rediscovered almost two centuries later in a case brought in the United States by Paraguayan

87. See, e.g., *Torres v. S. Peru Copper Corp.*, 965 F.Supp. 899, 900 (S.D. Tex. 1996) (dismissing the claims of Peruvian citizens against a Peruvian mining corporation for damages stemming from pollution). More recently, the fashion in litigation has tended towards apparel and footwear companies, reflecting the somewhat arbitrary manner of case selection on the basis of popular opinion. E.g., *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996).

88. See *Aguinda v. Texaco, Inc.*, 945 F.Supp. 625 (S.D.N.Y. 1996) (seeking equitable relief including an environmental clean-up of Ecuadorian land devastated by oil exploration and extraction); *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61 (S.D. Tex. 1994) (alleging corporate responsibility for air, ground, and water contamination in Ecuador).

89. See *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998) (refusing to dismiss for *forum non conveniens* unless defendant Texaco agreed to submit to Ecuadorian jurisdiction); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002) (observing that the adequate alternative forum requirement is ordinarily met when the defendant is agreeable to adjudication in the other jurisdiction). See also Chesterman, *supra* note 2, at 317-18 (noting that the *Aguinda* decision was intended to keep the *forum non conveniens* doctrine from being used in bad faith).

90. See Alex Markels, *Showdown for a Tool In Rights Lawsuits*, N.Y. TIMES, June 15, 2003, at C11 (stating that the “once-obscure” law has been used to bring cases based on human rights abuses such as torture and genocide).

91. See Kenneth Roth, Executive Director, Human Rights Watch, Remarks at the University of Oregon School of Law: Human Rights as a Response to Terrorism (Feb. 11, 2004), in 6 OR. REV. INT’L L., Spring 2004, at 37, 50 (asserting that the Alien Tort Claims Act gave U.S. courts jurisdiction over captured pirates).

92. 28 U.S.C. § 1350.

citizens against a former Inspector General of Police in Paraguay, the procedure is unique to the United States.⁹³

ATCA actions were largely thought of as symbolic as no judgment under ATCA has yet been enforced; however, in 2005, Unocal settled an action alleging that it used forced labor in Myanmar.⁹⁴ Ironically, this sole example of satisfaction of an ATCA judgment corresponds to the factual situation in which the Council on Ethics issued its only recommendation for *non*-exclusion of a specific company in the case of Total's operations in Myanmar.⁹⁵

C. INTERNATIONAL LAW

International law may, in some circumstances, provide a third arena in which legal remedies may be pursued, particularly through the emerging discourse of international criminal law. Some international crimes may be committed by individuals. Examples include piracy, including aircraft hijacking; enslavement, including forced labor; genocide; war crimes; and crimes against humanity.⁹⁶ Other crimes may be committed only by states.⁹⁷ It has been accepted at least since the war crimes trials after the Second World War that

93. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 876, 887, 889 (2d Cir. 1980) (acknowledging that U.S. federal courts have jurisdiction over such claims and reversing the lower court, which had dismissed the suit for lack of subject matter jurisdiction). Cf. Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 143 (1999) (concluding that U.S. courts have a unique mandate to take on violations of international law).

94. Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C1 ("Monetary terms of the settlement weren't made public. However, a statement released by both sides said the agreement would provide compensation for the villagers and provide money 'to develop programs to improve living conditions, healthcare and education and protect the rights of people from the pipeline region.'").

95. Total S.A., *supra* note 60, ¶ 4.2.6 (differentiating Total's mere knowledge of human rights abuses from Unocal's knowledge that abuses were perpetrated in the company's own interest). Unocal had been found complicit in human rights abuses but the Council on Ethics concluded that Total could not be labeled as such. *Id.*

96. See BROWNLIE, *supra* note 69, at 565-68 (accepting that since the late 19th century, individual actions may be punished by international tribunals and national or military courts).

97. See generally *id.* at 435-78 (discussing the responsibilities and obligations of states).

individuals may be held accountable for acts undertaken through corporations.⁹⁸ A more controversial possibility is that corporations themselves may be held liable.

In general, international criminal prosecution has tended to pursue the individual. As the Nuremberg Tribunal observed, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁹⁹ Although the court was referring to the danger of allowing individuals to hide behind the veil of the state, the underlying principle could be seen as applicable to the corporate veil as well.¹⁰⁰ Aside from such veil-piercing arguments, establishing the liability of the corporation itself could be appropriate in and of itself, especially if the organizational structure of the corporation made it difficult to establish the criminal responsibility of particular individuals that comprise the corporation. In practice, however, this area of international law remains of academic rather than practical interest.¹⁰¹

98. See, e.g., *United Kingdom v. Tesch et al. ("The Zyklon B Case")* 1 I.L.R. 93, 93 (U.N. War Crimes Comm'n, Brit. Milit. Ct., Hamburg 1946) (condemning to death two individuals, Bruno Tesch and Karl Weinbacher, for supplying poison gas to concentration camps with the knowledge that it was used to kill prisoners).

99. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (William S. Hein, 1995) (1947).

100. See Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563, 569 (2003) (maintaining that aiding and abetting is an established criminal liability standard dating back at least to the Nuremberg Tribunal, where German industrialists were punished for aiding and abetting the Nazi regime).

101. Conceptual problems once seen as a bar to corporate criminal liability in domestic law now largely have been overcome. Traditional reservations arose from the nature of a corporate entity being a creature of law with no physical existence and the difficulty of establishing the requisite *mens rea* to attribute criminal liability. See, e.g., *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705, 713 (H.L.). One leg of this bar to corporate responsibility specifically concerned the penalty that could be imposed following conviction. Clearly, a crime punishable only by imprisonment (or death) hardly could be attributed to a corporation without a substantial change to our conception of sentencing. *Rex v. I.C.R. Haulage, Ltd.*, [1944] K.B. 551, 554 (Crim. App.). The absence of an alternative penalty to imprisonment is arguably still a bar to convicting a corporation of murder in some jurisdictions. Chris Corns, *The Liability of Corporations for Homicide in Victoria*, 15 CRIM. L.J. 351, 354 (1991). A second consideration relates to certain crimes which are considered to be of such a nature

D. VOLUNTARY CODES

A few days after the Rome Statute was adopted in July 1998, the *Financial Times* published an article warning that the accomplice liability provisions in the treaty “could create international criminal liability for employees, officers and directors of corporations.”¹⁰² This was technically true, but the failure to include the liability of juridical persons within the Court’s jurisdiction and the likely difficulties of establishing individual guilt on the part of corporate officers meant that the breadth of the accomplice liability provisions was somewhat exaggerated.

Six months later, at the 1999 World Economic Forum in Davos, U.N. Secretary General Kofi Annan proposed the Global Compact.¹⁰³ “The Compact is not a regulatory instrument—it does not ‘police,’

that only a human could commit them (for example, sexual offenses, bigamy, and, arguably, perjury). *Dean v. John Menzies (Holdings) Ltd.*, [1981] J.C. 23, 35 (1980) (Lord Stott). These and related issues have tended to be overcome as problems of proof rather than of philosophy. *See, e.g.*, *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493 (1909) (holding that an agent’s culpable mental state can be imputed or directly attributed to the corporation and that the prosecution must prove only that an illegal act was committed by an employee within the scope of employment, with an intent to benefit the corporation); *New York v. Reagan*, 94 N.Y.2d 804, 806 (1999) (holding that a corporation and its president were not criminally liable for workers’ deaths where the plaintiffs could not prove that deaths were foreseeable). *See generally* William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 649 (1994) (criticizing federal corporate liability law for being “elementary and unsatisfactory”).

There is modest support for such an approach in international law. The 1993 U.N. Security Council resolution establishing a sanctions regime against UNITA in Angola is of interest for two reasons. First, it imposed an oil and arms embargo against a non-state entity—the rebel group UNITA. *See* S.C. Res. 864, ¶ 19, U.N. Doc. S/RES/864 (Sept. 15, 1993). Second, however, the Security Council called upon states “to bring proceedings against persons *and entities* violating the measures imposed by this resolution and to impose appropriate penalties.” *Id.* ¶ 21 (emphasis added). Nevertheless, the greatest enthusiasm for pursuing such avenues is exhibited by those furthest from policy influence. *See* Saland, *supra* note 72, at 199; Eser, *supra* note 73, at 778-79.

102. Maurice Nyberg, *At Risk from Complicity with Crime: Business Law Corporate Liability*, FIN. TIMES, July 28, 1998, at 15.

103. Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Doc. SG/SM/6881 (Feb. 1, 1999) (pressing business leaders to “give a human face to the global market”).

enforce, or measure the behavior or actions of companies.”¹⁰⁴ Instead, it relies on “public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.”¹⁰⁵

The emergence of this and other codes of conduct that are essentially voluntary is an acknowledgement of the inadequacy of efforts to protect the environment, human rights, and labor standards through traditional governmental and intergovernmental regulation.¹⁰⁶ It also reflects the preference of many governments, particularly those in the industrialized world, for minimal regulation generally.¹⁰⁷ In such an economic environment, many governments opt for voluntary undertakings on the part of companies themselves, sometimes supplemented through market mechanisms, over legislation to compel companies to comply with particular standards. The preference for voluntary standards is often justified by government fears of being placed at a competitive disadvantage with respect to its global competitors.¹⁰⁸

Such codes are essentially marketing tools, but this is neither unusual nor dispositive of their utility.¹⁰⁹ ATCA, for example, has

104. The emerging literature on “global administrative law” provides an overview of non-traditional regulatory regimes. *See, e.g.*, Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39 (forthcoming 2008); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 15 (2005); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 63 (2005).

105. U.N. Global Compact, *supra* note 75.

106. *See* Press Release, Secretary-General, *supra* note 103 (urging business leaders to take it upon themselves to protect freedom of association, enforce child labor laws, and practice non-discriminatory hiring and firing policies). The Secretary-General pressed those at the World Economic Forum not to wait for countries to implement such laws on their own. *Id.*

107. *See* Epstein, *supra* note 75, at 210 (granting that “law often articulates the lowest common denominator of socially acceptable behavior”).

108. *See* Jochnick, *supra* note 67, at 67-68 (warning that the promulgation of voluntary corporate codes may legitimize existing practices).

109. One of the best known sets of standards may be those promulgated by the International Organization for Standardization (“ISO”). The ISO 14000 family is primarily concerned with “environmental management,” covering standards intended to minimize harmful effects on the environment caused by its activities.

been influential despite the practical impossibility of enforcing judgments. Among other things, ATCA lawsuits played an important role in encouraging companies to contribute to the “voluntary” slave labor fund in Germany.¹¹⁰ Actions against Unocal for its activities in Myanmar were also intended to put pressure on the military government; there is some evidence that the lawsuits also influenced U.S. policy towards that military government.¹¹¹ In the absence of a global enforcement regime, such tactical litigation is most effective when combined with broader norm-generating activities. In its application to multinational corporations, this is presently an early state of development. A voluntarist regime may not seem to be the most efficient means of advancing this cause, but an analogy may be drawn with the development of international law, which is itself not far removed from voluntarism.¹¹²

An optimistic analogy might also be drawn with the emergence of human rights in Eastern Europe. In 1975, the Conference on Security

International Organization for Standardization, ISO 9000 and ISO 14000 - In Brief, http://www.iso.org/iso/iso_catalogue/management_standards/iso_9000_iso_14000.htm (last visited Feb. 20, 2008). See Jennifer Clapp, *The Privatization of Global Environmental Governance: ISO 14000 and the Developing World*, 4 GLOBAL GOVERNANCE 295, 296 (1998) (drawing attention to the criticism that voluntary environmental standards are a “new tool of industry to ‘greenwash’ the public”). For a discussion of “SA8000,” developed by Social Accountability International (“SAI”), which focuses on managing ethical workplace conditions throughout global supply chains, see Deborah Leipziger and Eileen Kaufman, *SA 8000: Human Rights in the Workplace*, in BUSINESS AND HUMAN RIGHTS 197 (Rory Sullivan ed., 2003).

110. See Michael J. Bazylar, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 615 (1999) (recognizing that fear of American litigation resulted in the Germans agreeing to pay the slave laborers); see also Roger Cohen, *German Companies Adopt Fund for Slave Laborers Under Nazis*, N.Y. TIMES, Feb. 17, 1999, at A1 (quoting German Chancellor Gerhard Schroder as stating the main reason the Fund was established was “to counter lawsuits, particularly class actions suits, and to remove the basis of the campaign being led against German industry and our country”).

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

112. See generally MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF THE RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 142 (1999) (discussing that in the process of creating international law states will engage in actions without acknowledging whether they are voluntary or in fulfillment of legal obligations).

and Cooperation in Europe's Final Act of the Helsinki Conference¹¹³ included human rights provisions that were, at the time, derided as laughably unenforceable.¹¹⁴ Despite the scorn of Western international relations scholars, dissidents were later able to co-opt the language of such documents to call for union rights in Poland, *glasnost* in Russia, and, after 1989, multi-party elections.¹¹⁵ These weak norms provided a language for the articulation of rights that later transformed societies. It would be overly optimistic to suggest that corporate social responsibility is laying similar foundations for regulation of multinational corporations, but it is possible that regimes such as the Global Compact, "enforced" through mechanisms such as the Council on Ethics, is at least changing the language.

III. ETHICS, COMPLICITY, AND RESPONSIBILITY

Though the Council on Ethics is not a court and its recommendations do not have the force of law, it swiftly assumed a legal character. Through careful interpretation of its mandate, evaluation of evidence, and justification of decisions, the recommendations resemble judgments of a rudimentary court of first instance. They are rudimentary not because of the quality of the reasoning but because of the limited resources available to make independent findings of fact, and the absence of discipline imposed by the possibility of formal appeal. The recommendations are ultimately administrative decisions, yet the nature of the ethical judgments being made and the dispositions of the individuals making them has led to a kind of jurisprudence of ethics.

113. Conference on Security and Co-operation in Europe: Final Act, 73 DEP'T ST. BULL. 323 (1975), 14 I.L.M. 1292 (1975).

114. See generally DANIEL C. THOMAS, *THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM*, at ch. 7 (2001) (noting the persistence of human rights abuses and the various demonstrations in response to the repression of human rights articulated in the Helsinki Final Act).

115. See Michael Ignatieff, *Human Rights, Power, and the State*, in *MAKING STATES WORK: STATE FAILURE AND THE CRISIS OF GOVERNANCE* 59, 62 (Simon Chesterman et al. eds., 2005) (comparing the dissident movement and Soviet Cold War ideology, which placed emphasis on social and economic development, to Western ideology, which focused on achieving political freedoms).

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

Even though the issue of complicity raises difficult questions, the Committee considers, in principle, that owning shares or bonds in a company that can be expected to commit grossly unethical actions may be regarded as complicity in these actions. The reason for this is that such investments are directly intended to achieve returns from the company, that a permanent connection is thus established between the Petroleum Fund and the company, and that the question of whether or not to invest in a company is a matter of free choice.¹¹⁶

This and other fairly broad references to complicity were not elaborated. By its fifth and sixth recommendations, however, the Council on Ethics was using complicity to define the human rights obligations relevant to its decisions. In the *Recommendation on Total*,¹¹⁷ quoted again in the *Exclusion of Wal-Mart*,¹¹⁸ the idea of complicity is introduced.¹¹⁹ Whereas complicity had previously been understood in terms of explaining Norway’s ancillary responsibility for wrongs through investment of its resources, complicity was now invoked to justify the reference to human rights treaties that apply in a formal sense only to states:

Only states can violate human rights directly. Companies can, as indicated in paragraph 4.4 [of the Ethical Guidelines], contribute to human rights violations committed by states. The Fund may in its turn contribute to companies’ complicity through its ownership. It is such complicity in a state’s human rights violations which is to be assessed under this provision.¹²⁰

This is, of course, partly correct but conflates the ethical and legal conceptions of complicity: a company may indeed contribute to a violation, but this is quite separate from the legal notion of

116. Graver Committee Report, *supra* note 23, § 2.2.

117. *See* Total S.A., *supra* note 60, § 1.

118. *See* Wal-Mart, *supra* note 56, § 3.3.

119. *See also* Weapons Systems Spider, *supra* note 59, at 1-2 (recognizing that the Mine Ban Treaty, *supra* note 20, defines complicity to include any assistance, encouragement, or inducement of an activity prohibited by the convention).

120. *See* Total S.A., *supra* note 60, § 3.1.

complicity as a form of ancillary responsibility.¹²¹ The reason only states can violate human rights in the sense of rights protected by treaty is that the parties to those treaties are *states*. Individuals (arguably including juridical as well as natural persons¹²²) can violate international criminal law, either directly or through ancillary offences,¹²³ but the insertion of complicity in these two ways—both explaining the company’s and Norway’s relationship to the alleged violation—seems confusing, unnecessary, and unhelpful.

Confusion arises from the multiple ways in which complicity is invoked. The Council grapples with complicity as both an ethical and a legal principle; with the complicity of a company vis-à-vis the conduct of its employees; and with the complicity of the Fund (and thus Norway) itself vis-à-vis the actions of the companies in which the Fund invests.¹²⁴ Its use derives in part from Principle Two of the Global Compact, which provides that “businesses should make sure they are not complicit in human rights abuses.”¹²⁵ The Global Compact itself acknowledges the difficulty of defining complicity, outlining three distinct meanings relevant to businesses:

Direct Complicity: Occurs when a company knowingly assists a state in violating human rights. An example of this is in the case where a company assists in the forced relocation of peoples in circumstances related to business activity.

121. See generally CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000) (asserting that concepts of complicity can conflict with principles of commonsense morality and the individualistic conception of moral agency, which holds that one is only responsible for a harm if they directly participated in procuring such harm).

122. See *supra* note 95 and accompanying text.

123. See *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Judgment and Sentence, ¶¶ 435, 551-52 (May 15, 2003) (holding Laurent Semanza guilty of complicity in genocide).

124. See, e.g., *Freeport McMoRan*, *supra* note 57, § 1. The Council, for the first time, considered its first exclusion of a company on the basis of avoiding complicity in “severe environmental damage.” See *Ethical Guidelines*, *supra* note 35, § 4.4. The Council confusingly assumed “that the Fund, through its ownership interests in companies, can be said to contribute to companies’ complicity in severe environmental damage.” *Freeport McMoRan*, *supra* note 57, § 2.4.

125. See *Ten Principles*, *supra* note 25, at 1 (upholding, in total, ten principles promulgated by the United Nations concerning human rights, labor, environment, and anti-corruption standards that have obtained universal consensus).

Beneficial Complicity: Suggests that a company benefits directly from human rights abuses committed by someone else. For example, violations committed by security forces, such as the suppression of a peaceful protest against business activities or the use of repressive measures while guarding company facilities, are often cited in this context.

Silent complicity: Describes the way human rights advocates see the failure by a company to raise the question of systematic or continuous human rights violations in its interactions with the appropriate authorities. For example, inaction or acceptance by companies of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender could bring accusations of silent complicity.¹²⁶

Direct and beneficial complicity are clearly intended to be covered by the Ethical Guidelines, but the notion of “silent complicity” would appear to go well beyond those guidelines, which requires some form of contribution to a wrongful act. This was partly acknowledged by the Council when it distinguished purely “passive complicity” as it is understood in Norwegian criminal law from situations where a defendant knows that such passivity assists the main perpetrator’s commission of the criminal act.¹²⁷ Again, however, the importing of criminal law concepts to delimit ethical responsibility blurs the nature of the inquiry and undermines assertions by the Council that it does not need to prove the existence of a human rights violation or other wrong to recommend exclusion of a company.

Reference to complicity is unnecessary, in any case. As indicated earlier, the Ethical Guidelines do not mention complicity.¹²⁸ And, indeed, in formulating criteria for the exclusion of a company, the Council on Ethics itself included the term only in passing:

Based on the preparatory work to the guidelines the Council accepts as a fact that the Fund, through its ownership interests in companies, can be said to contribute to companies’ complicity in states’ human rights violations. The guidelines are principally concerned with *existing* and *future* breaches of the ethical guidelines, although earlier breaches might

126. *Id.* at Principle 2.

127. *See* Total S.A., *supra* note 60, § 3.2 (citing ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 165-67 (2003)).

128. *See* Ethical Guidelines, *supra* note 35, § 4.4.

give an indication of future conduct. The point is that there must exist an unacceptable risk of breaches taking place in the future. Complicity includes actions carried out to protect or to facilitate the company's activities, and refers to circumstances which are under the company's control or circumstances which the company could have been in a position to countervail or to prevent. Based on the guidelines' preparatory work, the Council lists the following criteria which constitute decisive elements in an overall assessment of whether there exists an unacceptable risk of the Fund contributing to human rights violations:

- There must exist some kind of linkage between the company's operations and the existing breaches of the guidelines, which must be visible to the Fund.
- The breaches must have been carried out with a view to serving the company's interests or to facilitate conditions for the company.
- The company must either have contributed actively to the breaches, or had knowledge of the breaches, but without seeking to prevent them.
- The norm breaches must either be ongoing, or there must exist an unacceptable risk that norm breaches will occur in the future. Earlier norm breaches might indicate future patterns of conduct.¹²⁹

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

Reference to complicity also appears to be unhelpful because it imports a quasi-legal standard that, on the one hand, runs the risk of setting too high a threshold for exclusion, or on the other hand, implicitly asserts that a wrong has been perpetrated without the concomitant obligation to prove that it has. This is an understandable response to arguments in favor of holding multinationals accountable. But the Council does not possess an adequate alternative forum to address such legal forms of accountability. If it

129. See Total S.A., *supra* note 60, § 3.3 (emphasis in original).

pursued the complicity arguments to their natural conclusion, the Council would not merely depart from its position that the recommendations are not judgments upon the company in question, but would also be implying the complicity of every other investor in that company.

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

IV. LAW, ETHICS, AND POLITICS

The virtue of law as a means of regulating behavior is clarity; the virtue of politics is flexibility. The principled use of disinvestment stems from an ethical commitment on the part of Norway to avoid participation in a wrong, but exercise of that discretion has demonstrated a discomfort with doing so on what might be seen as an arbitrary basis. One mechanism through which the Council has sought to avoid arbitrariness is through reference to “complicity.” A second manifestation of arbitrariness is less obvious and yet may be, in the end, even desirable.

Quite apart from the uncertain use of complicity as a touchstone of exclusion, a second set of concerns relates to the link between the “*unacceptable risk* that the Fund contributes to . . . violations”¹³⁰ and an implied need to prove actual or potential causation:

130. See Ethical Guidelines, *supra* note 35, § 4.4.

The acts or omissions must constitute “an unacceptable risk of (the Fund) contributing to . . .”. This means that it is not necessary to prove that such contribution will take place—the presence of an unacceptable risk suffices. The term unacceptable risk is not specifically defined in the preparatory work. NOU (Norwegian Official Report) 2003: 22 states that “Criteria should therefore be established for determining the existence of unacceptable ethical risk. These criteria can be based on the international instruments that also apply to the Fund’s exercise of ownership interests. Only the most serious forms of violations of these standards should provide a basis for exclusion.” In other words, the fact that a risk is deemed unacceptable is linked to the seriousness of the act.

The term *ris* [sic] is associated with the degree of probability that unethical actions will take place in the future. The NOU states that “the objective is to decide whether the company in the future will represent an unacceptable ethical risk for the Petroleum Fund.” The wording of paragraph 4.4 makes it clear that what is to be assessed is the likelihood of contributing to “present and future” actions or omissions. The Council accordingly assumes that actions or omissions that took place in the past will not, in themselves, provide a basis for exclusion of companies under this provision. However, earlier patterns of conduct might give some indications as to what will happen ahead. Hence it is also relevant to examine companies’ previous practice when future risk of complicity in violations is to be assessed.¹³¹

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

In addition to the components of probability and gravity, however, there is a third implicit variable: unacceptable *to whom?* This is distinct from the general question of what ethical framework is adopted as it relates not merely to the determination of wrongs but to the tolerance for risk. The answer would appear to be linked to Norwegian sensibilities as well as to market constraints. To be absolutely certain of avoiding complicity in any wrong, Norway could disinvest from *all* companies. This would clearly be unsatisfactory and would undermine key economic functions that the

131. See Total S.A., *supra* note 60, § 3.1 (emphasis removed) (citations omitted).

Fund is intended to play.¹³² It would also be self-defeating if that line were drawn at the other extreme of precluding investment only where actual proof of a legal wrong could be established.

It is, nevertheless, important to draw a line somewhere and it is possible to do so in a non-arbitrary way. As the Council demonstrated in *Freeport*, certain harms can be ranked and the unacceptable probability determined accordingly.¹³³ The problem lies in how that line is justified to the company in question, and to third parties who may be adversely affected by the decision to disinvest. If one abandons complicity as a tool for justifying disinvestment on the basis that the company and all other investors must also be said to be complicit in the wrong, how is that line to be justified?

This became a particular issue in the case of the Fund's disinvestment from Wal-Mart.¹³⁴ The decision drew a sharp protest from the U.S. ambassador, Benson K. Whitney, who accused Norway of a sloppy screening process and unfairly singling out U.S. companies.¹³⁵ In a speech to the Norwegian Institute of International Affairs, he outlined a more nuanced critique:

I respectfully ask the Norwegian government and people to fully recognize the seriousness of what Norway is doing with divestment decisions like these. Norway is not just selling stock—it is publicly alleging profoundly bad ethical behavior by real people. These companies

132. See *supra* notes 16-17 and accompanying text (observing that the goals of the Fund are to stabilize the exchange rate and save for future generations of Norwegians).

133. See *Freeport McMoRan*, *supra* note 57, § 2.2.

Moreover, the company's acts or omissions must constitute an *unacceptable risk* of the Fund contributing to severe environmental damage (point 4.4). The preparatory work preceding the Guidelines does not explicitly define the term "unacceptable risk", but states that: "*Criteria should be established for determining the existence of unacceptable risk. These criteria can be based on the international instruments that also apply to the Fund's exercise of ownership interests. Only the most serious forms of violations of these standards should provide a basis for exclusion.*" Hence, the unacceptability of the risk is linked to the seriousness of the act and how severe the environmental damage is.

Id. (emphasis in original).

134. See *Wal-Mart*, *supra* note 56, § 7.

135. See Mark Landler, *Norway Backs Its Ethics With Its Cash*, N.Y. TIMES, May 4, 2007, at C1 (criticizing Norway for relying on unreliable third parties and outdated information).

are not lifeless corporate shells. They represent millions of hard working employees, thousands of shareholders, managers and Directors, all now accused by Norway of actively participating in and supporting a highly unethical operation. The stain of an official accusation of bad ethics harms reputations and can have serious economic implications, not just to the company and big mutual funds, but to the pocketbooks of workers and small investors.¹³⁶

These accusations are not without merit. Indeed, the practice of disinvesting prior to making decisions public¹³⁷ implicitly acknowledges the harm that disinvestment will cause. One solution would be to avoid public justification altogether. If the purpose of the Council is genuinely and solely to reduce the risk of Norwegian complicity in unethical activities, it could make disinvestment recommendations secretly, implemented with discretion by the Norges Bank as part of the regular trading undertaken by its investment arm.¹³⁸ There might be speculation as to why the Fund is moving assets, but as the Fund is limited to owning at most five percent of the voting rights in any one company¹³⁹ this is unlikely to have major consequences. If the Council eschews disinvestment either as a tool to change behavior¹⁴⁰ or as a form of punishment,¹⁴¹

136. See Benson K. Whitney, Ambassador, Pension Fund Divestment: Meeting Norwegian Fairness Standards?, Remarks at the Norwegian Institute of International Affairs (Sept. 1, 2006), available at <http://norway.usembassy.gov/embassy/ambassador/speeches/disinvestment.html> (questioning the use of fair procedures when the Council applies its ethical guidelines to make disinvestment decisions, while recognizing Norway's right to adopt such guidelines to screen their investments).

137. See Graver Committee Report, *supra* note 23, § 5.1A.

138. Norges Bank Investment Management ("NBIM") is responsible for investing the Fund's international assets. See NORGES BANK 2006 ANNUAL REPORT, *supra* note 10, at 72.

139. See Norway Ministry of Finance, Provisions on the Management of the Government Pension Fund, <http://www.regjeringen.no/en/dep/fin/Selected-topics/The-Government-Pension-Fund/The-Guidelines-for-the-management-of-the.html?id=434605> (last visited Mar. 3, 2008) [hereinafter Provisions] (unofficial English translation).

140. See Ethical Guidelines, *supra* note 35 and accompanying text (maintaining that the ethical guidelines and unacceptable risk analysis should be used as a means to safeguard the Fund's financial interests).

141. See Graver Committee Report, *supra* note 23, § 2.2.

A third ethical perspective emphasizes [sic] retribution. Evil actions should be punished, doing good should be rewarded. In the view of the Committee,

the need for public scrutiny of such decisions is not justified as an element of natural justice: If a company is not being penalized or accused directly of wrongdoing, it has no right to hear charges against it or be given an opportunity to rebut them.

Secrecy is proposed here only hypothetically. Apart from anything else, public scrutiny of how Norwegian public funds are invested is appropriate, but it is intended to highlight that the Council should not be seen as a substitute for a legal regime that *is* intended to change the behavior of multinational corporations. Indeed, there is a danger that Norway, a good global citizen, may feel that by adopting these guidelines it is doing “its bit” to promote good corporate behavior. It may well be doing more than most countries, but the structure of the disinvestment regime is clearly intended to be more of a political framework than a legal regime, and with domestic rather than international consequences.¹⁴²

An alternative, also proposed hypothetically, would be to use this political framework explicitly to change behavior of multinationals. If one takes seriously the international impact of Council recommendations, the real influence lies not in the nominal punishment of disinvestment, but the *threat* of disinvestment and the possibility of further investment. In other words, whereas the law typically operates as a stick, Norway’s oil wealth may be more appropriately used as a carrot. At its most extreme, one could conceive of an effort to link the Council’s work with the active ownership rights exercised by the Norges Bank: When confronted with a company operating unethically, one way of changing its behavior would be not to sell but to *buy*.¹⁴³

striving to achieve justice by using the Fund to penalise or reward is beyond the obligations that should be imposed on the Fund. In practical terms, this means that the Committee will not propose an approach whereby the Fund withdraws its investment from a company that has acted unethically in response to the unethical action. It is the opinion of the Committee that if the Fund withdraws its investment, it must do so because withdrawal is considered necessary to avoid complicity in unethical actions in the future.

Id.

142. *See id.* §§ 1, 3.1.

143. This is, of course, a highly unlikely scenario. Apart from the caps on investment in any one company, the ability to acquire a controlling stake in a large company would strain the resources even of a large pension fund. *See Provisions,*

CONCLUSION

The appearance of regulation may, in some circumstances, be worse than no regulation at all. The turn to ethics as a means of improving behavior of multinational corporations offers an opportunity but also an opportunity cost: Ethics can be a means of generating legal norms, through changing the reference points of the market and providing a language for the articulation of rights; yet, they can also become a substitute for generating those norms.

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

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

supra note 139, § 4 (detailing the Fund's asset allocation by percentage to each geographical region, and placing a limit on holdings).