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# Divesting from ‘Dirty Business’: *Investing in Human Rights?*

A study of the threshold for invoking exclusion of companies from the  
Government Pension Fund Global

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*Susanne H. Flølo,  
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## **Abbreviations**

<b>CEDAW</b>	The Convention on the Elimination of all Forms of Discrimination Against Women
<b>CRC</b>	The Convention on the Rights of the Child
<b>CSR</b>	Corporate Social Responsibility
<b>GPFG</b>	Government Pension Fund Global
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice
<b>ILO</b>	International Labour Organization
<b>NBIM</b>	Norges (Norway's) Bank Investment Management
<b>NGO</b>	Non-Governmental Organisation
<b>NCP</b>	National Contact Point for the OECD
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>SWF</b>	Sovereign Wealth Fund

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# 1 Introduction

## 1.1 Background

When the *Ekofisk* oil field was discovered in the North Sea in the late sixties, few, if any were able to predict the overwhelming impact it would have on Norwegian society for decades to come. The Norwegian petroleum industry and the management of its revenue has come to be regarded a success story of how a state may manage the discovery of vast natural resources. Although the process from discovery to effective and durable management might not have been as harmonious as it tends to be depicted, concerns for environmental impact, and emphasis on how to best make sure that the revenue would benefit both current and future generations were seemingly core values since the very beginning.

In order to avoid negative consequences arising from large increases in a country's income ('the Dutch Disease') and to make sure that the return of the fund would continue to benefit the Norwegian population for generations to come, the so-called 'budgetary rule', a fundamental principle of Norwegian fiscal policy was created. The budgetary rule states that over the course of a business cycle, the Government may only spend the expected real return of the fund.<sup>1</sup> Most of the revenue is invested in companies and projects abroad. It is the Fund's investments abroad, represented by the Government Pension Fund Global (GPF) that will be discussed in this paper. The GPF has grown to become the largest sovereign wealth fund (SWF) in the world, owning approximately 1.3 % of all global stocks with a market value of more than 8 billion NOK as of May 2017.<sup>2</sup> Currently 64.6 per cent of the GPF is invested in equities (shares), 32.9 per cent is invested in interest-earning securities (bonds), and 2.5 per cent in real estate. Today, the GPF is invested in nearly 9,000 companies abroad, and represented in 77 countries.<sup>3</sup>

Up until 2015, Norway was regarded as the "best country in the world" to live in for 12 years in a row by the United Nations Human Development Index (HDI). HDI measures countries in three basic areas; life expectancy, education and income/standard of living.<sup>4</sup> It is little doubt that the revenue from massive natural resources (along with good governance and

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<sup>1</sup> Usually less than three per cent of the Fund's annual surplus is spent as a part of the Government budget.

<sup>2</sup> For real-time value, see <<https://www.nbim.no/en/the-fund/>>.

<sup>3</sup> NBIM, 'Government Pension Fund Global' (NBIM, 2017) <<https://www.nbim.no/en/the-fund/>> accessed 03 January.

<sup>4</sup> UNDP, *Work For Human Development* (Human Development Report, 2015).

strong institutions) has been fundamental in building probably the world's most successful welfare state, and hence to achieve such a ranking. But what responsibilities, if any, should follow such fortune and wealth? Norway was one of the first states to develop a coherent policy on Corporate Social Responsibility (CSR) in a global economy, and a part of this policy is to base the investments of the GPFG on an ethical foundation. The Fund is managed by Norges Bank Investment Management (NBIM), a part of the Norwegian Central Bank, on behalf of the Ministry of Finance.

The Fund can hold up to 10 per cent of the shares in one company,<sup>5</sup> but as noted by Nystuen “normally, the holding is much lower as the Fund is what is sometimes called a universal owner which follows the markets more generally.”<sup>6</sup> The Fund's investment in companies abroad might by some be regarded as insignificant, and should therefore entail few ethical responsibilities, including human rights and environmental. Another common argument is that investors, such as SWF's<sup>7</sup>, are first and foremost obliged to ensure the highest possible financial return, and that might not be synonymous with investing in companies known for good human rights records.

The Norwegian Parliament has signed off on several bills, regulations and multilateral agreements entailing environmental and social responsibilities for their investments abroad since Ekofisk was first discovered. One domestic initiative which is particularly important in this thesis is the *Management mandate for the Government Pension Fund Global*.<sup>8</sup> This regulation entails, inter alia, that the Bank independently, on behalf of the Ministry of Finance, shall develop principles for good corporate governance of the GPFG. These principles shall be based on concern for the environment and societal relations in line with

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<sup>5</sup> The ten per cent limit does not apply to real estate-investments, as manifested in § 3-4 (10) *Mandat for forvaltningen av Statens Pensjonsfond Utland*, adopted by the Norwegian Ministry of Finance on 8 November 2010 pursuant to section 2, second paragraph, and section 7 of Act no 123 of 21 December 2005 relating to the Government Pension Fund No 1781 of 20 December 2016.

<sup>6</sup> Gro Nystuen, Andreas Føllesdal and Ola Mestad, *Human rights, corporate complicity and disinvestment* (1<sup>st</sup> edn, Cambridge University Press 2011) 7.

<sup>7</sup> Sovereign wealth funds are defined by the International Working Group of SWF's as “special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports.” IWG, *Sovereign Wealth Funds: Generally Accepted Principles and Practices "Santiago Principles"*, (2008) 27.

<sup>8</sup> The original legal basis is in Norwegian: *Mandat for forvaltningen av Statens pensjonsfond utland* [2010] LOV-2005-12-21-123, an unofficial English translation been used for the exact citing, available at: <[https://www.regjeringen.no/contentassets/9d68c55c272c41e99f0bf45d24397d8c/gpfg\\_mandat\\_20122016.pdf](https://www.regjeringen.no/contentassets/9d68c55c272c41e99f0bf45d24397d8c/gpfg_mandat_20122016.pdf)>.

internationally recognized principles and standards, “such as the UN Global Compact; the OECD Guidelines for Corporate Governance, and the OECD Guidelines for Multinational Enterprises.”<sup>9</sup> Although the Bank “shall seek to achieve the highest possible return”<sup>10</sup> in the management of the Fund, Norwegian law also emphasise that: “A good long-term return is considered dependent on sustainable development in economic, environmental and social terms, as well as well-functioning, legitimate and efficient markets.”<sup>11</sup>

During the last decades the discussion of CSR and human rights -responsibilities of SWF’s such as the GPFG has attracted growing interest from CSR-and human rights advocates, even from within the business world itself. Although the topic legally remains somewhat a controversy, there seems to be an agreement that SWF’s are different from ‘regular’ investors investing abroad because they represent states and the states’ interests. Regardless of what legal obligations that entail, there are strong political and societal reasons for demanding higher emphasis on ethically responsible investment. As the world’s largest SWF, the GPFG influences the daily lives of millions across the globe and attracts a lot of attention for its management. The GPFG’s power to influence the market and certain business-sectors, both economically and policy-wise should not be underestimated. In many ways, the Bank, the Norwegian Government and the State as a whole have been given a unique opportunity to promote responsible investment. In addition, as the GPFG is de facto owned by the Norwegian people, including future generations, where the Fund is invested should be a concern of all of us. So in what ways do NBIM, on behalf of the Norwegian Government and the Norwegian people, actually work to make ensure that the GPFG does not contribute to harm towards present and future generations abroad? What exactly is the ethical foundation on which Funds investment should be based on? Let alone, who safeguards that these values are being applied?

## **1.2 Ethical Fund Management**

### **1.2.1 The Guidelines for Observation and Exclusion from the GPFG**

In 2002, the Government appointed a committee, chaired by Professor Hans Petter Graver to propose ethical guidelines for the Government Petroleum Fund (later the GPFG). The

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<sup>9</sup> Management mandate for the Government Pension Fund Global s 2-2 (3), Un-official English translation of 2016.

<sup>10</sup> *ibid* s 1-3.

<sup>11</sup> *ibid*.

Committee presented its findings in July 2003.<sup>12</sup> Based on these findings, the seated Government presented the first ethical guidelines for the GPFG in the 2004 Revised National Budget. After the Parliament endorsed the Guidelines, the Ministry of Finance made them effective from 1 December 2004. The report from the Graver Committee is considered the preparatory work of the Guidelines for observation and exclusion of companies from the GPFG, and will be frequently referred to in this thesis. The preparatory works talk about ‘A three-track strategy’ in the ethical management of the Fund. First, is *exercising ownership rights*, which should be based on the above mentioned UN Global Compact, and the OECD Guidelines to promote long term financial returns and good corporate governance.<sup>13</sup> It is emphasized in the report that the exercise of ownership rights refers to all activities performed by the Fund to ensure that the Fund’s basic rights as an owner of companies are respected. Second is *negative screening* in order to prevent inclusion of companies that produce products regarded as ethically unacceptable.<sup>14</sup> Third is *withdrawal* of investments/exclusion of companies where there is “an unacceptable risk as an owner of complicity in gross or systematic breaches of ethical norms within the areas of human rights and the environment.”<sup>15</sup> It is the latter strategy that will be in focus throughout this thesis. In order to narrow down my subject of inquiry I will not present a comprehensive discussion of the first two important strategies.

It was emphasized by the Committee that withdrawal should happen after an individual assessment of each case. In addition, as stated by the Bank itself, exclusion is only a matter of last resort: “Before deciding to exclude a company, Norges Bank shall consider whether the use of other measures, including the exercise of ownership rights, may be better suited.”<sup>16</sup> The initial Guidelines for the Fund proposed by the Committee state that the GPFG should not be invested where there is an unacceptable risk that the Fund “may contribute to unethical acts or omissions, such as violations of fundamental humanitarian principles, serious violations of human rights, gross corruption or severe environmental damages.”<sup>17</sup> The

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<sup>12</sup> HP Graver et al., *The Report from the Graver Committee* (Ministry of Finance 2003) <<https://www.regjeringen.no/en/dokumenter/Report-on-ethical-guidelines/id420232/>> accessed 14 May 2017.

<sup>13</sup> The OECD *Guidelines for Corporate Governance* were not referred to in the original report, but added to the Guidelines later on.

<sup>14</sup> Graver (n 12) para 5.1.

<sup>15</sup> *ibid.*

<sup>16</sup> NBIM, 'Decision on exclusion of companies from the Government Pension Fund Global' (NBIM, 2016) <<https://www.nbim.no/en/transparency/news-list/2016/decision-on-exclusion-of-companies-from-the-government-pension-fund-global/>> accessed 02 January.

<sup>17</sup> Graver (n 12) para 5.1.

Guidelines eventually spell out a set of criteria for recommending exclusion of companies. These criteria are separated into two ‘categories’, product-based and conduct-based. As evident in its name, the product-based criteria imply that certain types of products are ‘unethical’ and investments to production of such should be avoided. This category includes weapons that through their normal use violate fundamental humanitarian principles.<sup>18</sup> As for the latter category, it is implied that certain types of business-conduct are considered unethical and ‘contribution through investment’ should therefore be avoided. Since 2004 this category has encompassed five criteria: serious or systematic human rights violations; serious violations of the rights of individuals in times of war and conflict; severe environmental damage; gross corruption, and; other particularly serious violations of fundamental ethical norms.<sup>19</sup>

### 1.2.2 The Council on Ethics

In 2004 an independent Council of Ethics was appointed by the Ministry of Finance. The Council has ever since had mandate to recommend exclusion of companies from the GPF investment universe/portfolio based on the criteria manifested in the Guidelines. While the mandate has remained practically unchanged over the years, the Guidelines have been amended several times, most significantly in 2014. The new Guidelines entailed that as of 1 January 2015 it is Norges Bank's Executive Board itself that makes final decisions on the Council's recommendations. Final decisions on recommendations prior to this date were made by the Ministry of Finance. In addition, all five members of the Council, including the leader, were replaced. This significant event will be discussed in greater detail later on.

## 1.3 Research Question

I have chosen to focus on only the conduct-based criteria for exclusion as each of the recommendations related to this category are assessments of individual cases and companies. The exclusion mechanism is, as noted by Nystuen “based on the aspiration to avoid complicity in unethical conduct, and does not seek to influence company conduct or policy.”<sup>20</sup> As exclusion represents a ‘last resort strategy’ the outcome of these recommendations will be

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<sup>18</sup> More products have since been added; inter alia tobacco and military material that are subject to investment restrictions.

<sup>19</sup> The original legal basis is in Norwegian: *Etiske retningslinjer for Statens pensjonsfond – Utland 2004-2010* (Finansdepartementet 2004) an un-official English translation has been used for exact citing, *Ethical Guidelines: Norwegian Government Pension Fund – Global*, available at: <<https://platform.reprisk.com/downloads/080613%20Ethical%20Guidelines.pdf>> s 2.

<sup>20</sup> Nystuen, Føllesdal and Mestad, *Human rights, corporate complicity and divestment*, 43.

quite descriptive of the threshold applied when establishing what is considered ethically unacceptable conduct by companies within the investment universe/portfolio. In particular, I am interested in the recommendations concerning human rights violations. My aim is to figure out to what extent the observation and exclusion criterion ‘contribution to serious or systematic human rights violations’ is actually applied and what it entails. My overall research question is therefore: *To what extent is ‘contribution to serious or systematic human rights violations’ a factor invoking exclusion from the GPFG’s investment universe/portfolio?*

### 1.3.1 Disclaimer

Before introducing my actual research, I would like to make a disclaimer. While I am fully aware of the debate around the effects (more precisely; lack thereof) that divestment have on the human rights situation in companies and the related sectors that have been under scrutiny, that debate is beyond the scope of this thesis, and neither is it the purpose of the exclusion-mechanism. The same goes for the overall debate about SWF responsibilities under international human rights law. That said I believe that exclusion as a matter of last resort is an important mechanism, in particular when each case is investigated as thoroughly as they are by the Council on Ethics. The Council’s recommendations have created ‘ethical jurisprudence’ in absence of laws regulating investors’ responsibility towards the environment and human rights. This is illustrated by the fact that other investors have withdrawn their investment as a direct result of the Council’s recommendations. Some might argue in order to influence the human rights situation in a given ‘problem-sector’ one should *invest* and use its ownership-rights, not divest and lose influence. I hypothesise that the ‘threat of exclusion’ is likely to spur more change than exclusion itself, yet if the Bank never withdraws investments it would likely be hard to take such threats seriously, but that too is a debate for another time. For now, I will settle with analysing the threshold that the Council, the Ministry and the Bank have applied when addressing allegations of serious or systematic human rights violations occurring within the GPFG’s investment universe/portfolio.

## **2 Theoretical Framework and Hypotheses**

Establishing a theoretical framework to guide me through the research-process for this thesis proved to be quite a challenge. My case study evolves around the Council on Ethics and their recommendations regarding conduct-based exclusion of companies from the GPFG. Determining what I wanted to measure (the outcome variable), was easy; to what extent human rights violations invoke exclusion from the GPFG, but identifying reasonable

explanations for the ‘exclusion-ratio’ was not as straight forward. I eventually decided to address the ‘to what extent’- question from two different angles. The first angle represents a quantitative analysis where I will measure how many times the Council recommended exclusion under each of the five criteria for observation and exclusion, and to what extent these recommendations were followed during a ten-year period from 2004-2014. This analysis will illustrate in a quite superficial manner to what extent (i.e. how many times) human rights violations have invoked recommendations for exclusion and how frequently companies were actually excluded under this criterion compared to the other four criteria. Because of the time-frame this analysis is limited to cover only the recommendations prepared by the former Council and the final decisions reached by the Ministry, but as I will explain in more detail later on, that is a deliberate decision.

The second angle is a qualitative analysis set out to identify which variables seemingly affect the exclusion-ratio the most. For this analysis I found it necessary to divide my independent variables into two categories; human rights-specific variables and institutional-dynamic variables. The former variable category encompasses all the factors I believe are likely to influence how cases are assessed by the Council, and why the recommendations under the human rights criterion have been accepted or rejected by the Ministry. The latter category of variables is also related to explaining why some recommendations prepared by the Council are followed while others are not, but in a different way and a broader sense; it encompass the institutional dynamics of the Council on Ethics. More precisely, in what ways the appointment of a new Council making recommendations directly to the Bank appears to influence the exclusion-ratio. Finally, I will make use of compliance theory in an attempt to explain *why* changes in the institutional dynamics came about and how they appear to influence the ‘final outcome’ of recommendations.

## **2.1 The Human Rights Criterion: Specific Challenges**

My initial assumption is that the human rights criterion under the Guidelines provides a particular set of challenges, which are reflected in the fact that only two recommendations assessed under this criterion have led to exclusion of companies from the GPF’s investment universe since 2004. The 2010 guidelines § 3 states that a company *may* be placed under observation or excluded if there is an *unacceptable risk* that the *company contributes to or is responsible for* of any of the norm-breaches listed. The human rights criterion explicitly refers to *serious or systematic human rights violations* before listing examples; “such as murder, torture, deprivation of liberty, forced labour and the worst forms of child labour and other

child exploitation.”<sup>21</sup> However, what constitute an “unacceptable risk”? To whom is it considered unacceptable? And how can we describe and assess contribution to or “responsibility for” a human rights violation? Other related questions that arise are how do you measure the “seriousness” of a violation? How frequent must violations occur in order for it to be considered “systematic”? And what kind of human right violations does this criterion entail in practice?

A conceptual understanding of these questions and controversies is essential in order to be able to analyse the human rights recommendations later on and eventually be able to identify the threshold applied when the Council recommends exclusion of companies under this criterion. In the following I will address these questions and discuss some of the controversies around the role of the Guidelines in the operation of the Council based on a comparison of the 2004<sup>22</sup>, 2010<sup>23</sup> and the 2014<sup>24</sup> Guidelines, landmark recommendations, the Report from the Graver Committee, as well as selected academic sources.

### 2.1.1 Ethical Guidelines or Legal Standards?

The very framework that the human rights criterion is built on has become subject to scrutiny by legal scholars as well as the companies accused of this particular norm breach. The overarching argument is that human rights law (international and regional treaties) is designed to hold states, not companies or investors liable for violations. The 2004 Guidelines state that the Council shall issue recommendations on exclusion “because of acts or omissions that constitute an unacceptable risk of the *Fund contributing to* serious or systematic human rights violations.”<sup>25</sup> The Guidelines applicable from 2010 on the other hand refers to an unacceptable risk that the *company contributes to* or is responsible for serious or systematic human rights violations.<sup>26</sup> Stating that either a company or the Fund can *contribute to*, and let

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<sup>21</sup> The original legal basis is in Norwegian: *Retningslinjer for observasjon og utelukkelse av selskaper fra Statens pensjonsfond utlands investeringsunivers 2010-2015* (Finansdepartementet 2010) an un-official English translation has been used for exact citing, *Guidelines for observation and exclusion from the Government Pension Fund Global*, available at: <<https://www.regjeringen.no/globalassets/upload/fin/statens-pensjonsfond/guidelines-for-observation-and-exclusion-14-april-2015.pdf>>.

<sup>22</sup> See n 19.

<sup>23</sup> See n 21.

<sup>24</sup> The original legal basis is in Norwegian: *Retningslinjer for observasjon og utelukkelse fra Statens pensjonsfond utland* (Finansdepartementet 2014) an un-official English translation has been used for exact citing, *Guidelines for observation and exclusion from the Government Pension Fund Global*, available at: <[https://www.regjeringen.no/contentassets/7c9a364d2d1c474f8220965065695a4a/guidelines\\_observation\\_exclusion2016.pdf](https://www.regjeringen.no/contentassets/7c9a364d2d1c474f8220965065695a4a/guidelines_observation_exclusion2016.pdf)>.

<sup>25</sup> See n 19 s 4.4.

<sup>26</sup> The 2014 Guidelines also refer to the *company's* contribution to or responsibility for norm violations.

alone that a company can be considered *responsible for* human rights violations, make both versions of the Guidelines quite controversial. The Council addressed this issue in its recommendation regarding *Wal-Mart* with reference to the Graver report stating that:

*Since international law expresses a balancing of interest between states, it is difficult to derive norms of action for market actors from sources of international law. On the other hand, international conventions give concrete form to the content of an international consensus on minimum requirements which should be imposed regarding respect for human rights worldwide.*<sup>27</sup>

The Council also addressed this in its very first human rights recommendation regarding the company *Total S.A.*, stating that “only states can violate human rights directly.”<sup>28</sup> While the Council clearly holds that only States can *violate* human rights, the Guidelines indicate that companies could be considered responsible for these violations.<sup>29</sup> Nystuen writes that the reason why the Council has not discussed the issues surrounding potential human rights responsibilities of non-state entities is because it was not considered necessary as: “The wording of the Ethical Guidelines refers to contribution or complicity to human rights abuses, and it is not contested that companies can contribute to such abuses.”<sup>30</sup> Undoubtedly, the Government through the Ministry and the Bank has the discretion to decide what kind of business conduct it would like discourage through divestment of companies from the GPFG’s investment universe/portfolio without any basis in human rights law, and the Guidelines and the Council are highly welcoming initiatives to streamline this part of a larger CSR-policy. The debate around the Council’s assertion of contribution and/or complicity in its recommendations however, is not as easily dismissed as Nystuen prescribes it above.

### 2.1.2 The Council on Ethics: An Ethical or a Legal Body?

Scholars have argued that although the Council is not in any way a court, it has swiftly assumed a quasi-legal character. Before making recommendations to the Ministry, the Council is required to “gather all necessary information at its own discretion and shall ensure that the matter is documented as fully as possible”, and if they decide to recommend exclusion “the company in question shall receive the draft recommendation and the reasons

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<sup>27</sup> Council on Ethics, *Recommendation on Exclusion of Wal-Mart Stores Inc. and Wal-Mart de Mexico*, 15 November 2005) 5.

<sup>28</sup> Council on Ethics, *Recommendation Concerning the Company Total SA*, 14 November 2005) 9.

<sup>29</sup> As evident in s 2.3 of the 2010 Guidelines.

<sup>30</sup> Nystuen, Føllesdal and Mestad, *Human rights, corporate complicity and divestment*, 20.

for it, for comment.”<sup>31</sup> In addition, the Council is supposed to “review on a regular basis whether the reasons for exclusion still apply.”<sup>32</sup> As noted by Chesterman with such a responsibility “questions of burden of proof and natural justice swiftly arise.”<sup>33</sup> In theory, the Council received its mandate in order to decrease the risk of the GPFG contributing to unethical conduct and not necessarily to attribute responsibility for unethical conduct to companies. Chesterman holds that the Council has since “justified its decisions on quasi-legal grounds, establishing precedent and following or distinguishing prior decisions; a quasi-adversarial procedure, allowing companies the opportunity to know allegations and respond to them, though without the full trappings of legal process.”<sup>34</sup> I will not go any further in discussing the Council’s role as ‘quasi-legal body’. I found it important to introduce this controversy because at the core of such arguments is how the Council has attributed ‘complicity’ and ‘contribution’ to both the GPFG and companies in its recommendations.

### 2.1.3 Complicity and Contribution

The Guidelines themselves do not mention the word ‘complicity’ but it was discussed in the Graver Report and later introduced in the Council’s very first human rights recommendation about the company Total SA. The Council held that the term “is used in many different contexts, *inter alia* both as legal and ethical categorisation of acts.”<sup>35</sup> Chesterman holds that the confusion surrounding the term “arises from the multiple ways in which complicity is simultaneously invoked – as ethical and legal principle – as applicable to a company and to the Fund itself (and thereby to Norway).”<sup>36</sup> He goes on stating the way in which complicity is asserted by the Council “seems confusing, unnecessary and unhelpful.” Mestad holds a different opinion stating that: “Complicity is the core concept of the Guidelines with respect to assessing the link between the Fund and unethical conduct.”<sup>37</sup> His main concern lies with term ‘contribution’, or more specifically the English translation of the 2004 Guidelines. He writes that “unfortunately it has been said that exclusion of companies shall be recommended ‘because acts of omissions that constitute an unacceptable risk that the Fund *contributes to*’ a

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<sup>31</sup> Ethical Guidelines 2004 (n 19) para 4.1.

<sup>32</sup> *ibid* para 4.2; these requirements are manifested in the 2014 Guidelines as well, but the language has been slightly revised.

<sup>33</sup> Simon Chesterman, 'Laws, standards or voluntary guidelines?' in Nystuen et al (eds), *Human Rights, Corporate Complicity and Divestment*, vol 1 (CUP 2011) 48.

<sup>34</sup> *Ibid* 50.

<sup>35</sup> See n 28, 10.

<sup>36</sup> Chesterman (n 33) 57.

<sup>37</sup> Nystuen, Føllesdal and Mestad, *Human rights, corporate complicity and divestment*, 81.

specified list of types of unethical conduct.”<sup>38</sup> He goes on calling the translation misleading as the official wording in Norwegian “medvirker til” and the parallel noun “medvirkning” is much more related to ‘complicity’ than to contribution in Scandinavian criminal and tort law. He further writes that: “To give one pertinent translation is impossible since common law and civil law systems probably are too different in this field.”<sup>39</sup> Nevertheless, both terms have since been widely used in the Council’s recommendations. It should be stressed that I am referring to unofficial English translations of the recommendations when making this claim. And while the term ‘contribution’ was last used in the recommendation concerning the companies *Repsol S.A.* and *Reliance Industries Limited* in 2014, the Council has seemingly refrained from using the term ‘complicity’ in human rights recommendations since 2010.

### 2.1.3.1 *Companies’ Complicity and Contribution*

Based on the discussion of the Total case the Council summarised four criteria for establishing a company’s complicity:

- i) *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.*
- ii) *The breaches must have been carried out with a view to serving the company’s interest or to facilitate conditions for the company.*
- iii) *The company must either have contributed actively to the breaches, or had knowledge of the breaches, but without seeking to prevent them.*
- iv) *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.*<sup>40</sup>

These criteria are not particularly problematic as they do not refer to complicity in human rights violations, but the company’s complicity in breaches of the Guidelines. The Council has later indicated in their recommendations that these criteria are not necessarily required to be cumulatively fulfilled, but rather as noted by Nystuen, they are “decisive elements in the overall assessment of whether there exists an unacceptable risk of the Fund contributing to human rights violations.”<sup>41</sup> The assumption that GPFG can contribute to human rights violations through its investments will be discussed further in chapter 2.1.3.2.

The Graver Committee emphasized that a company’s legal structure cannot be decisive in the ethical assessment of complicity as long as “the links are so close between a

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<sup>38</sup> *ibid.*

<sup>39</sup> *ibid* 82.

<sup>40</sup> *ibid* 34.

<sup>41</sup> *ibid* 35.

company in the Petroleum Fund's portfolio and a company where there is an ethical risk that the two can be identified with each other."<sup>42</sup> The Committee wrote that other factors that might be decisive are "the size of the ownership interests, whether the companies act as one externally, and whether shareholdings in one of the companies have implications for the other."<sup>43</sup> Even if there is no such identification, the Committee held that "it may still be reasonable to argue that complicity exists."<sup>44</sup> In order to make claims of ownership the Committee found it "reasonable to require that the company has actual control over the entity involved in unethical action before complicity on the part of the Petroleum Fund can be invoked."<sup>45</sup>

Mestad writes that under the Guidelines, the basic rule that needs to be applied in such scenarios "must be that ownership that gives legal competence to instruct and control the acts of the subsidiary must be decisive when it comes to responsibility for unethical conduct at the level of the subsidiary."<sup>46</sup> This again however, he emphasize, will only suffice for exclusion if the other conditions are met.

As for companies using sub-contractors the Committee held that if the company "makes extensive use of sub-contractors with a high ethical risk, it can be argued that the investments should not be withdrawn if it is possible to influence the practices of their sub-contractors."<sup>47</sup> Essentially, in order to recommend exclusion, the Committee held that there must be "a pattern where the company uses the sub-contractors with dubious practices without seeking to influence the situation", and even then, the Committee write, this will only *approach complicity* "if the customer relationship is long-term or repeated after the unethical practices have been identified."<sup>48</sup> The Committee eventually held that there were not necessarily any clear rules on how such issues should be handled in each case, but that "a guiding principle for the assessment should be whether there are factors that indicate complicity in an ethical sense or whether the use of alternative measures are appropriate."<sup>49</sup>

### 2.1.3.2 *The GPF, State Complicity and Ethical Obligations*

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<sup>42</sup> Graver (n 12) para 5.3.2.3.

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> Nystuen, Føllesdal and Mestad, *Human rights, corporate complicity and divestment*, 84.

<sup>47</sup> Graver (n 12) para 5.3.2.3.

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

Legally, it is doubtful that the Norwegian state ought to be regarded as complicit through the GPF's investment in a company that has contributed to a State's human rights violation, even if Norway (as owners of the Fund) was aware that human rights violations were occurring and chose not to take any further action. Demeyere visits this scenario, eventually concluding that "even under the most extensive forms of existing human rights protection standards – coming from a regional or potentially universal treaty – that may be binding upon it, such a state does nothing wrong via-à-vis its obligations under public international law."<sup>50</sup> Thankfully, Norway has taken a more flexible view on what ought to be considered, at least an ethical obligation to avoid complicity in certain types of conduct. The Committee states that it in principle considers 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."<sup>51</sup> The reasoning behind this is that investments are intended to achieve returns for the Fund, and the Fund is free to decide which companies to invest in. From the wording 'can be expected to' it is implied that the GPF must be aware of the risks of grossly unethical conduct in order to be considered 'complicit' in a company's actions through investments. The Committee took on this issue as well, stating that:

*Some form of systematic or causal relationship must exist between the company's activities and the actions to which the investor does not wish to contribute. Investment in a company cannot be considered to entail complicity in actions that were impossible to anticipate or be aware of or circumstances over which the company in question could not have any significant degree of control.*<sup>52</sup>

The Council complicates the notion of complicity in the recommendation concerning Total SA, stating that: "The Fund may in its turn contribute to companies' complicity through its ownership. It is as such complicity in a state's human rights violations which is to be assessed under this provision."<sup>53</sup> Chesterman writes that "whereas complicity previously had been understood in terms of explaining Norway's ancillary responsibility for wrongs through investment of its resources, complicity was now invoked to justify reference to human rights treaties that apply in a formal sense only to states."<sup>54</sup> He further argues that the reference to complicity is unnecessary in any case, as it essentially "undermines the assertions by the

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<sup>50</sup> Bruno Demeyere, 'Sovereign wealth funds and (un)ethical investment: using 'due diligence' to avoid contribution to human rights violations committed by companies in the investment portfolio' in Nystuen et al. (ed), *Human Rights, Corporate Complicity and Divestment*, vol 1 (CUP 2011) 188.

<sup>51</sup> Graver (n 12) para 2.2.

<sup>52</sup> *ibid.*

<sup>53</sup> Council on Ethics, *Recommendation concerning the company Total SA* 9.

<sup>54</sup> Chesterman, 'Laws, standards or voluntary guidelines?', 56.

Council that it does not need to prove the existence of human rights violations or other wrong to recommend exclusion of a company.”<sup>55</sup>

### 2.1.3.3 *Complicity in State Violations*

Mestad writes that often, and always in connection to human rights violations, there is an additional level of attribution of responsibility, namely establishing “the link between the corporate actor in question and the human rights violations done by states.”<sup>56</sup> In the Total case, the Council refers to the Graver report, which specifically addresses the issue of complicity in states where human rights violations take place. The Council uses the example of a company’s use of private security or military forces in their operations involved in the deportation of people, arresting or persecuting workers seeking to join trade unions, or environmental damage to facilitate the company’s project. The Council eventually concludes that: “A company may be regarded as complicit to such actions only when they are taken in order to protect the company’s property or investment and the company has not taken reasonable measures to prevent the abuses.”<sup>57</sup> However, the Council took a quite proactive stand on such issues in a letter to the Ministry concerning a general assessment of companies involved in construction of onshore pipelines in Burma:

*[...] the Council may recommend the exclusion of these companies already from the time of entering into the agreements. Because such undertakings would most likely involve an unacceptable risk of contributing to human rights violations, it is not considered necessary to wait until the violations actually take place.*<sup>58</sup>

Even though the Burmese regime was under scrutiny by the international community at the time, the Council emphasized that even in the case of Total; a company having operations in states controlled by repressive regimes does not alone constitute sufficient grounds to exclude it. Even if:

*[...]it can be inferred that the presence of a company generates revenues for the repressive regime and thereby contributes to uphold it, such a connection between a company and the state’s unethical actions would not, in itself, be sufficient to exclude a company from the Fund.*<sup>59</sup>

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<sup>55</sup> *ibid* 57-58.

<sup>56</sup> Nystuen, Føllesdal and Mestad, *Human rights, corporate complicity and divestment*, 80.

<sup>57</sup> Council on Ethics, *Recommendation concerning the company Total SA*) 10.

<sup>58</sup> Letter from the Council on Ethics to the Ministry of Finance ‘Council on Ethics’ assessment of companies with operations in Burma’ (11 October 2007) unofficial English translation, 3.

<sup>59</sup> *ibid* 1.

#### 2.1.3.4 *Future Complicity*

The future risk of complicity is not explicitly mentioned as an absolute requirement in any of the Guidelines, but the wording ‘contributes to’ certainly imply a reference to norm violations that are at the least *ongoing*. The 2014 Guidelines mention the probability of future norm violations as a factor that *may* be considered by the Bank in the assessment of each case. In addition, it mentions factors such as “the severity and extent of the violations and the connection between the norm violation and the company in which the Fund is invested.”<sup>60</sup> The Guidelines also spell out a set of ‘mitigating’ factors that could be considered, such as the “breadth of the company’s operations and governance, including whether the company is doing what can reasonably be expected to reduce the risk of future norm violations within a reasonable time frame.”<sup>61</sup>

Future risk has nevertheless come to constitute a highly significant part of the human rights recommendations prepared by the Council since presented as the fourth point for establishing a company’s complicity in the Total case. Both the Graver Committee and the Council have held that although previous behaviour might be a good indicator of future behaviour, none of the criteria for conduct-based exclusion apply retrospectively. Kutz writes that the forward-looking focus is how assertion of complicity departs from representing a completely legalistic model of liability.<sup>62</sup>

#### 2.1.3.5 *Unacceptable Risk*

The wording ‘unacceptable risk’ is not distinctive to the human rights criterion. The term is complicated in the same way as ‘complicity’ and ‘contribution’ as it is being used both to refer to the risk of a company being involved in gross violations, and that the risk of GPFG’s as an owner of being complicit or contribute (through investment) in a company’s norm violations. The Committee emphasized that: “When the Council recommends that a company should be excluded, this is done on the ground that the ethical risk associated with investment in the company is unacceptable.”<sup>63</sup> The 2010 and 2014 Guidelines however, refer to the unacceptable risk of *the company* contributing to, or being responsible for norm violations. In

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<sup>60</sup> Regjeringen, *Guidelines for observation and exclusion from the Government Pension Fund Global* (2014) para 6.2.

<sup>61</sup> *ibid.*

<sup>62</sup> Christopher Kutz, ‘Responsibility beyond the law?’ in Nystuen et al (eds), *Human Rights, Corporate Complicity and Disinvestment*, vol 1 (CUP 2011) 70.

<sup>63</sup> Graver et al, *The Report from the Graver Committee*, para 5.4.

the Wal-Mart recommendation, the Council held that the criteria in the Guidelines are there precisely to determine what is considered an unacceptable ethical risk and that “only the most serious forms of violations of these standards should provide basis for exclusion.”<sup>64</sup> Thereby the Council linked ‘unacceptable risk’ to the seriousness of the norm breach. It is either way clear that what is considered an unacceptable risk must be evaluated in each case, and under each criterion. It is also important to note that the GPF’s ownership in a given company is not decisive when establishing what constitutes an unacceptable risk of complicity on the Fund’s behalf. Mestad notes that “holding shares is sufficient, no matter how small the holding is, as long as it is foreseeable that the company in which shares are held might be complicit in grossly unethical conduct.”<sup>65</sup>

#### 2.1.4 Serious or Systematic

The 2014 Guidelines state that in order to recommend exclusion, the human rights violations must be regarded as ‘serious or systematic’, before listing specific examples; “such as murder, torture, deprivation of liberty, forced labour and the worst forms of child labour.”<sup>66</sup> From the wording ‘such as’, it is clear that the violations mentioned do not represent an exhaustive list. However, by looking at the graveness of the examples, one does get the impression that certainly not all human rights violations would suffice.

In the Total recommendation the Council writes that it “takes as its point of departure that the reference to human rights pertains to internationally recognised human rights and labour rights.”<sup>67</sup> It further emphasise precisely that the violations listed in point 4.4 of the 2004 guidelines are examples of such violations and not an exhaustive list, yet “not all human rights violations or breaches of international labour rights standards fall within the scope of the provision.”<sup>68</sup> With reference to the Graver report the Council further states that there should be “fairly restrictive criteria for deciding which companies should be subject to possible exclusion.”<sup>69</sup> This is evident in the wording of the provision that a violation needs to be regarded as sufficiently serious *or* systematic. The Council clarifies that “a limited number

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<sup>64</sup> Council on Ethics, *Recommendation on Exclusion of Wal-Mart Stores Inc.*) 4.

<sup>65</sup> Nystuen, Føllesdal and Mestad, *Human rights, corporate complicity and disinvestment*, 80.

<sup>66</sup> See n 24 s 3.

<sup>67</sup> Council on Ethics, *Recommendation concerning the company Total SA*) 8.

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

of violations could suffice if they are very serious, while the character of a violation needs not be equally serious if it is perpetrated in a systematic manner.”<sup>70</sup>

While the Council emphasize that violations do not necessarily have to be both very serious *and* systematic, I suspect that due to the emphasis on the probability of future norm violations and the restrictive manner of which the criterion is supposed to be applied, cases that cannot show to both are less likely to invoke exclusion.

#### 2.1.5 Uncovering Violations

In the 2014 annual report the Council held that obtaining and assessing information in relation to the conduct criteria are more complicated than the product criteria. The Council uses electronic news-monitoring systems to find news of incidents which may contravene the Guidelines, subscribes to a database that assesses companies on the basis of their systems for taking human rights considerations into account, and receives tips from special-interest organisations. The Council writes that “such services provide assistance but do not give any complete basis for either ensuring that all relevant cases are noticed or assessing whether companies that are involved in the specific incidents should be excluded from the fund.”<sup>71</sup> The Council also conducts systematic reviews of sectors perceived as being particularly vulnerable and uses consultants to find out what actually happened and whether individual incidents are representative of the company.<sup>72</sup>

#### 2.1.6 Hypothesis I

Related to the debate regarding the quasi-legal language of the Council’s recommendations and the human rights criterion itself, I hypothesise that companies are less likely to be excluded from the GPFG under this criterion for one important reason; because complicity in, contribution to or responsibility for human rights violations is particularly difficult to establish. I have included the extensive debate about ‘complicity’ and ‘contribution’ in an attempt to clarify the threshold that seems to be applied when the Council is trying to ‘prove’ that there are grounds for excluding a company under the human rights criterion. Chesterman writes that the reference to complicity is unhelpful “because it imports a quasi-legal standard

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<sup>70</sup> *ibid* 8-9.

<sup>71</sup> Council on Ethics for the Government Pension Fund Global, *Annual Report 2014*, 2015) 25.

<sup>72</sup> *ibid*.

that runs the risk of setting too high a threshold for exclusion, or else implicitly asserting that a wrong has been perpetrated without the obligation to prove that it has.”<sup>73</sup>

The Council notes that obtaining facts in these cases is a difficult task as few companies are willing to provide information on how their operations affect the human rights of individuals. In addition, the workers and the local community might be unwilling to report incidents in fear of losing their jobs and the revenue the company provides. The result is either way that “the information on the case is often conflicting and may be relatively inaccessible.”<sup>74</sup> The Council concludes that its work in the field of human rights is particularly challenging in terms of “selecting companies for investigation and assessing the extent of companies’ responsibility for their supply chains.”<sup>75</sup> Human rights violations within the business-sector have a tendency to come to light when the situation has improved or when the factors that caused them have ceased to exist. For that reason, I hypothesise that allegations of human rights violations are less likely to lead to exclusion due to high emphasis on the probability of future norm violations.

To sum it up; I hypothesise that when the Council applies similar standards for ‘proving’ present or future human rights violations as they do for the other norm violations, these cases end up being assessed in a stricter manner for the above mentioned reasons, which in turn could be a way of explaining why few of these cases have ended with exclusion.

## **2.2 Institutional Dynamics**

In order to answer any overall questions related to exclusion of companies from the GPF’s investment universe/portfolio, I realized that I could not leave out discussing the dynamics of the process of exclusion and the institutions involved, starting with the Council on Ethics. The Council was first established by royal decree in 2004 as an independent Council answering to the Ministry of Finance. In 2013 the Norwegian government established a ‘strategy council’ (*Strategirådet*) tasked with making recommendations about how the GPF could strengthen its investments in the long run. *Strategirådet* suggested, among other things; shutting down the Council and embedding its knowledge and expertise into the Bank’s management, and to entrust the decisions about exclusions to the Executive Board of Norges Bank. This raised concerns of several Norwegian NGOs and politicians questioning whether decisions about ethical considerations could really be entrusted with the Executive Board that have increased

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<sup>73</sup> Chesterman, ‘Laws, standards or voluntary guidelines?’, 58.

<sup>74</sup> See n 71, 25.

<sup>75</sup> *ibid* 30.

financial return as their ‘number one objective.’<sup>76</sup> The NGO *Framtiden i våre hender* (‘The Future is in Our Hands’) stated: “It is difficult to see how ethical considerations could be ensured when the responsibility for financial profit and the responsibility to sanction violations of ethical norms are added to the same governing body.”<sup>77</sup> However, with effect from 1 January 2015, the Ministry consequently changed the rules governing appointments to the Council and the processing of recommendations regarding observation and exclusion from the GPF. A new Council on Ethics was established, replacing all five former Council members including the leader.<sup>78</sup> The Council’s main objective remains to recommend exclusion of companies that contravene the Ethical Guidelines stipulated for the GPF, but as of 2015, it is Norges Bank that makes final decisions on the recommendations and suggests new Council-members.<sup>79</sup>

Another significant change of interest is that while the former Council could make exclusion recommendations as long as there was an *opportunity to invest* in a company (i.e. it was a part of the investment *universe*), exclusion recommendations can as of 2015 only be made if a company is in the GPF’s investment *portfolio* at the time. This essentially means that the GPF must now own shares or bonds in the company in order for the Council to recommend exclusion.

As briefly mentioned the Council prepares recommendations to the Bank on companies’ involvement in breaches of the Guidelines. The Bank then has the discretion to decide whether or not to follow these recommendations. At the same time, the Council itself is nominated by the very own institution (the Bank) which it is set out to ‘govern’. I believe it is safe to argue that the Council has a formal structure akin to a political institution. March and Olsen define a political institution as a “collection of interrelated rules and routines that define appropriate action in terms of relations between roles and situations.”<sup>80</sup> They further argue that when individuals are motivated by the values of their institutions, behaviour will be “intentional but not wilful”, that is, “individuals will make conscious choices, but those

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<sup>76</sup> Manifested in *Mandat for forvaltning av Statens pensjonsfond utland*, s 1-3 (1).

<sup>77</sup> Translated by the author as the article referred to is written in Norwegian; Gunnell Sandanger, 'Etikkrådet nedleggingstruet' <<https://www.framtiden.no/201402046366/aktuelt/etiske-investeringer/etikkradet-nedleggingstruet.html>> accessed 17 February 2017.

<sup>78</sup> The secretariat, still under the Ministry of Finance remained.

<sup>79</sup> The Council members are still formally appointed by the Ministry of Finance however after receiving a nomination from the Bank. With the revision of the guidelines in 2010 the Council officially got mandate to recommend *observation* of companies in addition to exclusion.

<sup>80</sup> Guy B. Peters, *Institutional Theory in Political Science: The New Institutionalism* (3rd edn, Continuum 2012) 30.

choices will remain within the parameters established by the dominant institutional values.”<sup>81</sup> Building on this, Peters argues that institutions possess “an almost inherent legitimacy that commits their members to behave in ways that may even violate their own self-interest.”<sup>82</sup> The Council on Ethics is an extraordinary subject for an institutional analysis in this regard as replacing an entire Council/board of any kind is quite uncommon in Norwegian politics. As emphasized by Peters, each individual within an institution make their own interpretation of what the dominant values are, and when an entire Council is replaced, naturally this could leave room for different/new interpretations of quite significant values. Interestingly enough, and a phenomenon I will get back to in more detail in the following chapter, all the Council’s recommendations made public since 1 January 2015 have been followed by the Bank.

### 2.2.1 Compliance Theory

I hypothesise that these institutional changes and how they seem to influence to what extent recommendations are followed, can be partially understood from a democratic legalism perspective of compliance; the theory that democratic regimes possess distinctive features in the way they respond to international legal commitments. Simmons holds that “regimes based on clear principles of the rule of law are far more likely to comply with their commitments”, which she argues “indicates that rules and popular pressures can, and apparently sometimes do, have distinct consequences when it comes to international law compliance.”<sup>83</sup> She holds that this also applies to the way international economic transactions are handled by stable democratic regimes: “One interpretation is that a credible commitment to a stable system of law is not divisible in the eye of the investor. A rule-of-law government may have even more to lose from noncompliance with an international legal obligation than a more capricious regime.”<sup>84</sup>

My interest in this theory lies not with why Norway comply with international legal obligations as such, but more overarching how Simmons explains popular pressure as an influential tool to get states to comply with their commitments. I interpret her statement above as referring to reputational losses more so than economic in this context. Her theories become particularly interesting when seen in light of a case brought by the Norwegian Contact Point

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<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> Beth A. Simmons, 'International Law and State Behaviour: Commitment and Compliance in International Monetary Affairs' (2000) 94 *The American Political Science Review* 819, 832.

<sup>84</sup> *ibid.*

(NCP) for the Organization for Economic Co-operation and Development (OECD) against NBIM in 2013. Due to space limits of this thesis I will not go into details about the content of the complaint, but the NCP eventually concluded that NBIM had violated the OECD guidelines for Multinational Enterprises on two accounts:

*First; by refusing to cooperate with the OECD NCP NBIM violates the OECD Guidelines Procedural Guidance. Second; by not having any strategy on how to react if it becomes aware of human rights risks related to companies in which NBIM is invested, apart from child labour violations.*<sup>85</sup>

The judgement represented quite a controversy in Norwegian politics, and adding to the controversy; the Norwegian government decided not to renew Professor Hans Petter Graver mandate as head of the NCP two years later. Norwegian civil society organisations and the NGO *OECD Watch* questioned whether the decision not to renew Professor Graver's mandate was a direct result of the outcome of this case.<sup>86</sup> As I have debated earlier, the 2014 Guidelines and appointment of a new Council was not without controversy either. These events lead me to speculate if 'sudden compliance' with all the new Council's recommendations might be influenced by NBIM's reputational concerns. In addition, by placing the Council directly under the Bank, NBIM now has a strategy for what to do when they become aware of human rights risks through the Council's recommendations on observation or exclusion.

## 2.2.2 Hypothesis II

While the former Council can refer to ten years of work and data, the new Council has only been around since the beginning of 2015, and to make any generalizing claim of changing institutional values would not be empirically satisfying, and even maybe completely misleading. That said; I will address the phenomena that since replacing the Council and giving mandate for invoking exclusion to the Bank, all recommendations have been followed so far, and in a seemingly faster manner than before. This in turn could imply that the grounds for conduct-based exclusions are not exclusively normative, but influenced by institutional factors and dynamics as well. While there might be numerous explanations for this

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<sup>85</sup> *Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development Vs. POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway)* (The Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises) Final statement, para 1.3.1.

<sup>86</sup> See for example: OECD Watch, 'The Norwegian Government is getting rid of a critical NCP voice' <<https://www.oecdwatch.org/news-en/the-norwegian-government-is-getting-rid-of-a-critical-ncp-voice>>.

phenomenon, I hypothesise that recommendations are assessed faster because a ‘political’ level of assessing recommendations has been removed. In terms of why more recommendations have been followed, I hypothesise that this could be a result of NBIM’s reputational concerns following the NCP-case and public outcry over its extended mandate and the replacement of the former Council. In addition, I will re-visit the idea that the changes in the institutional dynamics in the first place might be understood from a democratic legalism perspective of compliance. I will unfortunately not be able to prove or disprove all of these theories in this thesis, but I will revisit some of them in chapter 4.5.

### **3 Methodology**

I have applied a mixed method-approach in my research which is at large based on a post-positivism philosophical understanding of ontology and epistemology.<sup>87</sup> My research question is empirical, but when I talk about *to what extent* contribution to serious or systematic human rights violations invokes exclusion from the investment portfolio/universe, I imply that the ‘extent’ is always contextual and usually quite subjective. I have addressed this ‘subjectiveness’ by doing a quantitative analysis to show on a more overarching level how many times human rights recommendations have led to exclusion in the past, compared to the other grounds for conduct-based exclusion. In addition, by applying the theoretical framework presented in chapter 2 to my qualitative analysis I will attempt to explain what this ‘extent’ contextually implies, and present probable explanations as to why human rights violations have invoked exclusion to a lesser extent than most of the other grounds for exclusion.

#### **3.1 Quantitative Analysis**

For my quantitative study I started by looking at the total amount of conduct-based recommendations prepared by the Council in the time period 2004-2014. The recommendations I have studied and their final decisions are retrieved from the databases of the Council and the Ministry at large. The recommendations are required by law to be made public once a final decision is made.<sup>88</sup> The recommendations were already separated into categories based on the criterion they were assessed under by the Council. Over the course of

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<sup>87</sup> Lindsay Mack, 'The Philosophical Underpinnings of Educational Research'  
<[http://www.apu.ac.jp/rcaps/uploads/fckeditor/publications/polyglossia/Polyglossia\\_V19\\_Lindsay.pdf](http://www.apu.ac.jp/rcaps/uploads/fckeditor/publications/polyglossia/Polyglossia_V19_Lindsay.pdf)>  
accessed 6 April.

<sup>88</sup> As manifested in § 4.1 of the 2004 Ethical Guidelines and § 8.1 in the 2014 Ethical Guidelines.

this 10-year period, five criteria have remained constant during numerous revisions of the Guidelines:

- a) *serious or systematic human rights violations*
- b) *serious violations of the rights of individuals in situations of war or conflict*
- c) *severe environmental damage*
- d) *gross corruption*
- e) *other particularly serious violations of fundamental ethical norms.*

I found early on that two companies had been excluded from the GPFG's investment universe under the human rights criterion since 2004, but my conviction is that you must see human rights-exclusions in relation to the other four criteria for conduct-based observation or exclusion before you start to understand the 'extent' two human rights exclusions constitute. For that reason, the statistics will also show what the Council recommended versus what the Ministry eventually decided in each case under each criterion. The Council can essentially recommend three things: No action/continued investment, observation, or exclusion (but only recommends observation or continued investment if they get a case referred by the Ministry). The Ministry then has the option whether or not to follow what the Council has recommended and the Bank has two months to complete the sale of all securities if the Ministry decided on exclusion.<sup>89</sup> The analysis will show both how often the Council has recommended exclusion under each of the criteria, and how likely the Ministry has been to follow recommendations in the past. Essentially, I will statistically illustrate the threshold the Ministry have applied when assessing conduct-based recommendations, and point out where the human rights criterion represents an anomaly.

### **3.2 Qualitative Analysis**

The main aspect of my qualitative study revolves around seven recommendations connected to companies in the investment universe accused of contributing to, or being responsible for, serious or systematic human rights violations. I have applied the theoretical framework presented in chapter 2 to uncover what kind of threshold that seems to be applied by the Council for recommending exclusion, what kind of human rights violations the criterion cover in practice, and if the two recommendations that eventually led to exclusion stand out in any way that would explain why they, and not the others did. What I found after further research was that apart from those seven recommendations strictly labelled 'human rights

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<sup>89</sup> In accordance with § 7.1 of the 2010 Ethical Guidelines.

recommendations' by the Council and the Ministry themselves, there were recommendations within the other exclusion-criteria referencing human rights violations and/or norms/standards as well. As they strictly speaking are not primarily assessed under the human rights criterion they are not regarded as such in the quantitative analysis. That said, in some of these recommendations I found that allegations of human rights violations made out a pretty substantial part of the Council's assessment and I would not render it empirically satisfying if I did not discuss them further. The recommendations in question will therefore also be addressed in the qualitative analysis.

### **3.3 Institutional Analysis**

For the final part of my analysis, I have revisited the institutional dynamics of the new Council and the relationship to the Bank. In an attempt to uncover if the quite drastic changes in the Guidelines applicable from 2015 have affected the recommendation and exclusion-ratio from the GPF (essentially to figure out if the grounds for conduct-based exclusions are exclusively normative or if there are other institutional factors and dynamics involved); I will present findings primarily based on the new Council's annual reports showing that all recommendations have been followed, and seemingly in a faster manner since the new Guidelines came in place. I have made further use of compliance theory, and information retrieved from the Council's annual report to speculate whether the institutional changes might actually lead to more companies being excluded under the human rights criterion in the future. If I was to include the recommendations issued by the new Council which are finally processed by the Bank, and not the Ministry in the quantitative analysis, I would not have been able to uncover if there are institutional dynamics involved influencing the exclusion-ratio, which is why that part of my analysis only covers recommendations issued from 2004-2014.

### **3.4 Limitations**

While I believe that the methodological approach I have applied has made it possible for me to eventually conclude, fairly objectively and from more than one angle; to what extent human rights violations invoke exclusion from the GPF, this 'extent' is based on my analysis of the former Council's recommendations and the dynamics between that Council and the Ministry at large. Although I have applied renowned theories and methodological approaches, the information I have retrieved will still have been filtered through my personal

experience of that information and could never be completely objective. In addition, all the recommendations I have referred to are un-official English translations of the original Norwegian recommendations prepared by the Council; there will as such always be a possibility that terms and information differ from their original meaning. Where I was unsure whether the statements or terms were representative of what were intended I double checked with the official documents, but information might still have gotten ‘lost in translation’. There might also be situations where the Bank have chosen not to invest in companies due to risk of becoming complicit in human rights violations after conducting their own risk assessments, and according to the guidelines companies might be placed under observation without this decision being made public.<sup>90</sup> But then again, my focus is *exclusion* of companies which are decisions that are required by law to be made public. I also hypothesise based on compliance theory that we might witness more human rights exclusions in the future, but I have little factual evidence to support that claim, as the new Council has not yet made any recommendations to exclude companies for human rights violations. I hope however that this research, in the future, could be used as a starting point for a deeper analysis of how the structural changes of 2015 might influence the threshold for invoking exclusion of companies from the GPFG.

## **4 Analysis and Findings**

### **4.1 Quantitative Findings**

I have studied the outcome of 32 conduct-based recommendations made by the Council involving more than 40 companies.<sup>91</sup> Table 1 is based on all recommendations published by the Council on Ethics since it was established in 2004 and the final decisions made in each case by the Ministry of Finance prior to 1 January 2015. Table 1 shows the name of the companies addressed in each recommendation, what the Council recommended, the Ministry’s final decision, and the amount of time spent from the recommendations were issued till the Ministry reached a decision and published the recommendation. In accordance with the transitional provision of the new Guidelines all recommendations from the Council which the Ministry had received, but not finally processed by that time should also be made public. This applies to six recommendations under the conduct-based criteria which are not

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<sup>90</sup> As manifested in the 2010 Ethical Guidelines § 3.2.

<sup>91</sup> All the recommendations referred to throughout (un-official English translations) are available at: <http://etikkradet.no/en/recommendations/> last accessed 14 May 2017.

included in the statistic. Recommendations issued to revoke previous recommendations are generally not included in the statistic either, but in three circumstances, the Ministry failed to make a final decision before the Council made new recommendations revoking their own decision. Where such is the case the last column in Table 2) below is marked with: \*, and further explanation is given when assessing each criterion.

Table 1 Overview of recommendations 2005-2014<sup>92</sup>

Rec.nr	Company	Council recommendation	Ministry decision	Criterion	Recommendation Issued	Rec./decision published
32	Soco International	Exclusion	Did not answer in time	Environment	17.10.12 & 11.09.14	28.10.14
31	Randgold Resources	Observation	Observation	War and Conflict	24.06.11, 04.03.13 & 13.01.14	10.12.14
30	Repsol S.A./Reliance Industries	Exclusion	Did not answer in time	Human Rights	01.12.10, 25.05.12 & 03.04.14	17.09.14
29	Petro China Co Ltd. (CNPC)	Exclusion	Continued investment	Human Rights	26.05.10	06.12.11
28	Zijin Mining Group Co. Ltd.	Exclusion	Exclusion	Environment	18.06.12	14.10.13
27	Volcan Compañia Minera SAA	Exclusion	Exclusion	Environment	21.06.12	14.10.13
26	WTK Holdings Berhad	Exclusion	Exclusion	Environment	25.06.2012 & 03.12.12	14.10.13
25	AngloGold Ashanti Ltd.	Exclusion	Observation	Environment	27.06.12	14.10.13
24	Ta Ann Holdings Berhad	Exclusion	Exclusion	Environment	03.12.12	14.10.13
23	Eni Sp.A.	Observation	Tried active ownership	Environment	20.03.13	14.10.13
22	Royal Dutch Shell plc.	Observation	Tried active ownership	Environment	20.03.13	14.10.13
21	Zuari Agro Chemicals Ltd.	Exclusion	Exclusion	Human Rights	18.04.13	14.10.13
20	Africa Israel inv. Ltd & Danya Cebus Ltd.	Exclusion	Exclusion	War and Conflict	25.02.13 & 01.11.13	21.08.13 & 30.01.14
19	Sesa Sterlite (Vedanta Resources Plc. )	Exclusion	Exclusion	Environment	13.09.13	30.01.14
18	Daewoo, ONGC, KOGAS, GAIL & POSCO	Exclusion	Did not answer in time	Human Rights	02.05.11, 08.05.12 & 13.09.13	17.12.13
17	Shikun & Binui Ltd.	Exclusion	Exclusion	War and Conflict	21.12.11	15.06.12
16	Potash Corp. of Saskatchewan & FMC Corp.	Exclusion	Exclusion	Other Ethical Norms	15.11.10	06.12.11
15	Alstom SA	Exclusion	Observation	Corruption	01.12.10	06.12.11
14	Samling Global Ltd.	Exclusion	Exclusion	Environment	22.02.10	23.08.10
13	Lingui Development Berhad	Exclusion	Exclusion	Environment	15.09.10	16.02.11
12	MMC Norilsk Nickel	Exclusion	Exclusion	Environment	16.02.09	20.11.09
11	Elbit Systems Ltd.	Exclusion	Exclusion	Other ethical norms	15.05.09	31.07.09
10	Monsanto Co.	Exclusion	Tried active ownership	Human rights	20.11.06	09.09.08
9	Siemens AG	Exclusion	Observation	Corruption	15.09.07	16.03.09
8	Rio Tinto plc. and Rio Tinto Ltd. (Freeport sub.)	Exclusion	Exclusion	Environment	15.02.08	09.09.08
7	Barrick Gold Corp.	Exclusion	Exclusion	Environment	15.08.08	30.01.09
6	DRD Gold Ltd.	Exclusion	Exclusion	Environment	24.08.06	11.04.07
5	Vedanta Resources Plc.	Exclusion	Exclusion	Environment	15.05.07	06.11.07
4	Wal-Mart Stores Inc. & Wal-Mart de Mexico	Exclusion	Exclusion	Human rights	15.11.05	31.05.06
3	Freeport McMoRan Copper & Gold Inc.	Exclusion	Exclusion	Environment	15.02.06	31.05.06
2	Kerr-McGee Corp	Exclusion	Exclusion	Other Ethical Norms	12.04.05	06.06.06
1	Total S.A.	Continued investment	Continued investment	Human Rights	14.11.05	05.01.06

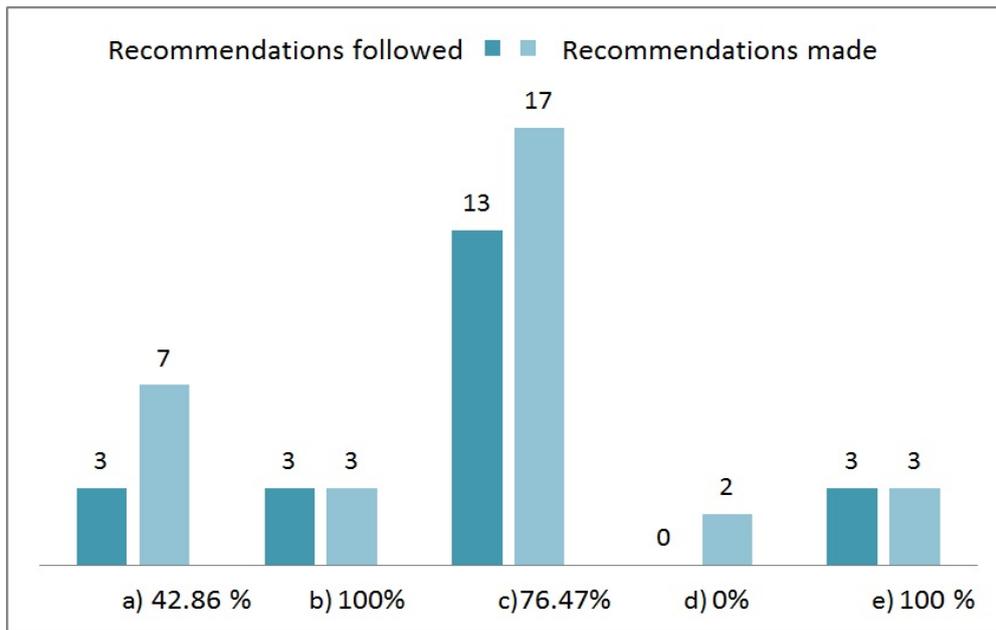
Table 2 Summary overview<sup>93</sup>

	Rec. total	Rec. Exclusion	Excluded at one point	Rec. Followed
a) Human Rights	7	6	2	3*
b) War & Conflict	3	2	2	3
c) Environment	17	15	13	13*
d) Corruption	2	2	0	0
e) Other Norms	3	3	3	3

<sup>92</sup> The Council made no recommendations during its first year in operation which is why 2004 does not show. The rec.nr field is for reference-purposes only and not necessarily representative of when the recommendations were issued.

<sup>93</sup> Table 1, 2 and 3 represent all conduct-based recommendations published by 01.01.2015.

Table 3) “Compliance” illustration



#### 4.1.1 Human Rights

I found that seven recommendations specifically dealt with contribution to serious or systematic human rights violations as their number one concern. Six of these were recommended for exclusion by the Council. In one of the recommendations, regarding the company *Total SA*, the Council did not find that there were grounds to recommend observation or exclusion and the Ministry took no further action; hence, it is regarded as recommendation followed in the statistics. Only two recommendations where the Council recommended exclusion led to actual exclusion; the recommendations regarding *Wal-Mart Stores Inc. and Wal-Mart de Mexico*, and *Zuari Agro Chemicals Ltd.*

In the recommendations on *Repsol S.A and Reliance Industries*, and *Daewoo, ONGC, KOGAS, GAIL and POSCO*, the Ministry did not manage to reach final decisions on the initial recommendations on exclusion before the Council made new recommendations to revoke them. As the Ministry spent respectively three years and nine months, and more than 2.5 years without being unable to reach a decision in these cases they are not regarded as ‘recommendations followed’ in the statistics. In the case regarding the company *Monsanto Co.* the Bank initiated a new active ownership strategy, and as a consequence, the Ministry did not follow the Council’s recommendation to exclude the company.

#### 4.1.2 War and Conflict

The second criteria, ‘serious violations of the rights of individuals in situations of war or conflict’ represents one out of two criteria where *all* the Council’s recommendations were eventually followed. In two circumstances the Council recommended exclusion, and in the third case they recommended observation.

#### 4.1.3 Environmental Damage

Severe environmental damage makes out by far the largest group of recommendations submitted to the Ministry. As depicted in table 2 most of the recommendations the Council made on this ground were followed by the Ministry. In the case of the company *SOCO International*, the Ministry did not process the recommendation to exclude the company until it was recommended for reinstatement two years later (hence, it is not regarded as ‘recommendation followed’ either in this statistic). The company *AngloGold*, which was recommended for exclusion, was instead placed under observation by the Ministry. The companies *Eni Sp.A* and *Royal Dutch Shell* were both recommended for observation, but the Ministry, in collaboration with the Bank, decided to try active ownership instead. The recommendations concerning *Vedanta Resources* and *Sesa Sterlite* need some further clarification. The Council first received a recommendation to exclude Vedanta and its two subsidiaries in 2007, which the Ministry followed. In 2013 building on the earlier decision to exclude Vedanta, the Council recommended the exclusion of one of Vedanta’s newly established subsidiary, *Sesa Sterlite* and to maintain the decision to exclude Vedanta. In the updated recommendation, the Council writes:

*As a result of the restructuring, the previously excluded companies Sterlite Industries and Malco are now part of the new company Sesa Sterlite, in which Vedanta has a controlling ownership interest. Accordingly, both Vedanta and Sesa Sterlite should be excluded from the investment universe of the Government Pension Fund Global.<sup>94</sup>*

The grounds for this exclusion is the same as the one concerning Vedanta, but since there were issued separate recommendations they are counted as such in my analysis (see table 1). The same goes for the recommendation on the subsidiaries *Rio Tinto plc. and Rio Tinto Ltd.*, which were at large based on the Council's earlier recommendation on exclusion of *Freeport McMoRan Copper and Gold Inc.*

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<sup>94</sup> Council on Ethics, *Recommendation to exclude Sesa Sterlite from the investment universe of the Government Pension Fund Global*, 13 September 2013) 2.

#### 4.1.4 Gross Corruption

Gross corruption represents the only criterion where none of the Council's recommendations were followed. The Council recommended exclusion in both cases but the Ministry decided to place the companies under observation instead.

#### 4.1.5 Other Norm Violations

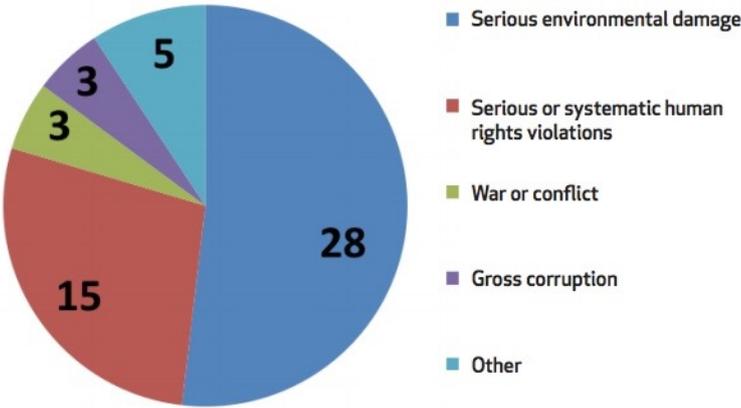
Under the criterion 'other particularly serious violations of fundamental ethical norms' the Council recommended exclusion in all three cases, and the Ministry decided to follow all of them. Consequently, this criterion, along with the war and conflict criteria represents the grounds where most recommendations were followed by the Ministry. Statistically, it also represents the criterion where most cases recommended for exclusion were de facto excluded (100%).

### **4.2 The Quantitative Extent of Human Rights Violations Leading to Exclusion**

As illustrated in table 2 the human rights criterion represents the second largest group of recommendations. Apart from the two recommendations for exclusion that were not followed under the corruption criterion, it is also the criterion where the least of the Council's recommendations were followed, and where the Council recommended exclusion most often. This indicates that recommendations under the human rights criterion have statistically been less likely to invoke exclusion than three of the other criteria. The fact that the human rights criterion has three times as many recommendations as the corruption criteria should be noted as well, and although the Ministry did not decide to exclude in the two recommendations on corruption, they were at least placed under observation. Under no other criterion did the Ministry decide on no action when the Council made a recommendation for exclusion like they did with PetroChina. In addition, in two instances, as mentioned above, the Ministry spent years without reaching a decision after receiving the first recommendation for exclusion. Because they never reached a decision in these cases, measuring the average time for a response under each criterion would be incorrect, that said; even if the Council managed to reach a decision right before the Council made a new recommendation to revoke it in these cases, the average time spent elaborating on these cases would still be greater than under any of the other criteria. For comparison, there is only one other example of the Ministry failing to reach a decision before the Council revoked the recommendation, *Soco International* under the environment criterion. It should be noted that the statistics would look a bit different if I

looked at the total amount of companies assess under each criterion. The Council did so in its 2014 annual report presented below.

Table 4 Companies assessed under each criterion<sup>95</sup>



The extent of human rights exclusions measures by the amount *companies* excluded in fact illustrates an even higher threshold for invoking exclusion; only 3 out of 14 companies recommended for exclusion were eventually excluded (*Wal-Mart Stores Inc., Wal-Mart de Mexico* and *Zuari*).<sup>96</sup> Based on this, I would conclude that statistically, over the course of the ten-year period I have studied, human rights violations have invoked exclusion to a small extent compared to the other conduct-criteria. Represented by only 2/6 of the Council’s recommendations to exclude companies, and only 3/14 companies recommended for exclusion being excluded.<sup>97</sup> However, this quantitative analysis does not uncover what kind of human rights violations have been in focus, how recommendations under this criterion have been assessed by the Council, why the Ministry seemingly had a hard time reaching a decision in these cases (if reaching one at all), or if human rights violations were considered a contributing reasons for why the Council recommended exclusion of companies under any of the other criteria. This is what the next section sets out to do.

<sup>95</sup> The figure shows the number of companies that the Council on Ethics has made a recommendation regarding based on the conduct criteria as presented in the *Annual Report 2014*, 24.

<sup>96</sup> One company, Total SA, was not recommended for exclusion which is why 14 is stated in the text.

<sup>97</sup> The figure includes more companies than my table illustrates as the Council has included the recommendations that were not finally processed by 01.01.15.

### 4.3 Human Rights Case Analysis

#### 4.3.1 Total SA

The recommendation on the company *Total SA* represents the only case under the human rights criterion where the Council did not recommend exclusion.<sup>98</sup> The company was assessed by the Council at the Ministry's request. The recommendation concerns Total's involvement in human rights violation in connection with construction of the Yadana gas pipeline from 1995-1998 in former Burma and of complicity in ongoing human rights violations by generating revenue for the Burmese regime that were ultimately responsible for the violations. In the construction of the pipeline, the company had hired military units through the Burmese public corporation Myanmar Oil and Gas Enterprise (MOGE) to provide security services. The construction of the pipeline had involved forced labour, forced relocation or deportation of villages and arbitrary abuse by the security forces against the local population.<sup>99</sup> The Council writes that Total was likely aware of the violations taking place, and did not adequately seek to prevent them, but that this "does not in itself provide a basis for exclusion from the Fund, as it is only the risk for present or future violations of the guidelines which can prompt exclusion."<sup>100</sup> As the construction of the pipeline was in fact completed at the time, it was at large the company's complicity in the state's ongoing human rights violations that was assessed by the Council. The Council held that the Burmese regime had been, and would likely continue to be responsible for serious and systematic human rights violations, but that it is "beyond the Council's mandate to assess whether exclusion of companies could contribute to improving the political situation within a state."<sup>101</sup> Further noting that its mandate "is confined to concrete assessments of whether the company's conduct falls within or outside the scope of the guidelines."<sup>102</sup>

The Council held that it was impossible to give an affirmative answer to whether presence and generation of tax revenues to suppressive regimes is enough to invoke exclusion. In addition, doing so "would moreover raise questions about whether the human rights situation of other regimes is sufficiently bad to warrant the same considerations. This entails an assessment of *states*, which the guidelines do not require the Council to embark

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<sup>98</sup> Council on Ethics, *Recommendation concerning the company Total SA*) 3.

<sup>99</sup> *ibid* 13.

<sup>100</sup> *ibid* 3.

<sup>101</sup> *ibid*.

<sup>102</sup> *ibid* 8.

on.”<sup>103</sup> In addition, the Council was unable to establish a direct link between the regimes ongoing human rights violations and the company’s operations. This led the Council to conclude that Total should not be excluded as the Guidelines “do not provide a basis for determining that the Fund is currently contributing to Burma’s human rights abuses through its ownership interest in Total.”<sup>104</sup>

#### 4.3.2 Wal-Mart Stores Inc. and Wal-Mart de Mexico

The recommendation to exclude *Wal-Mart Stores Inc. and Wal-Mart de Mexico* represents a landmark case being the first human rights recommendations leading to exclusion.<sup>105</sup> The recommendation separates between alleged violations of labour standards at Wal-Mart’s suppliers in South America, Africa and Asia, and alleged violations in connection with the company’s own operations in the US and Canada. When assessing Wal-Mart’s suppliers, the Council points to *inter alia* numerous reports of child labour, wages below the local minimum, violations of working hour regulations, employees being locked into the productions premises, health hazardous working conditions, unreasonable punishment and prohibition of unionisation. In addition, the Council emphasized extensive use of a production system that fosters working conditions bordering on forced labour.

In terms of the company’s own operations in USA and Canada there were allegations of extensive use of unpaid overtime, breach of rules governing the employment of minors, employment of illegal labour, obstruction of unionisation and discrimination against women. In this case the Council made numerous explicit references to international human rights treaties and ILO conventions/protocols.<sup>106</sup> Where the scope of the term ‘complicity’ is concerned, the Council wrote that because only states can in principle be held liable for human rights violations:

*It may consequently be asserted that a company’s complicity can only be established in cases where it is determined that the main perpetrator of the same violations is a state. However, it is entirely possible under both Norwegian and international criminal law to sentence someone for complicity in an act without having established another party as the main perpetrator. The Council presumes that it was hardly the intention that the Council, as a precondition for establishing companies’ complicity in*

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<sup>103</sup> *ibid.*

<sup>104</sup> *ibid* 3.

<sup>105</sup> Council on Ethics, *Recommendation on Exclusion of Wal-Mart Stores Inc.*

<sup>106</sup> For example: CRC art 32, the ILO Conventions 182, 100, 29, 87, 29, the ICCPR art 8 (3), 9, 21, 22 the ICESCR arts 22, 8, and CEDAW art 11.

*human rights violations, should be required to determine whether states violate such rights.*<sup>107</sup>

While it is certainly correct that the Council must not establish that a country has failed its human rights obligations in order to state that there is an unacceptable risk that a company or the Fund has contributed to human rights violations under the Guidelines, this statement is contrary to the view previously expressed by Mestad. He held that there is always an additional level of attribution of responsibility under this criterion; establishing the link between the corporate actor and the human rights violations done by states.<sup>108</sup> Despite this, the Council still made a point out of the fact that USA has not ratified the CRC, however concluding that: “Since the standards prohibiting harmful child labour apply to the great majority of states (...) there exists, in the view of the Council, a risk that companies which avail themselves of such labour are contributing to serious human rights violations.”<sup>109</sup>

In addition, when assessing violations in Wal-Mart’s own operations, the Council wrote that because the US is party to the ICCPR “there is, in the Council’s view, a risk that the Fund may be complicit in possible violations of this Convention’s standards regarding equal treatment of women and men.”<sup>110</sup> Further, again referencing the ICCPR, the ICESCR and two ILO conventions/declarations on freedom of association/the rights to join trade unions, the Council held that because US legislation *does not* always assure actual implementation of the right to organise, there is a risk of the Fund being complicit in potential violations of this right.<sup>111</sup> Yet, the Council held that their task is to establish whether there is “an unacceptable risk of complicity in violations of international standards” and “does not consider it necessary to find proof of the veracity of each individual claim.”<sup>112</sup>

The Council further referred to the four criteria for establishing complicity based on the Total case. With regards to the company’s own operations in North America, the Council found that the link between the company and the existing violations of the Guidelines was clear. The Council concluded that while proving that Wal-Mart is directly responsible for violations at its suppliers in the developing world is not as clear cut, there was an unacceptable risk that such a linkage existed. As for the second criteria, the Council found

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<sup>107</sup> Council on Ethics, *Recommendation on Exclusion of Wal-Mart Stores Inc.*) 5.

<sup>108</sup> See chap 2.1.3.3.

<sup>109</sup> Council on Ethics, *Recommendation on Exclusion of Wal-Mart Stores Inc.*) 18.

<sup>110</sup> *ibid* 19-20.

<sup>111</sup> *ibid* 20.

<sup>112</sup> *ibid* 2.

that the type of violations focused on in the recommendations has been taken to increase the company's profits, and hence; to facilitate or serve the company's interest. For the third criterion, the Council found that in North America the company was directly responsible for the violations. As for the supply-chain, the Council held that Wal-Mart was at least aware of the violations, but did not seek to prevent them. As for the final criterion, future risk, the Council held that the violations were ongoing, and that there were "no indications that the company plans to revise its approach in terms of seeking to prevent violations of labour rights" either at its suppliers or within its own business operations.<sup>113</sup> The Council concluded that all four criteria were met in this case.

When assessing whether the violations could be regarded as sufficiently serious or systematic the Council found the violations in the supply-chain to be very serious; however noting that "isolated occurrences of this type, even if serious, would probably not suffice to exclude a company since such events would not constitute sufficient grounds for establishing a risk of violation in the future."<sup>114</sup> When discussing the violations in the company's own operations, the Council held that "these too will probably not be sufficient in themselves to recommend exclusion, even in cases where they must be regarded as systematic."<sup>115</sup> The Council eventually concluded that: "Many of the violations are serious, most appear to be systematic, and altogether they form a picture of a company whose overall activity displays a lack of willingness to countervail violations of standards in its business operations."<sup>116</sup> In sum, this led the Council to recommend exclusion due to an unacceptable risk that the *Fund*, through investment may be complicit in human rights violations.

#### 4.3.3 Monsanto Co.

The Council first concluded in November 2006 that the company *Monsanto Co.* should be excluded from the GPF. The Council held that continued investment in the company, which was involved in the cotton seed industry in India, would constitute an unacceptable risk of contributing to the worst forms of child labour.<sup>117</sup> The allegations against the company involved employing children aged 8-15 years, exposing them to health risk through working long hours, being exposed to highly hazardous pesticides without protective equipment, and

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<sup>113</sup> *ibid* 22.

<sup>114</sup> *ibid*.

<sup>115</sup> *ibid*.

<sup>116</sup> *ibid*.

<sup>117</sup> Council on Ethics, *Recommendation on exclusion of the company Monsanto Co*, 20 November 2006) 1.

deprivation of schooling. For the fact-finding, in addition to relying on reports from the ILO and other sources, the Council conducted its own surveys through a commissioned Indian consultancy firm. They found a strong element of debt bondage in the company's operations. Many of the workers were migrant children, forced to live away from their families for months at a time while working on the plants. In addition, the children got paid far below minimum wage.

The Council made use of the CRC art. 32 and the ILO convention 183 article 3 a) and 3 d) to assess whether the child labour in this case fell within the scope of the Guidelines. Concluding that according to these conventions “child labour that may cause health damage, and work that interferes with children’s education and development, or is a result of debt bondage will constitute the core area covered by international bans on child labour.”<sup>118</sup> The Council found the norm breaches in this case constituted the worst forms of child labour, however writing that it “takes as its basis that they, as a rule, must also be regarded as systematic.”<sup>119</sup> The Council found the norm violations to be systematic as well as child labour constituted a significant part of an organized production system. However, the Guidelines clearly state that the violations must be serious *or* systematic, not necessarily both which appears to be the threshold applied by the Council in this case.

When assessing the company’s complicity, the Council found that all four criteria were met in this case. The Council further noted that “the subsequent assessment of the Fund’s contribution to violations will be based on these *[four criteria]*.”<sup>120</sup> Central in this assessment is establishing that there is an unacceptable risk on part of the Fund. This risk has previously been based on the risk of future complicity.

In the case at hand however, the Council writes that “the fact that a risk is deemed unacceptable is linked to the seriousness of the act.”<sup>121</sup> They return to the assessment of future complicity later stating that the Council “shall only recommend exclusion if there are no expectations that the unacceptable practices will discontinue.”<sup>122</sup> The Council thereby implies that there need to be a high degree of certainty that the norm violations will continue in the future in order to recommend exclusion. Nothing in the 2004 Guidelines appear to support such a threshold for establishing unacceptable risk. It is also contrary to what the Council applied in the two previous recommendations regarding Total and Wal-Mart; that an

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<sup>118</sup> *ibid* 17.

<sup>119</sup> *ibid* 18.

<sup>120</sup> *ibid* 16.

<sup>121</sup> *ibid* 17.

<sup>122</sup> *ibid* 20.

unacceptable risk of future complicity through investment on the *Fund's behalf* is sufficient to recommend exclusion. When eventually concluding on whether there was an unacceptable risk of complicity in future violations the Council again avoided addressing the Fund's complicity by stating that "there is an unacceptable risk that Monsanto will continue to be complicit in the worst forms of child labour in India."<sup>123</sup> The Council thereby implicitly asserted the human rights violation to the Indian State. In 2007 the Bank proposed an active ownership plan to reduce the risk of contributing to unethical conduct, and the Ministry decided to test this plan instead. In 2008 the Council published a new recommendation concluding that the principles for recommending exclusion were still present, but did not recommend exclusion as they expected that the ongoing efforts by the Bank would yield results.

#### 4.3.4 PetroChina Co Ltd.

The company PetroChina was recommended for exclusion due to risk of contributing to human rights violation in connection with the construction of two oil and gas pipelines in Burma through its parent company China National Petroleum Corporation (CNPC). The Council writes that infrastructure projects in Burma would likely entail human rights violations and considered that "there is an unacceptable risk of PetroChina being complicit in human rights violations due to close ties to its parent company, CNPC."<sup>124</sup> The human rights violations ascribed to the company's operations are at large similar to the ones described in the recommendation concerning Total SA.<sup>125</sup> In addition, the Council emphasised that the pipelines would pass through areas populated by ethnic minorities where extensive use of forced labour and severe human rights violations had been reported.<sup>126</sup> In 2009 CNPC signed an agreement entailing that the Burmese government should ensure security for the project. The Council found that this arrangement made it "highly probable that CNPC, through its involvement in the project, will contribute to human rights violations."<sup>127</sup> The Council again clarifies that in principle it would be the Burmese government and not the company that committed violations, but that "there is a link between the violations and the company's

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<sup>123</sup> *ibid.*

<sup>124</sup> Council on Ethics, 'Recommendation of May 26, 2010, on the exclusion of the company PetroChina Co Ltd.' (*Regjeringen*, 2010) <<https://nettsteder.regjeringen.no/etikkradet/en/tilradninger-og-dokumenter/recommendations/serious-violations-of-human-rights/recommendation-of-may-26-2010-on-the-exclusion-of-the-company-petrochina-co-ltd/>> accessed 5 April.

<sup>125</sup> See chap 4.3.1.

<sup>126</sup> Council on Ethics, *Recommendation on the exclusion of the company PetroChina Co Ltd.*, 26 May 2010) 1.

<sup>127</sup> *ibid* 2.

operations insofar as the violations take place to facilitate for the company's operations."<sup>128</sup> The real question was whether a subsidiary could be considered complicit in a parent company's unethical conduct. The Council held that this is normally not the case as "only the actions or omissions which can be attributed to the company in which the Fund owns equity will provide grounds for exclusion."<sup>129</sup>

Since the Fund owned shares in PetroChina and not CNPC, the Council held that it was "necessary to consider whether also PetroChina contributes to the human rights abuses through its relationship with CNPC."<sup>130</sup> When establishing this relationship, the Council emphasized that PetroChina is responsible for 80% of the income of the CNPC company group, the CNPC's management are both members and constitute the majority of PetroChina's board and furthermore "most of PetroChina's departments are headed by individuals with identical positions in the parent company."<sup>131</sup> In addition, the Council found that "there appears to be a considerable coordination of operations within PetroChina and CNPC, including the transfer of assets from CNPC to PetroChina."<sup>132</sup> For these reasons, the Council argued that "the companies should be perceived as one single unit insofar as CNPC's activities in Burma cannot be separated from PetroChina's operations."<sup>133</sup> Thereby the Council asserted that a subsidiary could be considered complicit in a parent company's actions.

As emphasised in the preparatory works, the legal structure of the company should not be decisive in the assessment of complicity. It is sufficient to establish that the companies can be identified with each other.<sup>134</sup> The Council recommended exclusion of the company in a letter to the Ministry already in December 2007 in which they held that they do not "consider it necessary to wait until the violations actually take place."<sup>135</sup> The Ministry eventually rejected the recommendation on the grounds that "the nature of PetroChina's relationship to CNPC is not such that the two companies should be regarded as one."<sup>136</sup> From the way I interpret the Guidelines and the preparatory works, I would argue the Ministry set too high of

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<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

<sup>133</sup> *ibid.*

<sup>134</sup> See chap 2.1.3.1.

<sup>135</sup> Council on Ethics, *Recommendation on the exclusion of the company PetroChina Co Ltd.*) 3.

<sup>136</sup> See n 124.

a threshold when dismissing this recommendation on such a ground. It is after all the *ethical risk* of complicity in human rights violations which is to be assessed under the Guidelines, and that does not diminish because the companies could not *legally* be regarded as one.

#### 4.3.5 Zuari Agro Chemicals Ltd.

The Council recommended the company *Zuari Agro Chemicals Ltd.* (Zuari) for exclusion due to an unacceptable risk of the company contributing to the worst forms of child labour through its production of hybrid seed in India.<sup>137</sup> The violations identified are nearly identical to those in the Monsanto recommendation. The Council emphasised that cottonseed cultivation had increased drastically from 2007-2012 and at large this expansion had been in less developed areas more prone to make use of child labour. When asked to comment on the allegations, Zuari held that it did not accept the use of child labour in the production, it did not employ children, and further that they regularly conducted inspections to ensure that child labour did not occur.<sup>138</sup> The Council contracted a consultant to survey the extent of child labour at 110 farms used in Zuari's production that concluded otherwise. The survey revealed that children made up 15-25 per cent of the workforce at those farms. Most of them had never attended school and around half of them were migrant workers with no family ties to the farm. 90% of the farms did not have access to protective equipment. The Council concluded that child labour associated with the company's production must be regarded as serious, systematic and widespread. The Council again referred to the CRC art. 32 and the ILO Convention 182 when define the worst forms of child labour, however emphasizing that it:

*[...] does not take a position on the extent to which the state is responsible for any human rights violations; it is sufficient to establish that the company in question is acting in a manner that links it to serious or systematic violations of internationally recognised human rights.*<sup>139</sup>

The Council held that this applies “regardless of whether state where the violations are taking place has ratified the conventions against which the circumstances are assessed.”<sup>140</sup>

As for the link between the company's operations and the violations the Council held that this is established by agreements entered into with local farmers. The Council noted that

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<sup>137</sup> Council on Ethics, *Recommendation to exclude the company Zuari Agro Chemicals Ltd.*, 18 April 2013).

<sup>138</sup> Ibid 8; In 2008-2009 the Guidelines were revised. The revised guidelines made it possible for the Council to inform companies at a relatively early stage that aspects of their operations is being examined and requests information. Previously the Council contacted companies through Norges Bank, usually only to present them with a draft recommendation.

<sup>139</sup> See n 137, 2.

<sup>140</sup> *ibid.*

the company itself did not own the farms where the seeds were cultivated, nor did it necessarily have “a direct contractual relationship with the people who work there (...) rather the seed is cultivated on commission from and under the supervision of the company.”<sup>141</sup> Because the company regularly inspected the farms, the Council found that the company must have been aware of the use of child labour, and held that the initiatives put in place to decrease the occurrences of harmful child labour were not sufficient. The Council concluded that there were “no grounds to believe that there is a downward trend in the use of child labour in production for the company.”<sup>142</sup> Based on this overall assessment the Council concluded that the company should be excluded.

#### 4.3.6 Daewoo, ONGC, KOGAS, GAIL and POSCO

The recommendation concerning the companies *Daewoo International Corporation, Oil and Natural Gas Corporation Ltd (ONGC), GAIL India, and Korea Gas Corporation (KOGAS)* was first issued 2. May 2011.<sup>143</sup> The recommendation took on the companies’ involvement in the construction of a gas pipeline across Burma/Myanmar. The Companies participated, as minority shareholders, in a joint venture with *China National Petroleum Corporation (CNPC)* who was responsible for the actual construction. This recommendation, as noted by the Council shares a number of similarities with the recommendation about Total and the company’s involvement in the construction of the Yadana pipeline, both as it concerns the same type of project, the same country, the use of military security forces, and the risk of human rights violations. The Council again referenced the letter to the Ministry of 2007 and held that with these types of projects in Burma/Myanmar the risk of human rights violations is imminent due to increased militarization in the affected areas, and it may therefore recommend exclusion already from the time of entering into the agreements.<sup>144</sup>

CNPC had signed an agreement that the Burmese authorities and the state-owned Myanmar Oil and Gas Enterprise (MOGE) should guarantee the safety during the construction of the pipeline.<sup>145</sup> While some of the companies held that it was CNPC who

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<sup>141</sup> *ibid* 1.

<sup>142</sup> Council on Ethics, *Recommendation to exclude the company Zuari Agro Chemicals Ltd.*) 10.

<sup>143</sup> The updated recommendation of 2012 also includes the Korean company POSCO which at that time had required controlling ownership over Daewoo. As the updated recommendation was issued before the Ministry decided on the previous recommendation it is regarded as one in the overview of quantitative findings (Table 1).

<sup>144</sup> See n 58.

<sup>145</sup> Council on Ethics, *Recommendation on the exclusion of Daewoo International Corporation, Oil and Natural Gas Corporation Ltd., GAIL India and Korea Gas Corporation, 2 May 2011*) 4.

controlled the planning and construction of the pipeline and that they, as minority shareholders, had little influence, the Council did not find the companies' influence to be decisive:

*When choosing to participate in the project, the companies also accepted that the Burmese military would be in charge of securing the pipeline. In other words, it is the kind of project in question and the military's role in the project that pose a significant risk for human rights violations.*<sup>146</sup>

The Council again emphasised that it would be the Burmese authorities, and not the company who in principle carry out the human rights violations. However, the Council found that there was a link between the violations and the companies insofar as they take place with the aim of facilitating the companies' activities.<sup>147</sup> They therefore recommended that the companies should be excluded due to an unacceptable risk of contributing to future violations of human rights. *Daewoo* expressed to the Council that it was "critical of the Council's reasoning that it may exclude companies in anticipation of future human rights violations, rather than base its assessment on the factual occurrence of events."<sup>148</sup> The Council held that "even in the event that abuses have not taken place to date, this does not necessarily reduce the future risk of them taking place."<sup>149</sup> The Council found that violations were likely to take place when facilitating the companies' future operations and there was therefore a link between the companies' operations and the risk of human rights violations. Further, the Council emphasised that the pipeline would be 15 times longer than the Yadana pipeline and run through areas experiencing serious ethnic conflict. The Council concluded that it: "finds reason to believe that human rights violations associated with the gas pipeline will be similar to, and more extensive than, those which occurred during the construction of the Yadana pipeline."<sup>150</sup> Furthermore, the Council expressed that they found it unlikely that the company's involvement and expressed concern for the human rights situation would prevent abuse committed by Burmese forces.

A year later the Ministry requested that the Council updated its recommendation "in light of recent political developments in Myanmar."<sup>151</sup> These developments included political reforms that had been implemented entailing the release of political prisoners and extension of

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<sup>146</sup> *ibid* 2.

<sup>147</sup> *ibid*.

<sup>148</sup> *ibid* 9.

<sup>149</sup> *ibid* 10.

<sup>150</sup> *ibid*.

<sup>151</sup> Council on Ethics, *Recommendation on the exclusion of Daewoo International Corporation, Oil and Natural Gas Corporation Ltd., GAIL India, Korea Gas Corporation and POSCO*, 21 June 2012).

the freedom of expression. In addition, supplementary elections had been carried out and ceasefires had been negotiated with many ethnic groups in the country.<sup>152</sup> In the updated recommendation, the Council held that “the positive political development in Myanmar has had little practical impact on how Myanmar’s military behaves towards civilians in conflict areas.”<sup>153</sup> The Council found that the military had in fact increased its presence along the pipeline corridor since the last recommendation and that “the pipeline seems to have become a catalyst for conflict and the focus of violent activities which are taking place in the area.”<sup>154</sup> The Council pointed to reports of “severe and systematic human rights violations in this area, perpetrated by military forces against civilians”,<sup>155</sup> and that these abuses were “currently taking place and appear to have increased as the military has sought control over new areas along the pipeline corridor.”<sup>156</sup> The Council therefore upheld the recommendation to exclude the companies, including POSCO. The Council also stated that even after the construction of the pipeline was complete, hence beyond 2013, there would still be an unacceptable risk that the companies would continue to contribute to human rights violations as the pipeline would be secured by military forces once it came into operation.<sup>157</sup> Nevertheless, in September 2013, before the Ministry managed to reach a decision in the case, the Council revoked the decision to exclude the companies on the grounds that the actual construction of the pipeline was completed.

#### 4.3.7 Repsol and Reliance Industries

The two companies *Repsol YPF (later Repsol S.A.) and Reliance Industries* were partners in a joint venture that carried out oil-exploration activities in Block 39 in the Peruvian Amazon. The Council’s recommendation was first issued in December 2010.<sup>158</sup> The Council assessed whether the oil-exploration in the area which is thought to overlap territories of indigenous peoples living in voluntary isolation entailed a risk of contributing to serious human rights violations. The Council based this risk on previous experience of first contact with isolated tribes entailing that one third to one half of a tribe could perish during the first five years

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<sup>152</sup> *ibid* 1.

<sup>153</sup> *ibid* 2.

<sup>154</sup> *ibid*.

<sup>155</sup> *ibid*.

<sup>156</sup> *ibid*.

<sup>157</sup> *ibid*.

<sup>158</sup> Council on Ethics, *Recommendation to exclude Repsol YPF and Reliance Industries Ltd.*, 1 December 2010) 3.

following initial contact. Worst case scenario, the whole tribe might become extinct.<sup>159</sup>

The Companies expressed that they did not consider it likely that isolated indigenous peoples existed in the block. The Council found it probable and that “the uncertainty of their existence follows from the absence of independent, thorough and scientific studies.”<sup>160</sup> Further they “found it noteworthy that neither the government nor the companies in question have taken the initiative to carry out studies of this kind.”<sup>161</sup> The Council held that there was no doubt that exploration activities would increase the risk of isolated peoples coming in contact with outsiders, and that the large number of workers that would be relocating in the area would increase that risk substantially. The companies had a contingency plan which was in line with the government’s requirements, but according to the Council it primarily covered what the companies should do if they came in contact with the isolated peoples.<sup>162</sup>

The Council placed particular emphasize on indigenous peoples’ rights to self-determination based on the *Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon and El Chaco* which entails showing absolute respect for their decision to remain in isolation. And further, that contact initiated by anyone else than the indigenous peoples themselves must be regarded as a violation of their human rights, and “in certain circumstances such contact could be considered a form of the international crime of genocide.”<sup>163</sup> They also referred to a communication with the Peruvian Ombudsman who held that “awarding concessions to exploit natural resources in territories of isolated indigenous peoples is a violation of the right to life, health and property.”<sup>164</sup> The source base in this case is at large based on UN and ILO reports, and reports/statements from various NGO’s, but some of the sources asked the Council not to disclose their identities. In addition, the Council held that “because the extractive activities provide local jobs and wages, neither the workers nor the local populations have an incentive for reporting observations as these would entail the stopping of operations.”<sup>165</sup>

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<sup>159</sup> *ibid* 2.

<sup>160</sup> *ibid*.

<sup>161</sup> *ibid*.

<sup>162</sup> *ibid* 3.

<sup>163</sup> *ibid* 27.

<sup>164</sup> *ibid* 19.

<sup>165</sup> *ibid* 16.

In the final conclusion, the Fund wrote that continued ownership in the companies “would amount to an unacceptable risk of contributing to severe violation of human rights.”<sup>166</sup> The 2010 Guidelines applicable at that time does in fact hold that the Council could recommend exclusion of companies from the GPF’s investment universe if there is an unacceptable risk that the *company* contributes to human rights violations, but in this case it appears that this risk is again attributed to the Fund.

In May 2012 the Ministry requested that the Council updated its previous recommendation in view of indications that Peruvian authorities had changed their approach towards indigenous peoples, making special mention of a new law and policy changes. The Council concluded that the grounds for exclusion were still present.<sup>167</sup> In 2014 Repsol entered into an agreement to sell its shares in the joint venture and the activities within the area of concern were stopped. The Council then decided to revoke the recommendation, before the Ministry had decided on the previous recommendation on exclusion.

#### 4.3.8 Human Rights References in Other Recommendations

Apart from the seven recommendations above strictly labelled ‘human rights recommendations’ by the Council and the Ministry themselves; I found that there were recommendations concerning the other criteria for exclusion referencing human rights violations and/or norms/standards as well (counting around ten all together). The human rights referencing varied between being fundamental to the overall assessment of the cases, to having some weight, and last to apparently having no weight in the overall assessment. The latter, ‘no weight’ is left out of this assessment. I believe that to be the case in the recommendations concerning *Siemens*, where it is stated only that it is recognized that corruption is a factor contributing to poverty and human rights violations. Where human rights is only mentioned as a term unrelated to the particular case, or where the Council stated along the lines that it is aware of accusations of human rights violations but has not assessed that in any further detail, these recommendations are also left out.<sup>168</sup> In the recommendation on the exclusion of the Israeli company *Elbit Systems Ltd* under the criterion ‘other serious norm violations’ the Council referenced an ICJ judgement which held that construction of the

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<sup>166</sup> *ibid* 33.

<sup>167</sup> Ola Mestad, ‘Concerning the recommendation on exclusion’, 20 June 2012 email.

<sup>168</sup> This applies to *inter alia* the recommendations concerning *Zijin Mining Group*, *Barrick Gold Corp*, *Samling Global Ltd.*, *Kerr-McGee Corp* and *Freeport McMoRan*.

border wall “constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments”. However, human rights violations as a ground for recommending exclusion of the company was not discussed further.<sup>169</sup>

In the recommendation concerning *Vedanta Resources* the Council held that it was “highly probable that Vedanta’s mining operations in the states of Chhattisgarh and Orissa have led to the expulsion of local farmers, and, in particular, tribals, from their homes and land.”<sup>170</sup> In this case, the Council concluded that the company should be excluded due to “an unacceptable risk of complicity in current and future severe environmental damage and systematic human rights violations.”<sup>171</sup> The company was eventually excluded. In the *AngloGold Ashanti* (AGA) recommendation, the Council held that the environmental damage in relation to the company’s mining activities in Ghana also represented human rights violations. The Council stated that AGA had “acted in a way that implies contribution to serious and systematic violations of internationally recognized human rights.”<sup>172</sup> The Council went on with an explicit reference to the ICESCR art. 12 on the right to health, holding that: “The mining operation affects people in the vicinity through both pollution and forced relocation, which lead to the deterioration or loss of both livelihood and health.”<sup>173</sup> The company was recommended for exclusion, but the Ministry decided on observation instead.

In the recommendation concerning *Eni Sp.A*, human rights violations were not a part of the actual assessment, but the Council made a very interesting reference to the UN Guiding Principles on Business and Human Rights. The Council wrote that they believe that these principles “do not directly apply to the environmental area but apply to breaches of human rights as a result of environmental damage.”<sup>174</sup> According to the Council, companies therefore “must be required to implement appropriate action to prevent breaches of human rights.”<sup>175</sup> The Council made an identical statement in the recommendation on *Royal Dutch Shell*.<sup>176</sup> In both these cases, the Council recommended observation and the Ministry decided to try

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<sup>169</sup> Council on Ethics, *Recommendation on exclusion of the company Elbit Systems Ltd*, 15 May 2009) 5.

<sup>170</sup> Council on Ethics, *Recommendation on Vedanta Resources Plc*, 15 May 2007) 36.

<sup>171</sup> *ibid* 39.

<sup>172</sup> Council on Ethics, *Recommendation on the exclusion of the company AngloGold Ashanti*, 27 June 2012) 28.

<sup>173</sup> *ibid*.

<sup>174</sup> Council on Ethics, *Recommendation on the observation of the company Eni Sp.A*, 20 March 2013) 20.

<sup>175</sup> *ibid*.

<sup>176</sup> Council on Ethics, *Recommendation on the observation of the company Royal Dutch Shell plc.*, 20 March 2013) 28.

exercising ownership rights.

All notable human rights references are found in recommendations under the environment criteria. In the 2014 annual report, the former Council recognised this phenomenon stating that: “In more than half of the environmental recommendations, the health effects of the company’s emissions are an important reason for the Council recommending exclusion or observation.”<sup>177</sup> While that might be the case, only the recommendations on *Vedanta* and *AGA* emphasised human rights violations as a factor for recommending exclusion in the actual assessment. It is clear however, that the Council considers that severe environmental damage generally could constitute human rights violations insofar as it could affect people’s right to life and health. In addition to the above mentioned concrete human rights references one might argue that all the criteria could be considered human rights- relevant to begin with, but that debate is beyond the scope of this thesis.

#### **4.4 The Threshold for Invoking Exclusion**

In the only two recommendations that led to exclusion from the GPFG under the human rights criterion (Wal-Mart and Zuari) the Council managed to establish, with extensive amounts of credible ‘evidence’, that the companies had been linked to both serious, systematic and widespread violations in the past. The Council also found that all four criteria for complicity on the company’s behalf, including the risk of future violations were present. However, the recommendations concerning the other companies recommended for exclusion did not appear substantially different from the ones that led to exclusion. In fact, I find it hard to explain, based on the Council assessment of the facts in each case, why the recommendation regarding *Repsol and Reliance* and *Daewoo et al.* in particular did not lead to exclusion. All the criteria appear to be fulfilled in accordance with the Guidelines. While it is true that the Ministry did not directly dismiss the Council’s recommendations in these cases, I find it noteworthy that the Ministry were not able to reach a decision during a time period of respectively 2.5 and nearly four years in these cases. In common however, were that these companies were involved in more ‘temporary projects’ than that of Wal-Mart and Zuari, and there was no evidence that the companies had *previously* been involved in human rights violations. But this is either way not what the exclusion mechanism is about. It should be noted that in the updated recommendation on *Daewoo et al.*, the Council held that the companies had been

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<sup>177</sup> Council on Ethics, *Annual Report 2014*, 24.

involved in human rights violations since the last assessment, but the Ministry was still not able to reach a decision until the Council revoked the updated recommendation the following year. I cannot know for sure whether the strictly forward looking focus of some of the recommendations is the main reason why they did not invoke exclusion (or were not acted upon in a ‘timely manner’), but it is certainly clear that attributing past violations to the companies was an important part of asserting future risk and complicity in the two recommendations that did.

I have previously hypothesised, that cases involving human rights violations are likely particularly difficult to ‘prove’ due to complicated business structures. Evidently, this was what led the Ministry to reject the recommendation on PetroChina. In the case of Wal-Mart however, although the Council writes that part of its source base, at the request of the sources will not be made public, the Council emphasised that link between the company’s operations and norm violations was “highly visible due to keen public interest in Wal-Mart shown by press and by a number of NGO’s.”<sup>178</sup>

There is another common ground in the two cases that led to exclusion. In both recommendations the Council held that the companies had been involved in the worst forms of child labour as prescribed in the CRC and ILO conventions, and workers’ rights violations (including breaches of ILO and UN conventions on the rights to a safe working environment, fair wages, non-discrimination, the right to organize/join trade unions and the right not to be subject to forced labour). The human rights violations in focus throughout the other recommendations were also largely connected to breaches of children and workers’ rights. But also, breaches of the rights of indigenous people and/or ethnic minorities connected to dispute over land, forced relocation, and the right to self-determination. In addition, there were more sporadic or implicit references to the two conventions (ICCPR and ICESCR) on the right to life and health.

Insofar as the Council found that the criteria for exclusion under the Guidelines were met in six cases, but only two of them led to exclusion (and two were never acted upon), I find it hard to argue that the grounds for invoking exclusion are exclusively normative. Rather, I believe there must be other institutional dynamics and factors involved as well influencing the ‘exclusion-ratio’. I will elaborate on this theory in the following.

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<sup>178</sup> Council on Ethics, *Recommendation on Exclusion of Wal-Mart Stores Inc.*) 21.

## 4.5 Institutional Analysis

I hypothesized in chapter 2.2.2 that recommendations are assessed faster and with less ‘objections’ because a level of ‘political assessment’ of the recommendations is practically removed. Since the new Guidelines and the new Council came in place in 2015, 14 recommendations have been published all together.<sup>179</sup> Twelve of which are assessed under the criteria for conduct-based observation or exclusion. Respectively three of these recommendations concern ‘other serious violations’, six concern environmental damage, and three concern corruption. In nine of these cases the Council recommended exclusion. In the remaining three cases the Council recommended the company *PT Astra International Tbk* for observation under the environment-criterion, *Petrolei Brasileiro SA* for observation under the corruption criterion, and that observation of the company *Alstom* under the corruption criterion should be terminated. All these recommendations were followed by the Bank within a year of receiving the recommendation from the new Council. The Council was invited to comment on this phenomena, but replied that they were unfortunately unable to do so as it would be only “be speculation on their behalf.”<sup>180</sup>

While none of the recommendations are assessed under the human rights criterion, the new Council stated in the 2016 annual report that they are drafting recommendations to exclude ten companies. Because none of these recommendations are published yet I cannot conclude on whether the changes in the institutional structure and dynamics have led to more recommendations being followed under this criterion, but it is certainly worth noting that all the recommendations issued by the Council to the Bank during the last two years have been acted upon. The former Council did in fact indicate in the 2014 annual report that faster assessments of recommendations might be a positive result of the restructuring, stating that: “Now that the responsibility for exclusion has been transferred to Norges Bank, it should also be easier to achieve a continuous chain of tools. This simply depends on the expedient organisation of the work and allocation of resources.”<sup>181</sup>

In its first annual report, the new Council writes that the new Guidelines “on the one hand confirm the Council’s independent position and on the other hand clearly state that we, together with *Norges Bank*, form part of a continuous chain of tools.”<sup>182</sup> The Chair, Johan H.

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<sup>179</sup> Unlisted subsidiaries are as of 2016 not counted as excluded companies.

<sup>180</sup> Email from author to The Council on Ethics (7 April 2017, replied 18 April 2017).

<sup>181</sup> Council on Ethics, *Annual Report 2014*, 2015) 28.

<sup>182</sup> Council on Ethics, *Annual Report 2015*, 2016) 5.

Andresen clarifies this stating that: “This chain is to function in such a way that exclusion is the last resort once other tools have been considered”, and that this is possible because they, as a result of the new Guidelines, make recommendations directly to Norges Bank.<sup>183</sup> H. Andersen further states that the Council task is not mainly to exclude as many companies as possible, but rather “help remove ethical risk from the fund”, “only make recommendations relating to the most serious or systematic violations”, and recommend exclusion “where there seems to be a high risk of recurrence.”<sup>184</sup>

I also hypothesized that changes in the institutional dynamics in the first place might be understood from a democratic legalism perspective of compliance. Seen from the Norwegian state’s perspective; the Bank already makes investment decisions and exercise ownership rights independently of the Ministry.<sup>185</sup> By placing the Council under the Bank as well, complaints of the GPFG not being managed ‘ethically enough’ will likely to an even lesser extent be directed to the Norwegian State. Companies’ home states appear to have a tendency to take exclusions from the GPFG quite personally too, and by giving the Bank mandate to decide on recommendations the ‘diplomatic repercussions’ following a company’s exclusion could decrease as well.<sup>186</sup> Hence, the changes in the institutional dynamics could not only be an attempt to make sure that NBIM fulfils its OECD obligations, but a way for the State/Government to avoid similar allegations in the future.

In the NCP case NBIM was criticized for not having a strategy on how to react if it becomes aware of human rights risks related to companies in which it is invested, apart from child labour violations. The focus of the Council since 2015 related to human rights has been to map violations of workers’ rights in the textile industry and companies operating in Qatar with conditions that may be characterised as forced labour. In the 2016 annual report, the Chair stated that: “It has proved more difficult than we initially anticipated to determine which abuses are serious enough and systematic enough to result in exclusion from the GPFG.”<sup>187</sup> The Council found that there were numerous examples of working conditions in particular not complying with labour standards, but that drawing a line of where such conditions are unacceptable has proven to be a challenge. In all cases up until now, harmful

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<sup>183</sup> *ibid.*

<sup>184</sup> *ibid.*

<sup>185</sup> In accordance with ‘*Mandat for forvaltningen av Statens pensjonsfond utland*’, s 1-3(3).

<sup>186</sup> For example the US after the exclusion of Wal-Mart; see Nystuen et al., *Human Rights, Corporate Complicity and Disinvestment*, (CUP 2011) 61.

<sup>187</sup> Council on Ethics, *Annual Report 2016, 2017*) 5.

child labour was highlighted when the Council established the existence of unacceptable working conditions and the seriousness of the violations. In addition, both recommendations that eventually led to exclusion emphasised widespread use of harmful child labour. It will be interesting to see to what human rights violations the new Council's recommendations highlights, and whether future recommendations concerning working conditions could be considered sufficiently serious to lead to exclusion if they do not involve harmful child labour. Either way, I suspect that as a result of the OECD-case against NBIM and to reinsure that the Council has maintained its independence since the scrutinized institutional restructuring of 2015, we might witness an increase in human rights recommendations invoking exclusion in the following years.

## **5 Concluding Remarks**

I believe it is safe to argue that contribution to serious or systematic human rights violations is a factor that has invoked exclusion from the GPF's investment universe to a small extent. This is first and foremost demonstrated by the fact that only two out of seven recommendations assessed primarily under this criterion have invoked exclusion since 2004. The violations leading to exclusion have been limited to the worst forms of child labour, and systematic workers' rights violations under the human rights criterion so far. Although the purpose of the Guidelines is to avoid future risk of complicity on behalf of the Fund, in both cases that led to exclusion, it was emphasised that the companies had been involved in human rights violations in the past. In addition, the Council was able to establish that both serious *and* systematic human right violations were committed by the companies and/or with the companies' knowledge, and they had not implement adequate measures to prevent abuse. Human rights violations proved to be a significant contributing reason for why the Council recommended exclusion in two instances under the environment-criterion as well. That said, only one of them, that of *Vedanta Resources* and its subsidiaries, actually invoked exclusion. The human rights violations attributed to Vedanta et al. were at large connected to abuse against tribal peoples (including forced eviction), but also deplorable wages, and dangerous working conditions. The 'extent' of human rights violations being factor invoking exclusion is therefore arguably slightly larger than my initial findings uncovered.

The qualitative analysis set out to identify reasonable explanations for this exclusion-ratio, which were separated into human rights-specific variables and institutional-dynamic variables. I hypothesised that when the Council applies similar standards for 'proving' present or future human rights violations as they do for the other norm violations, these cases end up

being assessed in a stricter manner. This again, I argued, is due to the many different ways complicity and contribution is asserted, the emphasis on future violations/risk, and the demanding fact-finding in these cases.

It is evident in all the recommendations that the Council went through an extensive process in order to establish ‘complicity’ and ‘contribution’. Chesterman argued that by importing a quasi-legal standard of complicity one runs the risk of setting too high a threshold for exclusion, by implicitly asserting that a wrong had been perpetrated without the obligation to prove it.<sup>188</sup> My qualitative analysis shows that in the cases that led to exclusion, the link between the companies and the norm violations were quite clear due to keen public interest, and the companies had been linked to serious *and* systematic human rights violations in the past. In *Daewoo et al.* and *Repsol et al.* where the Ministry was not able to reach final decisions, the Council could only show to future risk, not previous violations. As the Council was unable to assert that wrongs had been perpetrated in some of the recommendations that did not invoke exclusions, and the Ministry dismissed the case of PetroChina because the company committing the abuse could not legally be linked to the company in which the Fund held shares; it appears as if the Ministry has applied a quasi-legal understanding of complicity when deciding not to divest under this criterion. I would argue that this creates too high a threshold for excluding companies involved in human rights violations, and furthermore appears contrary to the purpose of having ethical guidelines.

The amount of time the Ministry spent without reaching a decision in *Daewoo et al.* and *Repsol et al.* could also work as an argument in favour of the grounds for invoking exclusion not being exclusively normative, but dependent on the expedient organisation of the work and allocation of resources. This theory is further strengthened by the fact that all the recommendations have been followed since the Ministry changed the rules governing appointments to the Council and the processing of recommendations. In addition, faster assessment of recommendations appears to be a result of the new Guidelines enabling the Council to communicate directly to the Bank. I also hypothesised that the changes in the institutional dynamics in the first place might be understood from a democratic legalism perspective of compliance. While I have no way of proving that theory, I believe I have presented compelling arguments of it being a probable explanation.

In order to avoid setting too high a threshold for excluding companies under this criterion, I would argue that the Guidelines should have avoided using the term ‘human rights

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<sup>188</sup> Chesterman, 'Laws, standards or voluntary guidelines?', 58.

violations'. I praise the proactive nature of the Guidelines, indicating that both companies and the Fund have human rights responsibilities. But it appears as this criterion has created a headache for the Council, when having to assert 'complicity' in, and 'contribution' to human rights violations, as human rights obligations apply in a formal sense only to states. I would suggest that the Guidelines read that observation or exclusion may be recommended due to; *serious or systematic breaches of internationally recognised minimum standards on the rights of individuals or peoples* instead. This way, the scope of protection would be the same but asserting complicity and contribution would likely involve much less controversy as it would not entail establishing responsibility for human rights violations. This again could remove some of the restrictions that apparently are attached to exclude companies for violations of this norm, and hence; lower the threshold for invoking exclusion of companies for contributing to human rights violations.

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