

# 1 Introduction

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In the twenty-first century, questions of corporate conduct in relation to human rights have come to the forefront of public attention. Globalization has brought multinational companies in closer contact with people in many countries, often countries where the state does not live up to ideals or legal obligations of protecting the human rights of their populations. The issues have reached the intergovernmental level of attention and action. It suffices here to refer to the UN Global Compact initiative launched by UN Secretary-General Kofi Annan in 2000 and the current United Nations process of establishing norms related to companies' conduct in relation to human rights led by Professor John Ruggie. Six out of ten Global Compact principles address human rights. At the same time as companies' activities have come in closer contact with people, increased use of market economy solutions through institutional investment has brought more citizens into closer contact with ownership of multinational companies. Pension funds and government funds have grown, and invest much of their stakeholders' or beneficiaries' money in listed multinational corporations. Thus people in many countries are linked with human rights violations in other countries. Such links can be seen or felt as issues of complicity in corporate wrongdoing.<sup>1</sup>

Several institutional investors such as pension funds, especially responsible private funds and government funds have established policies and practices to handle issues of corporate involvement which they find unethical. Basically, there are three main alternatives: (1) avoid investment in certain industries because of characteristics of the industry as such, (2) avoid investment in companies that through their conduct violate norms that the investor wants to uphold, or (3) engage directly or indirectly with specific companies with an aim to make them change their conduct or line of production. These alternatives can also

<sup>1</sup> The leading resource website on business and human rights is [www.business-humanrights.org](http://www.business-humanrights.org).

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be combined. None of them are clearly always best, or most ethical. And they can easily conflict and create tensions between activists and investment managers.

The adoption and application of Ethical Guidelines for the Norwegian Government Pension Fund – Global, which combines all three alternatives, was the starting point for this book (see Appendices 1 and 2 below). We wanted to discuss the challenges of ethical assessments of investment and human rights on a principled as well as a practical level and invited philosophers and lawyers to take part.

### 1. Three normative frameworks

The discussions of the book lie at the intersection of three important current developments relating to normative frameworks: first, the corporate social responsibility (CSR) discussion which addresses companies directly rather than the investors' perspective; second, the ethical, or responsible, investment development; and third, discussions on norms for sovereign wealth funds that are investors of a special breed. These three normative frameworks show very different approaches to human rights issues. In the Global Compact and in the work of Professor John Ruggie, human rights are at the forefront. In the principles on responsible investment, they have become included in a much wider context, as one of many considerations, and not explicitly mentioned. And in the principles for sovereign wealth funds, the impression is that it would have been better if human rights issues were avoided altogether, but indirectly, they are referred to and accepted. It is against this normative background that this book analyses the relationships between investment, companies' conduct and human rights.

With respect to corporate social responsibility, the UN Global Compact can be seen as its most 'official' expression on the global level.<sup>2</sup> The 'Ten Principles of the Global Compact' cover human rights, labour rights, the environment and corruption. The first two principles are that 'Business should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses.' We see here that the complicity issue is explicitly set out in this fundamental document. Also the four Global Compact principles on labour can be seen as human rights principles, especially applicable in relation to businesses. However, the broad discussions on corporate social responsibility draw mainly on theories

<sup>2</sup> See home page at [www.unglobalcompact.org](http://www.unglobalcompact.org). The Global Compact has over 5,300 business participants as of November 2010.

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from different fields of knowledge including sociology, economics, political theory and ethics. Human rights seem not to be central in the literature, but are included as only one of many ethical issues.<sup>3</sup> A generally agreed demarcation of CSR does not exist. But many issues covered in the discussions have repercussions on the issues of human rights and corporate complicity.

On the intergovernmental level, another initiative focuses especially on the relationship between business and human rights: the work of Professor John Ruggie, the Special Representative of the UN Secretary-General on business and human rights. This work started in 2005 and is scheduled to be finalized with a report containing guiding principles to the United Nations Human Rights Council's session in June 2011. Professor Ruggie has submitted a series of reports to the Council where he has laid out and developed the so-called 'protect, respect and remedy' policy framework. In his 2010 report, it is summarized in the following manner:

It rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.<sup>4</sup>

This is a comprehensive take on the overall relations between business and human rights including both governments and victims while companies are at the core of the analysis and framework. Issues of company complicity arise in relation to the companies' responsibility to respect human rights.

With respect to the second development, the rise of ethical, or responsible, investment, today the most important developed initiative are the 'Principles for Responsible Investment' (PRI).<sup>5</sup> These principles, launched in 2006, were developed by a group of institutional investors supported by two United Nations entities: the UNEP Finance Initiative and the already mentioned UN Global Compact. The 'PRI Initiative'

<sup>3</sup> Generally, on corporate social responsibility, see Andrew Crane et al. (eds.), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008), especially Archie B. Carroll on the history of CSR (pp. 19–46) and Domènec Melé on CSR theories (pp. 47–82). A striking feature of this handbook is that human rights appear very seldom, but see pp. 68–75 on corporate citizenship theories which relate explicitly to human rights issues.

<sup>4</sup> John Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Further Steps toward the Operationalization of the "Protect, Respect and Remedy"-Framework', UN Doc. A/HRC/14/27 (9 April 2010), para. 1.

<sup>5</sup> See home page at [www.unpri.org](http://www.unpri.org).

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was organized to help investors implement the principles.<sup>6</sup> Six short principles each list four to eight examples of possible actions. The three first principles are: (1) 'We will incorporate ESG issues into investment analysis and decision-making processes', (2) 'We will be active owners and incorporate ESG issues into our ownership policies and practices' and (3) 'We will seek appropriate disclosure on ESG issues by the entities in which we invest.' The three last principles are related to cooperative initiatives within the investment industry on application of the principles and the reporting on their application.

Human rights are not explicitly mentioned in the principles. The key abbreviation ESG means 'environmental, social and corporate governance issues'.<sup>7</sup> Neither is human rights mentioned in any of the possible actions listed under each principle. Only in relation to principle 3 is there an indirect reference through the following possible action: 'Ask for information from companies regarding adoption of/adherence to relevant norms, standards, codes of conduct or international initiatives (such as the UN Global Compact).'<sup>8</sup> Even if human rights are not explicitly mentioned, it seems as if it is understood to be covered by the language of 'social' issues. This is an unusual way of addressing human rights. Another important feature is that the principles do not in any way mention disinvestment, neither in the principles themselves, nor in the proposed actions. Active engagement and shareholder resolutions are suggested as well as reporting requested. Incorporation of ESG issues in analysis and decision-making processes are required. Nothing is said about the eventual effect of these analyses or the outcome of lack of reporting or non-adherence to ESG principles by the companies in which investments are made. It is possible to read the whole set of principles and actions to be without sanctions in the form of investor disinvestment no matter how a company's conduct may be.

With respect to the third current development, regarding the role of sovereign wealth funds (SWFs), the issues of human rights, companies

<sup>6</sup> As of November 2010, the initiative has 831 signatories, of which 211 are asset owners. This includes the Norwegian Government Pension Fund – Global, some other government pension funds and many private pension funds.

<sup>7</sup> Jill Solomon, *Corporate Governance and Accountability*, 3rd edn (Chichester (UK): Wiley, 2010) points to the changed terminology and focus over time from ethical investment, through socially responsible investment and, from around 2003, the turn to ESG and very recently to 'extra financials', see pp. 304–7. At p. 306, she also lists eleven issues associated with ESG investment, one of which is human rights.

<sup>8</sup> In the annual report of the PRI Initiative 2009 it is reported that there had been a recruitment initiative undertaken by signatories writing to more than 8,400 listed companies, urging them to participate in the UN Global Compact. This demonstrates activity in relation to respect for human rights on the companies' part.

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and investors have been treated differently from the ways we have already discussed. The debates on SWFs over the last few years have addressed such issues as whether they represented a threat of foreign government control over important national industries, or, during the financial crisis in 2007–8, if they could be suppliers of necessary capital to financial institutions in difficulties. These developments led to the adoption of the so-called Santiago Principles in 2008.<sup>9</sup> They were developed by the International Working Group of Sovereign Wealth Funds. Following completion of the principles, the working group was abolished and a new institution established to follow the functioning of the guidelines: the International Forum of Sovereign Wealth Funds (IFSFW).<sup>10</sup>

The twenty-four Santiago Principles and some sub-principles all address the legal framework and objectives of SWFs, their institutional framework and governance structures and frameworks for management of investment and risk. The relationship to human rights is not explicitly mentioned. An underlying idea seems to be to avoid political interference by SWFs, which also may include ethics and human rights. In the official introduction to the Principles, one of the four ‘guiding objectives’ is to ‘invest on the basis of economic and financial risk and return-related considerations’. In the Principles themselves this is expressed in principle 19: ‘The SWF’s investment decisions should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy, and based on economic and financial grounds.’ In the official explanation and commentary, it is stated that it ‘is a core principle that SWF’s overarching objective is to maximise risk-adjusted financial returns’. However, probably due to the existing practice of applying ethical considerations to investments, sub-principle 19.1 states: ‘If investment decisions are subject to other than economic and financial considerations, these should be clearly set out in the investment policy and be publicly disclosed.’ The explanation and commentary to this is: ‘Some SWFs may exclude certain investments for various reasons, including legally binding international sanctions and social, ethical, or religious reasons (e.g., Kuwait, New Zealand, and Norway). More broadly, some SWFs may address social, environmental or other factors in their investment policy. If so, these

<sup>9</sup> Formally, the principles are named ‘Sovereign Wealth Funds: Generally Accepted Principles and Practices’ (abbreviated GAPP). They can be found at [www.iwg-swff.org/pubs/eng/santiagoprinciples.pdf](http://www.iwg-swff.org/pubs/eng/santiagoprinciples.pdf) including introduction and commentaries and short presentations of the funds that participated in the preparations.

<sup>10</sup> See home page: [www.ifswf.org](http://www.ifswf.org). Work of the Forum is facilitated by staff from the IMF.

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reasons and factors should be publicly disclosed.’ The leading analyst of SWFs, Edwin M. Truman, concludes with respect to sub-principle 19.1 that ‘the US authorities did not get their way in the GAPP on the principle that SWF investment decisions should be based solely on economic grounds rather than political or foreign policy considerations’.<sup>11</sup> The official commentary, however, at least tries to make the exceptions as narrow as possible. The exercise of shareholder ownership rights is also addressed in the Principles. It should be done ‘in a manner that is consistent with its investment policy and protects the financial value of its investments’ (principle 21). The fund’s ‘general approach to voting securities of listed entities, including the key factors guiding its exercise of ownership rights’ should be publicly disclosed. In the commentary, the rationale behind the principle is explained to be to ‘dispel concerns about potential noneconomic or nonfinancial objectives’. Any informal engagement with the management of listed companies, in which the fund holds shares, is not covered by the Principles.

## 2. The Ethical Guidelines for the Norwegian Government Pension Fund – Global

This book discusses in general terms questions of principles and of practical application of ethical norms. No systematic mapping of different types of ethical guidelines will be given. In this section, however, we will briefly present the ethical guidelines of the Norwegian Government Pension Fund – Global. They are important in their own right since the Fund is by far the world’s largest investor applying ethical assessments. Further, they give an insight into the different issues that have to be addressed when developing such guidelines and issues surrounding the Guidelines and some of the recommendations are explicitly discussed in several of the chapters that follow.

The Norwegian Government Pension Fund – Global is the world’s second largest sovereign wealth fund, with a value of assets of approximately US\$432 billion (NOK 2,792 billion) as of 30 June 2010.<sup>12</sup> The Fund receives all net government petroleum sector income and

<sup>11</sup> Edwin M. Truman, *Sovereign Wealth Funds: Threat or Salvation?* (Washington, DC: Peterson Institute for International Economics, 2010), pp. 136–7.

<sup>12</sup> For a ranking of the world’s sovereign wealth funds as well as government pension funds, see *ibid.*, pp. 12–15. Truman’s table has Abu Dhabi Investment Authority as the largest SWF (US\$620 billion), but Japan’s Government Pension Investment Fund, which is not a SWF, is twice that size again, although it invests mostly domestically. In spite of its name, the Norwegian Government Pension Fund is no pension fund in the sense that citizens have an entitlement to any part of the Fund.

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transfers yearly to the state budget approximately four per cent of the Fund. Currently, approximately sixty per cent of the Fund is invested in equities (shares) and forty per cent in interest-earning securities (bonds). The Fund is in a process of diversifying into real estate as well. All investments are outside Norway. Investment of equities is spread out in international markets. The Fund holds approximately one per cent of the total value of the world's listed shares.<sup>13</sup> The Fund can hold up to ten per cent of the shares in one company.<sup>14</sup> Normally, the holding is much lower as the Fund is what is sometimes called a universal owner which follows the markets more generally.<sup>15</sup> Performance of the Fund is measured against a benchmark portfolio set by the Ministry of Finance. Basically, the benchmark portfolio also guides the distribution of the investments.

Following a public debate on the ethics of the (increasingly) sizeable Norwegian government fund generated by income from offshore oil and gas, Ethical Guidelines for the Norwegian Petroleum Fund (later renamed the Government Pension Fund – Global) were adopted in 2004 and amended in 2010.<sup>16</sup> A Council on Ethics, with a mandate to make recommendations to the Ministry of Finance on exclusion of certain companies, based on the criteria in the Guidelines, was also established. And the central bank of Norway, Norges Bank, which manages the fund, was entrusted with the task of shareholder engagement.<sup>17</sup>

Two sets of ethical considerations constituted the foundation for the Guidelines. First, the Fund should benefit future generations and thus secure 'a sound return in the long term, which is contingent on a sustainable development in the economic, environmental and social sense'. Second, while securing returns, the Fund should not contribute to serious unethical conduct.<sup>18</sup> Two main mechanisms were established in order to achieve these goals. First, the exercise of ownership rights,

<sup>13</sup> See Chart 1–4 of Government Pension Fund – Global report for second quarter of 2010, at [www.nbim.no/Global/Reports/2010/Q2\\_2010%20eng.pdf](http://www.nbim.no/Global/Reports/2010/Q2_2010%20eng.pdf).

<sup>14</sup> Section 6 of Regulations on the Management of the Government Pension Fund – Global dated 22 December 2005, No. 1725 (as amended).

<sup>15</sup> On universal owners, see Lloyd Kurtz, 'Socially Responsible Investment and Shareholder Activism', in Crane et al. (eds.), *The Oxford Handbook of Corporate Social Responsibility*, pp. 259–61.

<sup>16</sup> The original and the current guidelines are included as appendices to this book. On the development of the guidelines, see Norwegian Government White Paper, NOU 2003:22, on the Ethical Guidelines of the Government Pension Fund (Report from the Graver Committee).

<sup>17</sup> The part of the bank that manages the fund is Norges Bank Investment Management (NBIM).

<sup>18</sup> Norwegian Government Pension Fund – Global: Ethical Guidelines 2004 ('Ethical Guidelines'), para. 1 (see Appendix 2 below).



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including engaging with companies, which is the responsibility of Norges Bank. Engagement with companies in the portfolio and shareholder activism shall be based on the UN Global Compact, the OECD Guidelines on Corporate Governance and the OECD Guidelines for Multinational Enterprises.<sup>19</sup> Second, recommending *exclusion of companies* from the Fund's portfolio; this is the responsibility of the Council on Ethics which is an independent council appointed by the Ministry of Finance.<sup>20</sup> The exclusion mechanism is divided in two sub-categories; exclusion on the basis of certain *products* and exclusion of companies on the basis of company *conduct*. The chapters of this book that relate to the Ethical Guidelines of the Norwegian Pension Fund deal mainly with this second mechanism, but investor engagement with companies is also discussed.

Exclusion of companies related to specific *products* entails screening of all companies in the portfolio with a view to identifying companies involved in the following: production of weapons that through normal use may violate fundamental humanitarian principles, production of tobacco, and sale of weapons or military material to Burma. The humanitarian principles related to weapons are known as the principle of distinction (between civilians and military targets) and of proportion (avoidance of unnecessary suffering or superfluous injury). The predetermined list of such weapons includes weapons of mass destruction as well as anti-personnel mines, cluster munitions and certain other weapons deemed to violate humanitarian principles. All companies involved in the production of such weapons will be excluded from the Fund. This mechanism is therefore sometimes referred to as 'negative screening'. The term 'screening' indicates that the aim is to exclude *all* companies in the investment universe involved in the production of these weapons.

Exclusion of companies because of the company's *conduct* is a mechanism that requires more reasoned judgment in its application. A company can be excluded from the Fund if there is 'an unacceptable risk that the company contributes to or is responsible for:'

- 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,

<sup>19</sup> Guidelines for Norges Bank's work on responsible management and active ownership of the Government Pension Fund – Global (1 March 2010), Section 2(2) (see Appendix 3 below).

<sup>20</sup> Norwegian Government Pension Fund – Global: Ethical Guidelines 2010, Section 4 (see Appendix 1 below).



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- serious violations of the rights of individuals in situations of war or conflict,
- severe environmental damage,
- gross corruption,
- other particularly serious violations of fundamental ethical norms.<sup>21</sup>

We see here that human rights violations are listed as the first category on the list. While the *product*-related screening aims for the exclusion of all companies within the Fund involved in specific weapons production, the *conduct*-related exclusion mechanism does not aim for an actual investigation of all companies in the portfolio with regard to every incident of human rights violations, environmental damage, corruption, etc. The aim is to target worst case companies within the different categories.

The formulation of the standards and requirements in the Ethical Guidelines for the Pension Fund do not necessarily reflect general rules or standards for company conduct. The threshold for determining complicity in human rights abuses within the scope of the Ethical Guidelines must also be seen in the context of the political compromise that constituted the Norwegian parliamentary consensus at the time of adoption of the Guidelines.

### 2.1 *Processing of cases under the Ethical Guidelines*

The Council on Ethics comprises five persons, appointed by the Ministry of Finance. They are selected because of their expertise in various areas covered by the guidelines. The Council makes written recommendations to the Ministry of Finance, mostly on the exclusion of specific companies. The Ministry decides on whether to follow the recommendations, but all recommendations by the Council must eventually be made public.

The Council meets on average once a month, and has a Secretariat with eight full-time staff members who cover different fields of expertise relevant to the Council's mandate. The Secretariat collects information and prepares cases for the Council. The approximately 8,300 companies in the Fund are screened electronically on a daily basis against specific search criteria and databases. The Secretariat moreover collects specific information about companies from the public domain – news articles, websites, NGO reports and company reports – and solicits new information by commissioned consultants. In some cases Secretariat

<sup>21</sup> Ibid., Section 2(3).

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members conduct field-level visits to verify the quality of commissioned work and to obtain first-hand knowledge on specific company cases. Issues pertaining to child labour and labour conditions have been the theme of some previous fact-finding visits to developing countries, as has the issue of environmental damage caused by mining operations.

Because the recommendations on exclusion and the reasoning behind them are publicly available, the cases must be well documented. The Secretariat often works for many months with fact-finding and collecting documentation regarding one single company. The Council assesses the facts against the wording of the relevant part of the Guidelines, in addition to considering the Guidelines' preparatory work and previous recommendations.

If the Council finds that a company should be investigated more closely, the Council will normally contact the company to get information on the facts and on the company's intentions and plans. When a draft recommendation is completed, it is also always sent to the relevant company for comments, corrections, etc.<sup>22</sup> The company will normally be given several weeks to respond, and will also be granted extensions of the deadline if requested. In some cases, the response from the company has led to a case being dropped. In other cases, responses have led to amendments of the recommendation with no change of the conclusion. In yet other cases, the company in question has not responded at all.

Based on the investigations and possible input from the company, the Council issues a final recommendation to the Ministry of Finance. The recommendation is then subject to political processing among relevant ministries depending on the subject matter. This process can take several months. If the Ministry decides to exclude a company, the Central Bank is directed to sell its holdings, usually within two months. After this point the Ministry will publicize the recommendation in its entirety, also if exclusion has not been decided. Until publication, the Council on Ethics is not at liberty to comment on that specific case, or even to confirm that a certain case is under consideration. It follows from this that recommendations may have been submitted a fairly long time before they become public.

## 2.2 *Recommendations related to human rights issues*

Four recommendations on exclusion due to complicity in human rights violations have been made public as at October 2010.<sup>23</sup> These are the

<sup>22</sup> Ibid., Section 5(3).

<sup>23</sup> All publicized recommendations can be found in English at [www.etikkradet.no](http://www.etikkradet.no).