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Human Rights Considerations in the
Swedish AP-funds' Investments

- A case study in the Business and Human Rights field

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Summary

The Swedish Public Pension Funds, also known as the AP-funds, are the biggest trustees of Swedish pension payments. Their mission is to invest the buffer capital of the pension system and ensure growth that will provide pension disbursements for generations to come. To fulfil this mission investments are made in thousands of companies all over the world. During the last years the AP-funds have been heavily criticised for investing in companies that violate human rights through their operations.

The fact that business operations may have an adverse impact on the enjoyment of human rights has long been known. However it was not until the mid-1990s that the precondition that all responsibility for respecting and protecting human rights should be assigned to the State was abandoned. Since then the field of business and human rights has grown in importance and the responsibility for business actors to respect human rights throughout their operations is now commonly acknowledged, even though the extent of the responsibility is still being debated. In 2011 the development of business and human rights took a new step when the Human Rights Council unanimously endorsed the *Guiding Principles on Business and Human Rights (UN Guiding Principles)* that consists of 31 principles addressing the State duty to protect human rights and the corporate responsibility to respect human rights. The endorsement of the instrument is the first time that the UN member states adopt a common position for addressing the adverse human rights impact linked to business operations.

This thesis investigates the responsibility of Sweden and the AP-funds on account of the human rights infringements that have been associated with the AP-funds. The conduct of the two actors and their compliance with the provisions of the UN Guiding Principles is analysed and evaluated in a case study. The first part of the case study analyses the actions of Sweden and the fulfilment of the State duty to protect in the case of the AP-funds, whereas the second part addresses the AP-funds' compliance with the responsibility to respect human rights.

Sammanfattning

Allmänna pensionsfonder, oftast omnämnda som AP-fonder, är de största förvaltarna i det allmänna inkomstpensionsystemet. Fonder har i uppdrag att investera pensionssystemets buffertkapital och eftersträva en hög långsiktig avkastning för att bidra till en hög pension för framtida generationer. För att uppfylla sitt uppdrag investerar fonder i tusentals företag runt om i världen. Under de senaste åren har AP-fonder fått mycket kritik för sina investeringar i företag som kränker mänskliga rättigheter genom sin verksamhet.

Det faktum att företag och andra privata aktörer kan påverka mänskliga rättigheter negativt genom sin verksamhet har varit känt sedan länge, men det var inte förrän under 1990-talet som företag tillerkändes ansvar för denna påverkan. Sedan dess har utvecklingen av området "business and human rights" gått framåt och privata aktörers ansvar för att respektera mänskliga rättigheter i sin verksamhet är nu allmänt erkänt, även om omfattningen av ett sådant ansvar fortfarande debatteras. År 2011 tog utvecklingen ytterligare ett steg framåt när Human Rights Council enhälligt skrev under *Guiding Principles on Business and Human Rights (UN Guiding Principles)*. Genom beslutet att skriva under UN Guiding Principles antog FN:s medlemsländer för första gången en gemensam ståndpunkt för att motverka företags negativa inverkan på mänskliga rättigheter.

Uppsatsen undersöker Sveriges och AP-fondernas ansvar för mänskliga rättigheter i situationer då kränkningar av mänskliga rättigheter kopplas samman med AP-fonder genom deras investeringar. Med utgångspunkt i de internationella principer för business and human rights som stadgas i UN Guiding Principles analyseras Sveriges och AP-fondernas sätt att hantera fondernas påverkan på mänskliga rättigheter.

Preface

I have a lot of people to thank for the completion of this thesis, for encouragement, input and great company during long hours at the library. There are a number of people that I would like to mention especially.

First of all I would like to express my gratitude to my excellent supervisor Radu Mares for his engagement and constructive criticism throughout the whole process. Thank you Mirjam for outstanding proofreading and being my partner in crime this semester. Finally I owe my parents a great debt of gratitude for all the support and encouragement I have received, thank you so much.

Lund den 9 januari 2013.

Caroline Persson

Abbreviations

AP-funds	Allmänna pensionsfönderna, i.e. the Public pension funds
EU	European Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
GRI	Global Reporting Initiative
HRIA	Human rights impacts assessment
IACHR	Inter-American Commission of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
ILO	International Labour Organization
NCP	National Contact Point
NGO	Non-governmental Organization
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
SOU	Statens offentliga utredningar, i.e. the Government's Public Investigations
UN	United Nations
UNPRI	United Nations Principles of Responsible Investment

1. Introduction

1.1 Background

The inspiration to the subject of this thesis and the conducting of this research came from a postcard, posing the question if I knew what my pension money was doing in that very moment. The sender was the Swedish NGO Latinamerikagrupperna and their campaign to raise awareness around the fact that the Swedish Public Pension Funds (The AP-funds) have invested in a large number of companies criticised for infringing human rights around the world. The message received brought me face to face with the disturbing thought that the money that I will rely on for my support after my retirement is currently financing projects and operations that violates the human rights of others.

The case of the AP-funds is far from unique and during the last years several Swedish companies and business actors have been accused of causing or contributing to adverse human rights impacts through their operations or in other ways been connected to human rights violations. The majority of these human rights infringements have taken place abroad, often in countries where the protection of human rights is weak. A startling aspect of the issue is that several of these business actors are closely connected to the Swedish state, as in the case with the AP-funds.

The cases of the AP-funds and their connections to human rights infringements abroad can serve as an illustration of two different issues. On one hand it demonstrates how a State may be involved in human rights infringements outside its territory. On the other hand it is yet another example verifying that States are not the only actor that need to take a responsibility for human rights enjoyment. The issue of business actors' adverse impact on human rights enjoyment is growing and the current human rights debate involves questions of to what extent business actors should be required to observe human rights standards, if they should be liable for their violations and whether binding regulations or voluntary action will prove more efficient for governing this area.

1.1.1 The emergence and development of the idea of business and human rights

The impact of business operations and the way they could adversely affect local communities attracted increased attention in the 1970s. Although there was an understanding that adverse effects on the enjoyment of human rights could arise as a result of business operations, the responsibility was seen to lie in the domain of governments and holding companies accountable was not yet on the agenda.¹ When the UN made a first attempt to govern the activities of transnational corporations (TNCs)² with binding international rules in the 1970's, human rights considerations were not featured. This first attempt, known as the Draft UN Code of Conduct on Transnational Corporations was never unanimously approved, negotiations came to a halt after a decade and the Code was formally abandoned in 1992.³

It was not until the mid-1990s that the specific discussion of business and human rights came into prominence. Until then the precondition that all responsibility for respecting and protecting human rights lay with the government had not been questioned.⁴ The reason for the change of this perception, which led to a debate whether a change of allocation of responsibilities for human rights protection to business entities was due, is generally ascribed to the globalization of the world economy.⁵ In the 1990s widespread attention was given to the negative impacts for human rights enjoyment that had followed the globalization of the world economy. This development had highlighted the power of large corporations and their limited accountability in law for human rights abuses. When facilitating for these large corporations, especially TNCs, to extend economic impact and reach, the capacity for governments to control their operations and conditions for the production became limited. Since this process was facilitated by developments in national law and policies as well as international agreements, both the willingness and the ability of national governments to fulfil their human rights responsibilities were seriously questioned.⁶

¹ Geoffrey Chandler *The evolution of the business and human rights debate* – In *Business and Human rights*:

² TNC is one of many expressions used to describe a company that operates in different countries.

³ Ruggie, John *Business and Human Rights: The Evolving International Agenda*, *The American Journal of International Law*, p. 819.

⁴ Cragg, Wesley et al *Human Rights and Business Introduction*, *Business Ethics Quarterly* p.2.

⁵ Clapham, Andrew *Human Rights Obligations of Non-State Actors* (2006) p. 3f.

⁶ Cragg, Wesley et al *Human Rights and Business Introduction*, p.2.

If globalization provided the foundation for this change of perception, the catalyst for the development was the arbitrary execution of nine community leaders critical of the social and environmental impacts of oil exploitations, by the Nigerian government in 1995. Shell had, as the largest foreign investor in Nigeria, a significant leverage with the Nigerian government. Despite this, the company refrained from intervening and insisted it had no role to play in the internal affairs of a sovereign state. The international condemnation that followed this event and the accusations of Shell condoning human rights violations to gain profit showed the international business community that new strategies to handle human rights impact were urgently needed.⁷ Subsequently human rights commitments made their way into the voluntary ethics codes of large transnational companies, and NGOs increased their efforts to hold corporations with international business interests to account for human rights abuses.⁸

1.1.2 Instruments of Business and Human Rights

The fact that non-state actors, such as corporations can pose a threat to human rights is not something that was discovered as late as in the 1990s. However the development during the 1990s underlined that existing international instruments didn't manage to outmanoeuvre these threats and the problem brought up for discussion was how to make necessary improvements of the governing system. *Soft law* became a popular method to direct corporate activities in the 1970s and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, adopted during this decade, are still significant instruments on the area. The notion of soft law implies that the instrument does not create legally binding obligations in itself. Regardless the normative role of soft law instruments is essential and serves to further develop the standards of corporate responsibility. Since the adoption, governments and businesses have frequently referred both to the ILO Tripartite Declaration and the OECD Guidelines.⁹

During the 1990s when awareness of the need for corporate responsibility grew rapidly new sets of *voluntary initiatives* were created. In 1999 the UN Secretary-General Kofi Annan initiated the UN Global Compact, which directly engages companies in promoting ten

⁷ Geoffrey Chandler *The evolution of the business and human rights debate*, p. 24f.

⁸ Cragg, Wesley et al *Human Rights and Business Introduction*, p.2.

⁹ SRSG Report: *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/035, 19 Feb. 2007, p. 14f.

accepted UN principles in areas such as human rights and environmental protection.¹⁰ At the same time new discoveries of how the issues that posed a threat to human rights enjoyment could also become a risk for the company were made. The combination of these discoveries and the pressure from civil society made companies adopt their own policies and principles, a sort of *self-regulation*. The company policies tend to draw on internationally recognized instruments and many companies referred to previously mentioned instruments, such as the Global Compact or the OECD Guidelines when formulating their policies.¹¹

Even though the development constituted an important progress for the area of business and human rights, severe flaws in self-regulation approach were noted. The system with self-regulation made it convenient for companies to choose what rights to recognize and they didn't necessarily choose to recognize the rights on which they might have the greatest impact. The language of the policies also proved to create a problem, even though references to other instruments were made the language was rarely identical. And the watered down interpretations made it hard, both for the companies and the public to assess the performances against the stated commitments. Another severe flaw was that these voluntary commitments could not be enforced, in case the company disregarded it.¹² Critics claimed that the proliferation of these voluntary initiatives allowed for companies to subscribe to different initiatives and create an advantageous image, without actually perform any change of core principles or practices.¹³

As a result of the criticism and the escalating reports of corporate human rights abuses, binding human rights obligations on companies were being called for. As a response to these demands the subcommission to the Human Rights Commission set up an expert group on business and human rights in 1998. In 2003 they produced "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (Draft Norms).¹⁴ The Draft Norms were written as if they set out legally binding obligations, and were described as a reflection of already existing obligations. The position that the Draft

¹⁰ UN Global Compact, official homepage: <http://www.unglobalcompact.org/AboutTheGC/index.html>.

¹¹ SRSG Report, A/HRC/4/035, 19 Feb 2007 p.18ff.

¹² SRSG Report, A/HRC/4/035, 19 Feb 2007 p.20ff.

¹³ Geoffrey Chandler *The evolution of the business and human rights debate*, p. 26.

¹⁴ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, Aug. 26, 2003.

Norms suggested, that the body of human rights law already applied directly to companies, was highly endorsed by human rights advocates and highly opposed by most companies. This position received a lot of criticism for lacking support in international law.¹⁵ Therefore the governmental representatives within the Human Rights Commission declined to adopt the Draft Norms and stated that they had no legal standing.¹⁶

Even so, the Commission wanted to continue investigating the issue of business and human rights in order to keep the question on the agenda and find better ways of governing the area. For that reason the Commission requested that the UN Secretary-General appointed a Special Representative (SRSG) on the issue of human rights and transnational corporations and other business enterprises. The request was approved and in 2005 John Ruggie was appointed SRSG for business and human rights.¹⁷ The final result of his mandate is the UN Guiding Principles on Business and Human Rights. The Human Rights Council endorsed the UN Guiding Principles in 2011, with the expectation that it will establish a common global platform for actions regarding business and human rights.¹⁸

The history of business and human rights did not end in 2011, quite contrary the importance of the area seems to be growing steadily. The recent examples of Swedish companies associated with human rights infringements show that the area is of immediate interest and importance also for a country with the reputation and self-image of being a defender of the universal human rights. The allegations of the connections to human rights violations have received attention, the business actors have been criticised and the violations condemned from a moral point of view. Still there are questions to discuss from a legal perspective, and in particular with regard to the international principles concerning business and human rights.

¹⁵ Knox, John H *The Ruggie Rules: Applying Human Rights Law to Corporations* - In *The UN Guiding Principles on Business and Human Rights: Foundation and Implementation* edited by Radu Mares (2012) p. 53f.

¹⁶ Knox, John H *The Ruggie Rules: Applying Human Rights Law to Corporations*, p. 61.

¹⁷ Ruggie, John *Business and Human Rights: The Evolving International Agenda*, p. 821.

¹⁸ HRC Resolution 17/4: *Human rights and transnational corporations and other business enterprises*, A/HRC/RES/17/4, 6 July 2011.

1.2 Purpose and Research question

The purpose of this thesis is to further investigate the responsibility for the state and the business actor in these situations to determine whether their actions and/or omissions could be criticised for failing to meet international standards of business and human rights.

The thesis will focus on the example of Sweden and the AP-funds. The choice of subjects for this investigation is motivated by the fact that the AP-funds are actors with a considerable influence, as they manage a large fund capital and invest in numerous companies around the world. The potential of the AP-funds to impact the enjoyment of human rights, for better or for worse, must therefore be considered as significant. It is also actors with a very close connection to the State and the Swedish citizens, which should imply a strong policy rationale to ensure respect for human rights. However, the responsibility of the State is equally important and both the state responsibility to protect and the corporate responsibility to respect human rights will be addressed.

To fulfil the purpose of the thesis and further investigate the responsibilities of these actors from a business and human rights aspect, the point of departure will be the UN Guiding Principles on Business and Human rights adopted in 2011. There are of course several adequate instruments of business and human rights that could be used as a benchmark to evaluate the actions of the subjects in question. Nonetheless, the UN Guiding Principles enjoys a particular legitimacy from being unanimously endorsed by the Human Rights Council, this being the first time the UN member states adopted a common position for addressing the risk of adverse human rights impact linked to business activities. The instrument also represents the latest progress in the area of business and human rights as described above. Furthermore, it is the only set of principles that incorporates the shared but differentiated responsibilities of states and business actors in the same instrument, which suits the aim of this thesis.

With Sweden and the AP-funds as the subjects for investigation and the UN Guiding Principles as the point of departure from which the investigation will be conducted, the research question to be answered in this thesis is: *Do Sweden and the AP-funds fulfil the UN Guiding Principles on Business and Human Rights?*

1.3 Material and Method

To answer the research question a case study will be conducted. This thesis mainly uses a traditional legal method and investigates Sweden's and the AP-funds' compliance with the provisions of the UN Guiding Principles regarding the State duty to protect human rights and the corporate responsibility to respect human rights.

The UN Guiding Principles is an instrument with the aim of guiding the conduct of states and business actors to help them establish efficient policies and measures to address issues of human rights. The focus of the case study will therefore be the legislation and policies governing the AP-funds and their human rights considerations, and the evaluation concerns the instruments and measures taken to address adverse human rights impacts rather than the actual result. The analysis does not contain any empirical studies of the outcome of the process although two examples of actual cases and the measures taken by the Funds with regards to these situations are described.

The analysis of Sweden's compliance with the principles in Pillar I of the UN Guiding Principles is based on legislation, preparatory works and official policy documents that concern the AP-funds. As always when evaluating Swedish legislation, the preparatory works (*travaux préparatoires*) is an important source that provides a foundation for the analysis of the legislation. The preparatory works in this case are important for the governing of the AP-funds and will be included in the case study.

The point of departure for the analysis of the AP-funds is primarily the official ownership policies of the Funds. The annual reports of the Funds together with the reports from the Funds' Ethical council, where reports regarding their work with ethical considerations are incorporated have also been analysed.

1.4 Delimitations

There are many aspects from which the legal responsibility of the state in these situations could be discussed. The aim of this thesis is however to examine the question from a business and human rights perspective, which means that state responsibility on a more general level

will not be discussed. I would therefore like to make it clear that even though the “ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts” will be mentioned, I will not go further and try to conclude if the human rights infringements that have been associated with the AP-funds could be defined as internationally wrongful acts of Sweden, since that would go beyond the purpose of this thesis.

Another important delimitation of this thesis is that the provisions in Pillar III of the UN Guiding Principles won't be a part of the analysis conducted. The third pillar contains provisions regarding the State's duty to ensure access to effective remedy, and forms an important part of the instrument that is the UN Guiding Principles. The reason for omitting this pillar is that these provisions are only applicable if the human rights abuses have occurred within the territory of the state.¹⁹ In the case of Sweden and the AP-funds, the violations of human rights occur almost exclusively outside the territory of Sweden and the provisions in Pillar III are therefore not applicable to the issue in question.

The sixth AP-fund will also be left out of the analysis. AP 6 has a different investment strategy and invests almost entirely in companies in the Nordic region, primarily in Sweden.²⁰ It is also the smallest fund in terms of fund capital. These are all factors that make an evaluation of the conduct of AP 6 less interesting for the purpose and aim of this thesis. Furthermore the possibility of conducting this kind of evaluation is limited since there is not any policy statement or other material to analyse, the short sections describing strategy and mission on the official homepage do not mention ethical considerations either.²¹ As a consequence of this the AP 6 will not be featured in this thesis.

¹⁹ See *Guiding Principles on Business and Human Rights* – Principle 25.

²⁰ *Strategy of AP-fund 6* <http://www.apfond6.se/en/English/Mission-and-strategy/>.

²¹ <http://www.apfond6.se/en/English/Mission-and-strategy/>

2. The subjects; Sweden and the AP-funds

The area of business and human rights has diverged from the traditional human rights regime since the start, by introducing the idea of private entities as duty-bearers for human rights. This development has been lauded for opening up opportunities to counter the adverse effects on human rights that business activities may cause, but it has also been criticized for offering an easy escape for laggard states that are unwilling to take their responsibility. Therefore current research underlines the importance of keeping both actors in the picture when discussing these issues, and a shared but differentiated responsibility is most commonly advocated. From this perspective it has been a conscious decision to scrutinize the actions of both state and business actor for the purpose of this thesis.

Therefore this chapter will present the two actors of interest for this investigation, namely Sweden and the AP-funds. The first section of the chapter will give a brief introduction to some of the human rights commitments undertaken by the Swedish State. The description will focus on the area relevant for this investigation - business and human rights - and regulations and policies for human rights when operating abroad. This part of the chapter will also provide a couple of examples of companies questioned for not respecting human rights in their operations outside of Sweden.

The following section will give an introduction to the AP-funds and their operations. First of all the status of the AP-funds will be discussed, since this provides an important foundation for the case study to come. The section will also describe the role of the Funds in the pension system and how the Funds operate and invest. In connection to this, the debate regarding ethical considerations in these operations will be mentioned. To illustrate the problem from which the current discussion derive, the chapter will end with a description of the human rights infringements that has taken place in connection with two of the projects that the AP-funds have invested in.

2.1 Sweden in focus

Sweden prides itself with being deeply committed to the protection and promotion of human rights. Being a long-standing supporter of the UN work on human rights, in both political and economic terms, Sweden enjoys a good reputation on human rights protection around the world.²² Sweden also declares to be a strong defender on the international human rights system and is a State party to the core UN conventions on human rights, as well as the regional European conventions.²³

Regarding the specific area of business and human rights the government has expressed an intention to promote business and human rights internationally. In the candidature to the Human Rights Council for the period of 2013-2015, business and human rights is presented as one of nine focus areas that Sweden would endorse, if being elected to the council.²⁴

On the national level business and human rights is being acknowledged as an important issue. The Delegation for Human Rights in Sweden, appointed by the Swedish Parliament, conducted between 2006-2010 investigations with the mission to present proposals on how to provide continued support for the work towards ensuring respect for human rights in Sweden. In the final report from the Delegation, the business community is recognized as an important actor to protect and promote human rights. Among other things the Delegation propose the government to take practical measures to implement the “Protect, Respect, Remedy: A Framework for Business and Human Rights”²⁵, and to earmark sufficient means for this assignment.²⁶

Human rights are furthermore a prioritized issue in Swedish foreign policy. Promoting and increasing respect for human rights globally is set out as a goal in the government statement for human rights in Swedish foreign policy. To achieve this goal the government stresses the importance of coherent and effective policy that incorporates human rights in all areas of

²² *Candidature of Sweden to the Human Rights Council*, A/67/124, 2012-07-02, p. 2.

²³ *Candidature of Sweden to the Human Rights Council*, A/67/124, p. 6, see also government homepage on human rights, www.manskligarattigheter.se, for the full list of ratified conventions.

²⁴ *Candidature of Sweden to the Human Rights Council*, p. 5.

²⁵ *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5 (2008).

²⁶ SOU 2010:70 *Ny struktur för skydd av mänskliga rättigheter*, p. 461f.

foreign policy. According to this statement, the importance of human rights in development-, security-, and trade policy is steadily increasing and is being brought out as an important aspect in migration- and environmental policy.²⁷

The government declares to be working consistently to improve their policy for promoting human rights through further collaboration and coordination between different policy areas. For that reason Sweden, as the first country in the world, has established a policy for equitable and sustainable development that should apply to all policy areas.²⁸ The policy known as “Shared Responsibility: Sweden’s policy for Global Development” was first presented in a government bill in 2003 and renewed in 2008.²⁹ The policy is based on the perception that the only way of achieving equitable and sustainable development is for every policy area to work towards the same goals and with the same values. Hence, one of the fundamental principles is that a rights perspective based on international human rights conventions shall permeate all policy areas, not only development and aid policy but also areas such as international trade policy. The policy for global development also emphasizes the importance of a closer collaboration with actors in all sectors of society, including the business sector.³⁰

As apparent from the above-mentioned extracts of different policy documents and political statements, both the issue of business and human rights and the importance of respecting human rights when operating outside the national territory, have been discussed and to some extent incorporated in current policies. But despite the expressed ambitions and policies there are recent examples of situations where the actual effects seem scarce. During the last year several Swedish companies have been criticized for infringing human rights when operating outside the Swedish border and among these are a number of state-owned companies. This seems to indicate a disconnection between the international reputation of Sweden and the actual practices of its companies.

²⁷ Regeringens skrivelse 2007/08:109 *Mänskliga rättigheter i svensk utrikespolitik*, p. 7.

²⁸ Regeringens skrivelse 2007/08:109, p. 7f.

²⁹ Proposition 2002/03:122 *Gemensamt ansvar: Sveriges politik för global utveckling*, and Regeringens skrivelse 2007/08:89 *Sveriges politik för global utveckling*.

³⁰ Proposition 2002/03:122, p. 1f.

TeliaSonera is probably the company that has received most attention in the press. This telecom operator, in which Sweden has a 37 percent stake, offers its services in the Nordic and Baltic countries, but also in the Eurasian markets, including Russia, Belarus and Turkey.³¹ In April 2012 Swedish television broadcasted a TV-reportage, revealing how the regimes in Belarus, Azerbaijan and Uzbekistan got access to information from mobile operators owned by TeliaSonera. The regimes use this type of information to track and listen in to members of the opposition, in a way that clearly violates the rights to freedom of expression and privacy.³² Throughout the fall more negative publicity has been rendered to TeliaSonera, this time due to allegations of bribery, money laundering and human rights infringements in Uzbekistan.³³

Another example of a Swedish state-owned company that has been accused of contributing to human rights infringements during the last year is Swedfund. Defined as a bilateral Development Finance Institution, Swedfund is wholly owned by the Swedish government and make high-risk investments in developing countries around the world.³⁴ According to the webpage Swedfund's mission is "*to help in enabling poor people to improve their lives*" and "*to bring about strengthened democracy, equitable and sustainable development*".³⁵ The fulfilment of this mission has been questioned, for example with regard to investments made in Sierra Leone. In November 2011 Swedfund invested 90 million crowns from the Swedish development aid budget in the company Addax Bioenergy to finance an ethanol project in Sierra Leone. During 2012 Addax has been accused of land grabbing, due to the poor compensation given to farmers letting out their land to the project, and of violating the right to food and water for people in the area.³⁶ Swedfund has during the year also been criticized for investing in companies that do not respect fundamental worker's rights.³⁷

The Swedish AP-funds also qualifies for this list of business actors connected to the State and involved in operations or projects criticized for violating human rights. The following part of

³¹ *About TeliaSonera* - <http://www.teliasonera.com/en/about-us/teliasonera-in-brief/>.

³² *Uppdrag granskning: TeliaSonera i hemligt samarbete med diktaturer*, television reportage (2012).

³³ *Transcript of statement from the CEO of TeliaSonera*, TeliaSonera official homepage (2012).

³⁴ *About Swedfund* - <http://www.swedfund.se/en/about-swedfund/>.

³⁵ *ibid.*

³⁶ *Ekot: Svenska investeringar används till land grabbing*, radio broadcast (2012).

³⁷ *Ekot: Statliga Swedfund kränker arbetsrätten*, radio broadcast (2012).

this chapter will be dedicated to the Funds, their role in the Swedish pension system, their mission and their investments.

2.2 The AP-funds

Being the biggest trustees of Swedish pension payments, the six state-owned AP-funds play an important part in the national income pension system. The AP-funds, or Allmänna Pensionsfonderna (the public pension funds) invest pension payments from all Swedish income earners to make the pension buffer grow and provide pension disbursements for generations to come. Undoubtedly, this mission comes with a huge economic responsibility to safeguard the income of current and future pensioners. An urgent question that remains to be answered is to what extent a responsibility for making sure that the operations and investments are made with consideration to human rights also follows with the mission.

2.2.1 Status of the AP-funds

To address questions of responsibility and draw conclusions on fulfilment of obligations one must first conclude which obligations that are of relevance. One important factor for the definition of relevant obligations is what type of actor that is in question – since the different obligations have different actors as addressees. The definition of a subject belonging to a certain group of actors does not generally constitute a difficulty. However, the case of the AP-funds is not as straightforward. The aim with this section is therefore to clarify the status of the AP-funds.

The operations and organization of the Funds are exclusively regulated in the Swedish Public Pension Funds Act (2000:192) and The Sixth AP-funds Act (200:193). In accordance with these laws, the government appoints a board to each fund.³⁸ Each of these boards constitutes a government agency.³⁹ The six AP-funds represent a distinct category among the government agencies and differ from the majority in the way they are regulated. Whereas government directives are used to regulate most government agencies, the regulation of the AP-funds is done exclusively through legislation and the autonomy of the Funds is of great importance. In the preparatory material of the Public Pension Funds Act it is stated that the board should

³⁸ 3:2 § The Swedish Public Pension Funds Act (2000:192) and 2:1 § The Sixth AP-funds Act (2000:193).

³⁹ Proposition 1999/2000:46 *AP-fonden i det reformerade pensionssystemet*, p. 50.

have the full responsibility for the investment operations and that the government should not be given the possibility to control or direct the funds through instructions, appropriation directions or by earmarking money.⁴⁰ Furthermore, the assets of the Funds cannot be taken in use for any other purpose than the one provided for in the law, and to change this purpose the Parliament must agree to change the law.⁴¹

The definition of the AP-funds as government agencies means that the Funds constitute a part of the organization of the State. Establishing the Funds as a part of the State in national law will also have implications within international law. States are regarded as the primary subject and duty-bearer within international law and human rights law. Therefore treaties and conventions generally contain provisions with direct obligations for states. The fact that the AP-funds are a part of the State would consequently mean that the Funds are obliged to follow the conventions ratified by the Swedish state.

Although the definition of the AP-funds as a part of the State seem to place additional obligations on the Funds this classification might prove to have more implications for the State than the actual Funds. One such implication of the Funds being defined as a government agency and a part of the State is the close connection that it establishes between the actions of the Funds and the State, a connection that could lead to legal consequences for the State. According the “ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts” an internationally wrongful act of a State consists of an act or omission attributable to the State that constitutes a breach of an international obligation of the State.⁴² According to article 4, actions taken by organs of the State shall be considered an act of the State, where organs of the State includes any entity that has that status in the internal law of the State.⁴³ The commentary makes it clear that this cover any organ whether it exercises legislative, judicial, executive or any other functions. This includes all the individual or collective entities which make up the organization of the State and act on its behalf.⁴⁴ The actions of the AP-

⁴⁰ Proposition 1999/2000:46, p. 121f.

⁴¹ Proposition 1999/2000:46, p. 50

⁴² Article 2, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

⁴³ Article 4, ILC Draft Articles on Responsibility of States.

⁴⁴ Commentary to Article 4, ILC Draft Articles on Responsibility of States, p. 40f.

funds are therefore to be seen as attributable to the State, which means that actions carried out by the Funds could entail international responsibility of the State.⁴⁵

Government agency is not the only label than may be used to describe the AP-funds. The Funds do at the same time constitute a business actor, belonging to a group commonly termed “institutional investors”. The group of institutional investors include insurance companies, pension funds, investment banks and managers and sovereign wealth funds. These are all entities managing financial resources to invest in equities, bonds and other investment products.⁴⁶

The role of the AP-funds as business actors or institutional investors is further analysed in “The Policy for governing and evaluation of the AP-funds”. This policy document sets out the principles for the annual report and evaluation of the AP-funds that the government conducts.⁴⁷ The first part of the policy starts out with defining the characteristics of the Funds and compares the Funds with State-owned companies. Even though the funds do not constitute own legal objects separated from the State as the State-owned companies, there are many common characteristics. As in the case of “regular” or state-owned companies, the boards of the Funds have operational autonomy and carry the responsibility for the management of the Fund. The way the boards are responsible for the financing of the Funds through the resources managed by the Funds is similar to the way an insurance company operates. What distinguishes the Funds from a “regular” company is that these resources have not been acquired on a competitive market; instead the Funds are financed with public means. However, the investment operations are downright business activities and do not differ from the investment procedures of “regular” institutional investors.⁴⁸

By dissecting the whereabouts of the AP-funds I want to ensure an understanding of the complexities of this actor that may represent different categories depending on what aspect

⁴⁵ Compare Article 1, ILC Draft Articles on Responsibility of States.

⁴⁶ Hachez, Nicolas and Sullivan, Rory *Human Rights Norms for Business: The missing piece of the Ruggie Jigsaw* - In *The UN Guiding Principles on Business and Human Rights: Foundation and Implementation* edited by Radu Mares (2012) p. 217f

⁴⁷ *Policy för styrning och utvärdering av AP-fonderna*, Appendix 1 to Regeringens skrivelse 2011/12:130 *Redovisning av AP-fondernas verksamhet t o m 2011*.

⁴⁸ *Policy för styrning och utvärdering av AP-fonderna*, Appendix 1 to Regeringens skrivelse 2011/12:130, p. 72f.

you look at. From a legal point of view the Funds are established as government agencies, and as such organs of the state. Nevertheless, with regard to the operations of the Funds they qualify as institutional investors, and as such business actors. This understanding of the Funds is crucial for understanding the way the case study will be conducted. For the purpose of this thesis, the conduct of the AP-funds will be analysed in the function of a business actor. Whereas the analysis of the responsibility of the State will include the actions taken by the whole organization of the State. The fact that the AP-funds are organs of the state is still of importance since this makes their actions a direct concern of the State.

2.2.2. The role of the AP-funds in the pension system

The Swedish national pension system is divided into two types of pension insurances, the first one guarantees a basic pension for persons settled in Sweden based on the domicile principle. The other, and more significant part is the ATP-pension (Allmänna tilläggspensionen) where the pension disbursements are based on a person's income throughout his or hers working life.⁴⁹ The ATP-pension is then subdivided in two parts, the income pension and the premium pension. The income pension works as a distribution system where outgoing pensions are funded on an on-going basis by pension contributions from income taxes, whereas the premium pension is financed by money funds consolidated during the vested period.⁵⁰

The individual contributes to the national pensions system with a total of 18,5 per cent of his or her pension-qualifying income, 16 per cent goes to the income pension system and 2,5 per cent to the premium pension system.⁵¹ AP-fund 1-4 and AP-fund 6 all form part of the income pension system, whereas the seventh AP-fund is a part of the premium pension system. (Due to a re-structure in 2000 AP-fund 5 no longer exist.)⁵²

During periods when worker contributions to the income pension system exceed the amount to be paid to the pensioners, the surplus is allocated to AP-funds 1, 2, 3, and 4. The funds manage the money and build up a *buffer capital* that is used during periods when

⁴⁹ Proposition 1999/2000:46 p. 55f.

⁵⁰ Proposition 1999/2000:46 p. 55f.

⁵¹ *About the AP-funds* – <http://ap1.se/sv/Om-AP1/Var-roll-i-pensionssystemet/>.

⁵² Proposition 1999/2000:46 p. 2.

disbursements exceed contributions.⁵³ The 2,5 per cent of the pension-qualifying income that goes to the premium pension system is being managed according to the individual's own choice. The seventh AP-fund manages the money of investors that does not actively select a pension fund manager or who want a government-managed fund.⁵⁴ By the end of 2011 AP 7 represented 2,8 million premium pension savers and managed their savings.⁵⁵

The AP-funds manage a large fund capital; by the 30th of June 2012 the total assets of the six funds amounted to more than 1000 billion Swedish crowns.⁵⁶ With this capital the Funds constitute a powerful actor on the international investment market. In 2008 the Funds were estimated to be the sixth largest state pension fund in the world.⁵⁷

The common mission of the AP-funds is to manage the fund capital in such a way as to generate the highest possible benefit for the pension system.⁵⁸ In order to achieve this mission the assets of the Funds are placed in a global portfolio consisting of equities, fixed income securities and alternative investments that include real estate, private equity funds and hedge funds.⁵⁹

2.2.4 Current debate about the AP-funds and their ethical guidelines

Ethical guidelines and adverse human rights impact of investments of the AP-funds have been recurring topics of conversation during the last years. In 2008 a state investigation presented the results from an evaluation of how the Funds lived up to their obligations to take environmental and ethical considerations, including human rights, into account in their investment activities.⁶⁰

The investigation committee considered the AP-funds to have dealt, under the circumstances, commendably with these issues, but also offered several propositions for improvement. Some

⁵³ *About the AP-funds* – <http://ap1.se/sv/Om-AP1/Var-roll-i-pensionssystemet/>.

⁵⁴ *About AP-fund 7* – <http://www.ap7.se/sv/Om-AP7/Var-uppgift/>.

⁵⁵ Regeringens skrivelse 2011/12:130 p. 29.

⁵⁶ See semi-annual reports of the AP-funds.

⁵⁷ SOU 2008:107 *Etiken, miljön och pensionerna*, p. 38.

⁵⁸ 4:1 § Swedish Public Pension Acts (2000:192).

⁵⁹ *About the AP-funds* – <http://ap1.se/sv/Om-AP1/Var-roll-i-pensionssystemet/>.

⁶⁰ SOU 2008:107 *Etiken*.

of the more significant ones included a proposition to incorporate ethical and environmental provisions in the Public Pension Funds Act and a call for the Funds to define a set of principles or basic values on which to base their activities incorporating ethical considerations. The committee also proposed that the sufficient resources should be set aside to insure quality in work with these issues.⁶¹ In their annual report to the parliament about the AP-funds, the government supported the propositions directly addressed to the AP-funds, while the proposition regarding a change of the law was postponed.⁶²

In 2011 an investigation conducted by the Swedish parliament's independent investigation service (Riksdagens Utredningstjänst) brought new attention to the issues of human rights infringements in companies that the AP-funds invest in. The results of the investigation were presented in a report called "The investments of the AP-funds" ("AP-fondernas investeringar") and showed that the holdings of the AP-funds included several companies that are known to violate human rights, are accused of unethical business operations or have been blacklisted by other institutional investors.⁶³

Following the report several NGOs launched campaigns to raise public awareness to the question and influence the politicians to address the problem, among these FIAN Sweden, Latinamerikagrupperna and Swedish Fellowship of Reconciliation.⁶⁴ In September 2011 Latinamerikagrupperna published a report concerning the adverse effects on human rights associated with the AP-funds.⁶⁵ Another report focusing on the AP-funds investments in companies owning gold mines in Latin America, and the human rights violations associated with this industry was published the same month by the independent non-profit organization Swedwatch.⁶⁶

Parallel to these actions conducted by the civil society the government appointed a Buffer Fund Inquiry to evaluate the legislation surrounding the AP-funds. The mission for the

⁶¹ SOU 2008:107 p. 17f.

⁶² Regeringens skrivelse 2008/09:130 *Redovisning av AP-fondernas verksamhet t o m 2008* p. 74f.

⁶³ Swedwatch report #42 *Rena Guldgruvan? AP-fondernas investeringar har en smutsig baksida*, (2011) p.3.

⁶⁴ Campaign page - <http://globalportalen.org/kampanj/uppmanna-regeringen-och-ap-fonderna-att-investera-etiskt-och-klimatsmart>.

⁶⁵ Latinamerikagrupperna: *AP-fondernas ohållbara investeringar*, September 2011.

⁶⁶ Swedwatch report #42 (2011).

Inquiry was primarily to provide conditions to improve the cost-efficiency for the management to buffer capital of the pensions system, but a part concerning the question of ethical guidelines has also been incorporated in the evaluation.⁶⁷ Unlike the committee behind the 2008 report, the Inquiry did not consider that ethical provisions should have a feature in the legislation.⁶⁸

The Inquiry has received criticism from several NGOs for not addressing the issue of ethical guidelines properly and in a debate article published at SVT Debatt the 24 August 2012 the president of Latinamerikagrupperna argued that consideration of human rights and the environment must be upgraded to have the same significance as the goal of effective yield. Therefore he urged the members of the Parliament's pension committee to ensure that these changes are made when changing the legislation.⁶⁹

This question is also subject to discussion in the Parliament. Vänsterpartiet [The Left Party] and Miljöpartiet [The Green Party], both of which have been previously very active in this question, have recently submitted motions with propositions to strengthen the importance of ethical and environmental considerations in the operations of the AP-funds.⁷⁰ Whether this will lead to a change of the legislation and a shift from the current situation where economic considerations are to be prioritized over ethical and environmental considerations, to the suggested equal importance of these considerations remains to be seen. However the question has engaged and involved several actors and persons and remains important.

The following section will present two of the situations that have given rise to the debate, situations where the investments of the AP-funds have been associated with human rights infringements.

⁶⁷ SOU 2012:53 *AP-fonderna i pensionssystemet, effektivare förvaltning av pensionsreserven* p. 3ff.

⁶⁸ SOU 2012:53 p. 275ff.

⁶⁹ *AP-fondernas etikarbete måste bli bättre*, Article at SVT Debatt, 2012-08-24.

⁷⁰ See for example Motion 2012/13:Fi225 and Motion 2012/2013:Fi206.

2.3 The AP-funds and Human Rights infringements

The aim with this part of the thesis is to illustrate the reality from which the debate on business and human rights derives. The two present cases constitute representative examples of the adverse effects that business operations may have on the enjoyment of human rights.

Both examples are taken from the gold mining industry in Latin America and are associated with the AP-funds through the investments made in the companies owning the mines and running the operations. This description is a compilation of human rights infringements reported in connection to the mining operations. How the AP-funds have responded to these reports and whether the measures taken have been sufficient will be discussed in the case study.

2.3.1 Goldcorp and the Marlin mine

The Marlin mine is located in the western highlands of Guatemala, the poorest and most populated province in the country. The mine is owned by the Canadian company Goldcorp through its subsidiary Montana Explorer.⁷¹ All AP-funds except AP 6 currently holds a substantial amount of equities in Goldcorp⁷², and has through these investments become associated with the human rights abuses taking place in Guatemala.

The mine was established in 2004 with financial help from IFC. The loan was granted on the condition that indigenous rights would be respected. The mine began operating in 2005 and extract gold and silver through a combination of open pit and underground mine technology. The gold and silver are then leached using a cyanide process.⁷³ Since 2012 open pit operations ceased and the mine is now an underground operation only. Even so Goldcorp has claimed that exploration activities indicate that there is plenty of minerals yet to be extracted underground, which will extend the life of the mine. The corporation also plans to extend its operations to other nearby areas.⁷⁴

⁷¹ Swedwatch report #42 p. 40.

⁷² See the AP-funds' lists of holdings from 2012-06-30.

⁷³ *Human Rights assessment of Goldcorp's Marlin mine*, May 2010, p.9.

⁷⁴ *Goldcorp's official webpage* - <http://www.goldcorp.com/English/Unrivalled-Assets/Mines-and-Projects/Central-and-South-America/Operations/Marlin/Overview-and-Operating-Highlights/default.aspx>.

The Marlin mine has been controversial since the start and surrounded by allegations of human rights abuses. A majority of the population in the area affected by the mine belong to different indigenous groups. Together with the Catholic Church and environmental organizations they protest against the human rights abuses and the environmental damage that are the result of the mine.⁷⁵

The criticism towards Marlin mine concerns a wide range of areas. According to an independent human rights impacts assessment (hereafter HRIA) of the mine carried out in 2009, Montana Explorer failed to respect the rights of indigenous people by not involving the indigenous groups in the area in a prior consultation. The right to prior consultation is a key element of indigenous peoples' rights closely connected to the rights to decide their priorities for development and the right to natural resources pertaining to their lands.⁷⁶ These rights are all incorporated in the ILO Convention 169 – Indigenous and Tribal peoples Convention, to which Guatemala has been a ratified party since 1996.⁷⁷

Several cases of health problems among the people living close to the mine have also been reported since the inception of the mine operations. The HRIA refrained from stating the situation to be an infringement of the right to health – due to the lack of public health information and insufficient diagnostic capacity. Instead the HRIA levelled harsh criticism against Montana Explorer for a lack of due diligence since the company hasn't collected necessary information to determine whether the right to health and the right to food have been infringed.⁷⁸ Nonetheless, a number of smaller studies made by other organizations have demonstrated negative health effects on people living in the area close to the mine.⁷⁹ The negative effects on the health is closely connected to the reports on the water downstream from the mine being polluted, a situation that constitute an infringement to the right to water.⁸⁰

⁷⁵ Swedwatch report # 42, p. 41.

⁷⁶ *Human Rights assessment of Goldcorp's Marlin mine*, p.12

⁷⁷ International Labour Organization, *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989.

⁷⁸ *Human Rights assessment of Goldcorp's Marlin mine*, p.15

⁷⁹ Swedwatch report # 42, p. 43.

⁸⁰ COPAE: *Second Annual Report on the Monitoring and Analysis of the Water Quality*, 2009.

Furthermore people engaged in campaigns against the mine have been subject to persecution, harassments and threats. There have been several confrontations where the mine's private security guards have been involved. On at least two occasions the security guards have killed people opposing the mining operations.⁸¹

The list of human rights infringements could be made even longer, among other things a considerable number of infringements of labour rights and land grabbing have also been reported.⁸² And when making the assessment regarding infringements of right to own property and the right to adequate housing the HRIA concluded that "While recent studies do not definitely establish that the mine has caused the damage, they eliminate all other reasonable explanations."⁸³

In 2010 the number of reports and allegations of human rights abuses made the Inter-American Commission of Human Rights (IACHR) call to the Guatemalan state and Goldcorp to immediately suspend mining activities. The decision came as a response to a petition filed by the communities surrounding affected by the Marlin mine and the Commission recommended that activities would be suspended until it could issue a decision on the merits of the petition. After the decision the Guatemalan government submitted a declaration that they would take care of the problem and asked the IACHR to lift its recommendation of suspension, which the IACHR did in December 2011. All issues are far from solved and the work to ensure the enjoyment of human rights in the area continues.⁸⁴

2.3.2 Newmont and the Yanacocha mine

Another gold mine in Latin America infamous for conflicts and human rights abuses is the Yanacocha mine. Located in the north part of Yanacocha it is the largest gold mine in Latin America. The mine is a joint venture and the largest owner is Newmont Mining, a company from the United States that owns 51,35 per cent. The Peruvian mining company Cia de Minas

⁸¹ OHCHR: *Informe del Relator Especial de Naciones Unidas sobre los derechos de los pueblos indigenas James Anaya*, (2011).

⁸² *Human Rights assessment of Goldcorp's Marlin mine*, p. 17ff.

⁸³ *Human Rights assessment of Goldcorp's Marlin mine*, p.15.

⁸⁴ *Annual report of the Ethical council* (2011), p. 16f.

Buenaventura owns 43, 65 per cent and the IFC owns the last 5 per cent.⁸⁵ All AP-funds, once again with the exception of AP 6, have invested and own equities in Newmont mining. AP 1 also has holdings in Cia de Minas Buenaventura.⁸⁶

Yanacocha extracts gold from open pit operations after which the gold is leached through a cyanide process. The operations begun in 1993 and the mine has an estimated lifetime of 30 years. Simultaneously another mining project, Minas Conga, is being constructed right next to Yanacocha. The production is estimated to start in 2014.⁸⁷

As is the case with several mining operations, water has been a constant issue of conflict since the conception of the mine. The mining operations in Yanacocha require enormous amounts of water, and in this area the water resources were already scarce. Peru is one of the countries in Latin America considered most vulnerable to the lack of water that is an effect of the climate changes. The shortage of water strikes hard against the surrounding communities and the negative effects on the living conditions since the inception of the mine have made many people leave the area.⁸⁸

In 2010 the UN General Assembly adopted a resolution recognizing the human right to water and sanitation. The resolution acknowledges that access to clean drinking water is essential to realization of all human rights.⁸⁹ The inhabitants in the area around Yanacocha have lost this access as a result of the mining operations. Local authorities have confirmed that there have been outlets of acidic water from the mine on several occasions. Fish and frogs that used to live in the watercourses are gone and the farmers testify that their animals have become sick after drinking the water. The company itself confirms that some of the water that has been used in the mining operations and is then being let out is not suitable for drinking and should only be used for the agriculture – a practice allowed according to Peruvian legislation.⁹⁰

⁸⁵ *Yanacocha official homepage* - <http://www.yanacocha.com.pe/la-compania/quienes-somos/>.

⁸⁶ See lists of holdings of the AP-funds, 2012-06-30.

⁸⁷ Swedwatch report #42 p. 25.

⁸⁸ Swedwatch report #42 p. 28.

⁸⁹ United Nations General Assembly Resolution *Right to Water and Sanitation*, A/RES/64/292, 3 August 2010.

⁹⁰ Swedwatch report #42 p. 25ff.

The company carries out controls in cooperation with local authorities but the confidence for these reports is low among the local population. On-going and previous independent studies show and have shown high contents of heavy metals in the water, which constitutes a serious risk to human health.⁹¹

Another major issue at the Yanacocha mine concerns the security and conflicts with the local inhabitants. There have been conflicts between the local inhabitants and the mining company ever since the beginning of the mining operations, many of them connected to the pollution and lack of water. In 2000 mercury from the mine leaked and poisoned more than a thousand persons in Choropampa in an accident that received much attention and led to a deeper mistrust against the company. The mercury accident became a starting point for the mobilization against the mine, a mobilization that has grown along with the plans of expansion of the mine.⁹²

The disagreements in themselves are not the issue of concern from a human rights perspective, but rather the way the company and the Peruvian government handle them. Opponents of the mine have on several occasions been harassed and threatened to life by security guards from Yanacocha. The threats against the catholic priest Marco Arana, famous for his commitment to the environment and resistance to the mining operations, were noticed and condemned by Amnesty International and Inter American Court of Human Rights.⁹³

The protests against the mine and the expansion of the mine have gathered hundreds and sometimes thousands of people in protest demonstrations. Police and security guards from Yanacocha have treated the demonstrators with violence and on more than one occasion demonstrators have been shot to death.⁹⁴ The recent expansion of the mine to the Conga area has given rise to massive protests. The situation has degenerated and the government has declared state of emergency in northern Peru three times since December 2011. Five protestors have been killed and 21 seriously injured in the course of the recent protests.⁹⁵

⁹¹ Swedwatch report # 42 p. 27.

⁹² Swedwatch report # 42 p. 29ff.

⁹³ Swedwatch report # 42 p. 35f.

⁹⁴ Swedwatch report # 42 p. 35.

⁹⁵ *Newmont mine on back-burner*, Article in Chicago Tribune, 23 August 2012.

The investments in companies like Goldcorp and Newmont is what has caused the criticism against the AP-funds. After this presentation of the subjects, the next chapter contains the case study that will investigate whether these associations with human rights infringements is due to a failure to meet international standards of business and human rights.

3. The Case study

In this chapter the case study will be carried out and by analysing the conduct of Sweden and the AP-funds an answer to the question posed in the introduction of the thesis will be sought.

The chapter is divided into three sections, where the first part gives a more thorough background to the instrument used as a benchmark in the case study, the UN Guiding Principles. The section describes the work of John Ruggie during his mandate as SRSG and the Framework and Guiding Principles that became the outcome of this mandate.

The second part is dedicated to the first Pillar of the Guiding Principles, the State duty to protect human rights. Under this headline Sweden's conduct will be analysed with the provisions of Pillar I as the point of departure. This analysis does not aim to assess the how well the State fulfils its duty to protect in a general sense, since this lies outside the purpose of the thesis. The focus is on the actions taken with regard to the AP-funds.

In the last part of the chapter the actions of the AP-funds concerning human rights considerations will be scrutinized to assess whether the Funds meet the requirements of Pillar II of the Guiding Principles.

3.1 The UN Guiding Principles

3.1.1 Protect, Respect and Remedy: A Framework for Business and Human Rights

When John Ruggie was first appointed SRSG in 2005 his initial mandate was to identify and clarify existing standards and practices. When this was accomplished in 2007 the Human Rights Council invited the SRSG to submit recommendations, based on the findings in his research. For this purpose the mandate was renewed for an additional year.⁹⁶

The SRSG described the absence of an authoritative focal point in the business and human rights debate as an obstacle for progress. The debate was flooded with claims and counter-claims. New initiatives emerged, involving diverse stakeholders, yet none of these efforts reached significant scale. As a result, laggards among States as well as companies could

⁹⁶ *Guiding Principles on Business and Human Rights*, A/HRC/17/31, 21 March 2011, p.3.

continue to avoid responsibility. After several multi-stakeholder consultations the SRSG draw the conclusion that even though the different stakeholder groups had disagreed on how an efficient governance regime should be formulated, they all expressed an urgent need for a common conceptual and policy framework.⁹⁷ Therefore Ruggie made only one recommendation in June 2008, that is, the Human Rights Council support the “Protect, Respect and Remedy” Framework, which he had developed. In its resolution 8/7 the Council unanimously endorsed the Framework, and by doing so provided the first authoritative focal point on the area.⁹⁸

The Framework rests on differentiated but complementary responsibilities and comprises three core principles; the State duty to protect against human rights abuses by third parties including business, the corporate responsibility to respect human rights, and the need for more effective access to remedies. The Framework is described as a dynamic system of preventive and remedial measures where each pillar is an indispensable component. In the words of the SRSG each pillar is essential; *“the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse.”*⁹⁹

3.1.2 The Guiding Principles: provisions, status and impact

In the same resolution that endorsed the “Protect, Respect and Remedy” Framework, the Human Rights Council also extended John Ruggie’s mandate until June 2011. His mission for this third phase of the mandate was to operationalize the framework, by providing practical and concrete recommendations for its implementation.¹⁰⁰ With the same inclusive approach that had been significant for the all work of the SRSG, through research and extensive consultations with all stakeholder groups, 31 Guiding Principles for Business and Human

⁹⁷ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, p.4.

⁹⁸ *Guiding Principles on Business and Human Rights*, p.3.

⁹⁹ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, p.4f.

¹⁰⁰ *Guiding Principles on Business and Human Rights* p.4.

Rights were developed. The Guiding Principles were unanimously endorsed by the Human Rights Council when presented in June 2011.¹⁰¹

The endorsement of the Guiding Principles is considered an important breakthrough for the area of business and human rights. John Ruggie himself said that the endorsement of the Guiding Principles “*will mark the end of the beginning, by establishing a common global platform for action on which cumulative progress can be built*”¹⁰² And the OHCHR stated that the endorsement “*...established the Guiding Principles as the global standard of practice that is now expected of all governments and businesses with regard to business and human rights.*”¹⁰³

However, the Guiding Principles’ normative contribution to the governance regime of business and human rights lies not in the creation of new international law obligations. The general principles of the instrument states that “*Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.*”¹⁰⁴ Instead the emphasis lies on *guiding* States’ and corporations’ behavior in operations with an impact on business and human rights, to adapt it to already existing standards. As Ruggie explains, the UN Guiding Principles contributes by elaborating on the implications of existing standards and practices for States and businesses; but also by identifying where the current regime falls short and how it should be improved.¹⁰⁵

Although being expectations and not obligations, the UN Guiding Principles can still prove important to area of business and human rights. Both the Framework and the UN Guiding Principles have gained extensive support from governments, businesses and civil society. The principles have been employed by individual governments and implemented by businesses

¹⁰¹ OHCHR: *The Corporate Responsibility to Respect Human Rights – An Interpretive Guide*, HR/PUB/12/02 (2012) p. 1.

¹⁰² *Guiding Principles on Business and Human Rights* p.5.

¹⁰³ OHCHR: *The Corporate Responsibility to Respect Human Rights – An Interpretive Guide*, p. 1.

¹⁰⁴ *Guiding Principles on Business and Human Rights* p.6.

¹⁰⁵ *Guiding Principles on Business and Human Rights* p.5.

moreover a number of organizations have drawn upon both the Framework and the UN Guiding Principles when developing their own initiatives on business and human rights.¹⁰⁶

One example is the OECD that in 2011 updated its Guidelines for Multinational Enterprises and added a new chapter regarding human rights and business, which is consistent with the UN Guiding Principles.¹⁰⁷ As previously mentioned these Guidelines are not legally binding either, so even though the provisions of the Framework and the UN Guiding Principles can be found within the Guidelines, that does not change the legal status of these provisions. However, a certain importance should be given to this fact. The ideas becoming generally accepted and recovered in several international instruments will undoubtedly stress the implementation and compliance.

Another actor showing interest in the UN Guiding Principles is the European Commission. The Commission has outlined the improvement of the European Union's (EU) CSR policy as one of the key concepts to achieve the EU's treaty objective of sustainable development and highly competitive social market economy.¹⁰⁸ In a communication from October 2011 the Commission presents a new strategy containing commitments for the Commission itself, as well as suggestions for enterprises, Member States and other stakeholder groups. One of the sections of the new strategy is dedicated to the implementation of the UN Guiding Principles. Among the measures for implementation is an intention to publish a report by the end of 2012 on EU priorities in the implementation of the UN Guiding Principles and after that issue periodic reports on the progress; a call to all Member States to develop national plans for the implementation; and the expectation that all European enterprises meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles.¹⁰⁹

¹⁰⁶ *Guiding Principles on Business and Human Rights* p.4, and OHCHR: *The Corporate Responsibility to Respect Human Rights – An Interpretive Guide*, p. 2.

¹⁰⁷ OECD Guidelines for Multinational Enterprises - 2011 Edition, p.3f.

¹⁰⁸ *A renewed strategy EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681, p. 3.

¹⁰⁹ *ibid.* p. 14.

3.2 Pillar I – State Duty to Protect

The first pillar of the Framework and the Guiding Principles contains the State duty to protect against human rights abuses. In the Guiding Principles the duty to protect is divided in two categories of obligations, to adopt regulations to prevent human rights abuses and to adjudicate abuses that take place. The adjudication of abuses is being addressed in the third pillar of the Guiding Principles. Hence, the first pillar primarily lists provisions focusing on the policy and regulatory functions of the State.

The State duty to protect represents the very core of the human rights regime and is, in a general sense, well understood and of little controversy. Whereas many claims about business and human rights are deeply contested, the state duty to protect is firmly established in international law, generally agreed to exist under customary international law and the treaty bodies to the core UN human rights treaties unanimously affirms that this duty require states to regulate and adjudicate abuses committed by non-state actors.¹¹⁰ Nevertheless, the understanding of how the duty should be fulfilled with respect to business activities is far less developed and the SRSG is of the opinion that it should be viewed as an urgent policy priority for governments.¹¹¹

There is however aspects of the State duty to protect that have caused a lot of controversy, one such issue is the question whether this duty is extraterritorially applicable. Due to the fact that the human rights infringements associated with the AP-funds have occurred outside the national borders of Sweden, the question of extraterritoriality is of great significance for this investigation. Many of the criticized investments are made in companies operating in developing countries where the state is either unwilling or incapable of fulfilling its duty to protect. In these governance gaps human rights abuses are very likely to take place. For that reason the question of States extraterritorial responsibility for human rights will be discussed, before continuing to the evaluation of Sweden's fulfilment of Pillar I in the UN Guiding Principles.

¹¹⁰ SRSG Report, A/HRC/4/035, 19 Feb 2007 p.5ff.

¹¹¹ *A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, p.9.

3.2.1 Is the State Duty to Protect extraterritorially applicable?

Human rights are universal rights - even so, the understanding of this concept has for long been quite one-sided. While all right-holders are considered to have rights everywhere based on international law, duty-bearers, that usually are states, do not have the same obligations with regard to individuals everywhere. This perception has recently been questioned by a number of actors in the international community, such as policymakers, NGOs, academics and international institutions. The question now being raised is whether states breach their legal obligations if their actions or omissions result in human rights violations abroad.¹¹²

There are a number of scholars advocating the existence of extraterritorial obligations, one of them is Sigrun Skogly. According to Skogly, the fact that States' extraterritorial obligations often have been ignored does not signify that these obligations are non-existent or lack a legal foundation. To prove this statement she draws on the UN Charter, concluding that in order to achieve "international co-operation", which is listed as one of the organisation's purposes in article 1(3), states are required to contribute outside their national territory. She also refers to articles 55 and 56, which provide that the UN shall promote universal respect for, and observance of human rights and fundamental freedoms for all and that this shall be done in joint and separate action in co-operation with the Organization. Furthermore some of the specific human rights treaties have provisions that either give specific content to extraterritorial obligations or have been interpreted to contain such obligations. Especially important among these treaties are the ICESCR, CRC and CRPD.¹¹³

One example of an institution that is promoting the idea of extraterritorial obligations is the UN Committee on Economic, Social and Cultural Rights. The Committee has stated that all levels of obligations, to respect, to protect and to fulfil apply to extraterritorial obligations. In the General Comment 15, on the right to water, the Committee confirms that "*international obligations includes that steps should be taken by State parties to prevent their own citizens*

¹¹² Skogly, Sigrun *Extraterritoriality: Universal Human Rights without Universal Obligations?* – In *Research handbook on International Human Rights Law*, edited by Sarah Joseph and Adam McBeth (2010) p. 71ff.

¹¹³ *ibid* p. 76ff.

and companies from violating the right to water of individuals and communities in other countries”¹¹⁴

It is especially with regard to the economic, social and cultural rights that extra territorial obligations are being discussed. In 2011 a group of experts from universities and organizations around the world wrote and adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights from 2011. This instrument does not provide any legally binding obligations, but is based on legal research conducted during a decade and intends to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights.¹¹⁵ The Maastricht Principles proclaims that all States have obligations to protect, respect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially. The commentary to the principles maintain that these duties are implied in a number of recognized instruments and refer to similar provisions as Skogly did when explaining extraterritorial obligations.¹¹⁶ Interesting to notice, considering the question in focus of this thesis, is that the Maastricht Principles expect States to regulate the conduct of private actors to ensure that their conduct does not result in violating human rights and that this obligation extends to situations where the human rights violations occur on the territory of another state.¹¹⁷ It is however important to bear in mind that these principles are still controversial and have both supporters and opponents.

The question of extraterritorial obligations have also been analysed specifically in relation to business and human rights. In 2006 Olivier De Schutter, one of the authors of the Maastricht Principles, presented a study that had the purpose to examine under which circumstances States should exercise extraterritorial jurisdiction on companies domiciled within their

¹¹⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, p.33.

¹¹⁵ *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, edition with commentary*, (2012) - preamble.

¹¹⁶ *Maastricht Principles* - Principle 3 with commentary.

¹¹⁷ *Maastricht Principles* - Principle 24 with commentary.

territory for human rights abuses committed abroad. The study was conducted in support of the mandate of John Ruggie.¹¹⁸

In this report published five years before the Maastricht Principles, De Schutter explains that the current state of law does not clearly recognise extraterritorial duties to protect. However he continued by stating that this is a view that might be changing, especially concerning economic and social rights. He traced this change of view to the growing understanding of the interdependency of States, something that should lead to State obligations being extended.¹¹⁹ De Schutter finished his report with the conclusion that there is a need for new instruments to clarify and where necessary extend the State obligation to protect.¹²⁰

When John Ruggie then presented his Framework in 2008 his assessment of the current situation was similar to that of De Schutter, and he concluded that experts still disagreed on whether international law requires home States to help prevent human rights abuses abroad, when they are a result of the conduct of companies based within their territory. The Framework underscores that States are not prohibited from doing so, where a recognized basis of jurisdiction exists provided that their actions don't interfere with the principle of non-intervention.¹²¹

Being a guide for implementation of the Framework, the UN Guiding Principles reflect the same approach to extraterritorial obligations and this explains why the duty to protect is only required within the States territory and, something that is clearly stated in Principle 1. This position is definitely defensible. Even scholars that advocate the recognition of extraterritorial obligations concede that uncertainties remain as to what extent the obligations already exist in international law and what such obligations imply. There is also a strong resistance from developed countries, disputing these obligations that they regard as an extension of existing duties.

¹¹⁸ De Schutter, Olivier – *Extraterritorial Jurisdiction as a tool for improving Human Rights Accountability of Transnational Corporations*, (2006).

¹¹⁹ *ibid* p. 19.

¹²⁰ De Schutter, Olivier (2006) p. 51f.

¹²¹ *A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, p. 7.

The question of extraterritorial obligations is still controversial, disputed and not yet crystallized in international law. Ruggie has clearly stated that the intention of the UN Guiding Principles is not to create new standards, but to provide for guidance with regard to standards that already exist. With these preconditions, a requirement for States to implement their duty to protect extraterritorially might have meant a step over that line. Considering the resistance from States, refraining from extraterritorial obligations might also have been decisive for the unanimous endorsement in the Human Rights Council, which of course was of great importance for the credibility of this instrument.

Nevertheless, the decision to limit the reach of the duty to protect has also received strong criticism, in particular from human rights groups. One could also have wished for Ruggie to be bolder in this regard, irrespective of the objection that the UN Guiding Principles should not create new standard. There is an opening to argue for the existence of these obligations, as described above, which would allow the Guiding Principles to include these obligations, claiming it to be a reflection of existing provisions. There are big expectations on the UN Guiding Principles to provide a modern and functional instrument for the area of business and human rights. However, the position taken in the question of extraterritoriality can hardly be seen as very progressive. Even the more expectant reports on the issue foresee a development where State obligations will have to be extended as a result of increasing global interdependency.

Regardless of the opinion one might have regarding the answer that Ruggie gave to the question of extraterritorial reach for the State duty to protect, it is clear that the Guiding Principles do not impose extraterritorial obligations on States. This sets a frame for the analysis I am intending to do in the following chapter, making it harder to criticise the State for the extraterritorial violations of human rights associated with the AP-funds, at least on basis of non-compliance with the UN Guiding Principles.

Still, the fact that the UN Guiding Principles do not place direct extraterritorial obligations on States does not render them worthless as an instrument to prevent adverse effects on human rights enjoyment outside the national territory. Although not requiring States to regulate the way businesses domiciled within their territory operates abroad – the UN Guiding Principles

strongly advise States to at least set out expectations on businesses to respect human rights in all their operations, especially where the State itself is involved in or supports the business. And the effects of an effective regulation of the conduct of businesses with regard to human rights are likely to have an impact on the whole business actor, something that in turn hopefully spills over on its operations abroad.

3.2.2 The Guiding Principles regarding the State Duty to Protect

Pillar I of the Guiding Principles consists of ten principles, covering different aspects of policymaking and different situations when considerations of business and human rights are of importance. For the purpose of this thesis, Swedish policies will be discussed in relation to five of these principles. Without a doubt, the remaining principles would form equally interesting issues for analysis, but since they are of little relevance for the question of the regulation of the AP-funds, they are not included.

3.2.2.1 Foundational Principles

Principle 1 proclaims that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including businesses. Through effective policies, legislation, regulations and adjudication appropriate steps are to be taken to prevent, investigate, punish and redress such abuse.¹²²

As the commentary to the principle explains, States are not per se responsible for human rights abuses by private actors. Nonetheless, if the abuse can be attributed to the State or the State has failed to take appropriate steps to prevent the abuse this could constitute a breach of the State's international human rights law obligations. To assure that such a breach is not committed, the State should consider the full range of permissible preventative and remedial measures.¹²³

This first principle sets a broad standard for the types of measures that are to be taken, but limits the applicability to the jurisdiction of the State. As to compensate for this, the second principle concerns the situation of businesses situated within one State that conducts

¹²² *Guiding Principles on Business and Human Rights* - Principle 1.

¹²³ *Guiding Principles on Business and Human Rights* - Commentary to Principle 1.

operations in other States and places a responsibility on the “home state” of the business entity. However, the requirements in principle 2 differ profoundly from those stated in principle 1. Whereas the State *must* protect against human rights abuses within their territory, the exhortation in principle 2 is that States *should* announce their expectations on businesses to respect human rights. According to Principle 2 “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”.¹²⁴ This could be achieved through domestic measures with extraterritorial implications, multilateral soft law instruments such as the OECD Guidelines are mentioned as an example.¹²⁵

3.2.2.2 Operational Principles

Three of the operational principles will also be discussed in this case study, namely principles 3, 4 and 8. The third principle elaborates on the regulatory and policy functions of the State. To meet their duty to protect, States are required to enforce laws with the aim and effect to make business actors respect human rights law. At the same time, it is equally important that other laws directed to business entities does not constrain but enable business respect for human rights. Principle 3 also calls on States to provide effective guidance to business actors on how they should act to respect human rights throughout their operations. As a last requirement States are also demanded to encourage, and where appropriate require, business actors to report and communicate how they address their human rights impact.¹²⁶

Principle 4 is of particular relevance to the question at issue, as it targets business actors that are owned or controlled by the State. The principle declares that States should take additional steps to protect against human rights abuse by these actors.¹²⁷ The commentary once again underlines the risk for the State to breach their international law obligations since the conduct of the owned or controlled business actor could be attributed to the State. But it is not only the risk of breaching international law that motivates an increased effort. The commentary also establishes that “*the closer a business enterprise is to the state, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for*

¹²⁴ *Guiding Principles on Business and Human Right* - Principle 2.

¹²⁵ *Guiding Principles on Business and Human Rights* - Commentary to Principle 2.

¹²⁶ *Guiding Principles on Business and Human Rights* - Principle 3.

¹²⁷ *Guiding Principles on Business and Human Rights* - Principle 4.

ensuring that the enterprise respects human rights".¹²⁸ Something that should indicate very strong policy rationales for Sweden to ensure that the AP-funds really respect human rights, given that the operations of the Funds consist in investing the taxpayers' money.

The commentary also points out that States have various and powerful means to control businesses under their ownership or control. These business actors typically report to State agencies, and government departments have a greater scope for scrutiny and oversight, which gives the State the possibility to ensure the implementation of effective human rights due diligence.¹²⁹

The last principle in focus from Pillar I is principle 8 which has the purpose to safeguard policy coherence. The principle require States to ensure that governmental departments, agencies and other institutions that shape business practices are aware and observe human rights when fulfilling their mandates.¹³⁰ States are called upon to establish both vertical and horizontal domestic policy coherence. Vertical policy coherence implies that States have the necessary policies, laws and processes to implement their human rights obligations. Whereas horizontal policy coherence means that States must assure that all actors that shape business practices are well informed and act in compliance with the human rights obligations of the State.¹³¹

3.2.3 Sweden's compliance with Pillar I

For the purpose of this evaluation of Sweden's compliance with the provisions provided in Pillar I of the UN Guiding Principles the legislation, regulations and policies issued by the State and of principal importance to the AP-funds will be analysed. This includes the Swedish Public Pension Funds Act from 2000 and The Sixth AP-fund's Act from 2000 (hereafter The Pension Funds Acts), with adherent preparatory works. Subsequently the government investigation regarding the AP-funds, SOU 2008:107, will be scrutinized since it contains proposals of new regulations of the AP-funds.

¹²⁸ *Guiding Principles on Business and Human Rights* - Commentary to Principle 4.

¹²⁹ *Guiding Principles on Business and Human Rights* - Commentary to Principle 4.

¹³⁰ *Guiding Principles on Business and Human Rights* - Principle 8.

¹³¹ *Guiding Principles on Business and Human Rights* - Commentary to Principle 8.

Another important control mechanism of the AP-funds is the annual report from the government to the Parliament. The annual government report is motivated as a way to balance the autonomy of the Funds and to fulfil the obligation of the government to give an impartial assessment of the results of the Funds.¹³² Therefore the latest year report, concerning the operations of the AP-funds during 2011, and the parliament bills that followed are also included in this evaluation. Finally the policy statement *Shared Responsibility: Sweden's policy for Global Development* will be discussed.

3.3.3.1 Legislation – Swedish Public Pension Funds Act

The legislation of the AP-funds is the most important mechanism for regulation, since it is the only way for the State to directly place obligations on the AP-funds. (See discussion on the Status of the AP-funds, section 2.2.1). What is most striking with this legislation, when evaluating its efficiency as an instrument to regulate business respect for human rights, is the complete absence of references to human rights or other ethical considerations. Neither one of the Pension Funds Acts have any provisions addressing these issues.¹³³ The only reference is instead found in the proposition to the law, that constitutes a part of the preparatory works and is the foundation of the legislation. In the section describing the overall objectives of the AP-funds, a statement regarding ethics in the investment operations has been added. According to this statement “*The AP-funds should take environmental and ethical considerations into account in their investment activities without deviating from the overall objective of a high rate of return*”¹³⁴

First of all it is of importance to compare this vague statement with the UN Guiding Principles that calls on States to protect against human rights abuses by businesses through effective policies, legislation and regulations and to clearly set out expectations that businesses should respect human rights throughout their operations.¹³⁵ Whether the quoted statement really does this can be questioned. The ambiguity of a statement where ethical considerations should be taken into account but at the same time always be subordinated to the objective of a high rate of return can hardly be considered to set out the clear expectation

¹³² Proposition 1999/2000:46 p. 111ff.

¹³³ Compare The Public Pension Funds Act (2000:192).

¹³⁴ Proposition 1999/2000:46 p. 76.

¹³⁵ Compare *Guiding Principles on Business and Human Rights* - Principles 1 and 2.

asked for in Principle 2, or a policy that has the effect of obliging businesses to respect human rights, which Principle 3 (a) requires States to enforce - at least not without guidance on how to balance these two principles.

Effective guidance for businesses on how to respect human rights throughout their operations is also something required of States according to Principle 3 (c). And guidance was also required by one of the AP-funds, asking the legislator to specify and concretize the statement and to provide guidance on how to weigh the different considerations against each other.¹³⁶ The government chose not to meet this demand, and neither the law nor the preparatory works contains any guidance on this matter. Instead the responsibility for the interpretation of the statement is placed with the boards of the different AP-funds.¹³⁷

To meet their duty to protect, States should moreover use their regulatory functions to require businesses to communicate how they address their human rights impacts, according to Principle 3 (d). Any requirements of that kind are not visible in the wording of the Public Pension Funds Act.¹³⁸ However, the preparatory works encourages the Funds to show how considerations of ethics and environment are incorporated in the investment policy that the Funds have to present. How this is to be presented is not further specified, but instead left to the Funds to decide. The only explicit direction in this regard is that the Funds should, in their annual report, show how they have handled the administration of resources for these considerations. The purpose of this direction is to verify that these considerations have not had a negative impact on the overall objective of high rates of return.¹³⁹

After the government investigation that presented its proposals in 2008 some improvements in this respect has been made, which will be analysed under next section. Interesting to note nonetheless, is that since 2007 all Swedish state-owned companies are required to submit an annual sustainability report that is to be independently verified. The sustainability should follow the internationally recognized Global Reporting Initiative framework, which includes

¹³⁶ Proposition 1999/2000:46 p. 76.

¹³⁷ Proposition 1999/2000:46 p. 77.

¹³⁸ Compare Chapter 6 in Swedish Public Pension Funds Act (2000:192).

¹³⁹ Proposition 1999/2000:46 p. 82f.

provisions for reporting on the area of human rights.¹⁴⁰ But in this context the AP-funds are defined solely as government agencies, and therefore not included among the businesses that have to submit GRI reports.¹⁴¹

3.2.3.2 *The Government Investigation – SOU 2008:107*

In 2007 the government appointed a committee with the mission to evaluate the AP-funds work with ethical and environmental considerations in their operations and bring forward suggestions of improvements. The results of the investigation were presented in their final report “SOU 2008:107 Etiken, miljön och pensionerna”.¹⁴²

Many of the committee’s proposals are directed to the AP-funds, but since this part of the case study has the purpose of evaluating whether the State fulfils its duty to protect with regard to its policy and regulatory functions, I’ll focus on the treatment that these proposals received from the government and the parliament. The government decided not to start a legislation process; instead it presented its view on the proposals in their annual report to the parliament.¹⁴³

The first proposal presented in SOU 2008:107 was that environmental and ethical considerations should be included in the laws regulating the AP-funds.¹⁴⁴ A proposal that is in line with the requirements placed on the State according to the UN Guiding Principles.¹⁴⁵ However, this has not yet led to any measures being taken; the government postponed the matter and did not comment further on the possibilities for that kind of provision to be included in the law, neither did the finance committee of the parliament.¹⁴⁶ As mentioned under chapter 2.2.4, the question was brought up again in the final report of the Buffer Fund Inquiry. The inquiry disagreed with the proposal in SOU 2008:107 and opposed a change of the law to incorporate ethical considerations.¹⁴⁷ It is still too early to conclude whether a

¹⁴⁰ Ownerpolicy of the State (2011).

¹⁴¹ Ownerpolicy of the State (2011) p.5.

¹⁴² SOU 2008:107.

¹⁴³ Skrivelse 2008/09:130 – *Redovisning av AP-fondernas verksamhet t. o. m. 2008.*

¹⁴⁴ SOU 2008:107 p.10.

¹⁴⁵ Compare *Guiding Principles on Business and Human Rights* - Principle 3 (a), and Principle 2.

¹⁴⁶ Skrivelse 2008/09:130 p. 74.

¹⁴⁷ SOU 2012:53.

change of the legislation in this regard will take place, the final report of the inquiry is currently under consideration and has not yet lead to a proposition of a new legislation.

Among the proposals that were not considered to require a change of legislation are recommendations on how to improve the State's assessment of the Funds ethical and environmental work, but also recommendations to require the Funds to communicate how they address their impact on environment and human rights.¹⁴⁸ Both these issues are featured as a part of the State duty to protect in the UN Guiding Principles.¹⁴⁹ The SOU 2008:107 recommended that the annual reports from the government to the parliament should also include an assessment of the ethical and environmental work being carried out by the Funds within their operations, except for the financial assessment already being done.¹⁵⁰ The parliament approved of that recommendation and stated that it assumes that the government would include these aspects in its annual report, something that has been done ever since.¹⁵¹

As one of several recommendations to ensure public confidence in the AP-funds, the SOU 2008:107 recommended that the Funds should conduct an open and transparent communication towards the public and that this should include reporting on how they address their human rights impacts.¹⁵² The government acknowledges that open and transparent communication regarding the operations will promote the credibility of the Funds and is therefore an important demand on the Funds.¹⁵³ Although not commenting specifically on the communication of measures taken to address human rights impacts, this acknowledgement is probably as close as the State had gotten to fulfil the duty stated in principle 3 (d) of the UN Guiding Principles and officially encourage the AP-funds to communicate how they address human rights impact at that point.

¹⁴⁸ SOU 2008:107 p. 10ff.

¹⁴⁹ Compare *Guiding Principles on Business and Human Rights* - Principle 3 (a) and 3 (d).

¹⁵⁰ SOU 2008:107 p. 13.

¹⁵¹ Finansutskottets betänkande 2008/09:FiU6 – *AP-fondernas verksamhet tom 2007*, p. 20ff.

¹⁵² SOU 2008:107 p. 89f.

¹⁵³ Skrivelse 2008/09:130 p. 77.

3.2.3.3 The Government's Annual Report and Evaluation of the AP-funds

The most important instrument for the government and the parliament to exert an influence on the conduct of the AP-funds on a recurrent basis is the annual report and evaluation of the Funds operations during the year. Since 2009 these reports contain an evaluation of the Funds' guidelines for environmental and ethical considerations within their operations.¹⁵⁴ This gives the government an opportunity to criticize the conduct of the Funds and give recommendations for improvement. The report and evaluation is also debated in the parliament and in connection to that parliament bills with proposals regarding the AP-funds are submitted. If approved, the parliament bills might lead to a change of the legislation.

This year's report, Skr 2011/12:130, does not contain a lot of information of interest for the discussion regarding Pillar I of the UN Guiding Principles. The government wrote a statement proclaiming that the AP-funds conduct a commendable work developing guidelines for ethical and environmental considerations. The government particularly encourages the effort to incorporate these considerations in the running administration and analysis.¹⁵⁵ Of interest for the discussion regarding principle 3(d), is that the government once again addresses the issue of communication regarding the work of the AP-funds. This time however, communication concerning ethical considerations is explicitly mentioned and the government refers to this as a demand rather than a recommendation.¹⁵⁶

The report from the government has been considered in the Finance committee of the parliament and was approved, in a decision taken by the parliament in December 2012 without any amendments. However, for the sake of this analysis it is more interesting to look at the decisions that weren't taken and the proposals that weren't approved of. In connection to the annual report of the AP-funds operations a number of parliament bills were submitted, out of which six addressed different aspects of ethical considerations in the AP-funds operations. Among the proposals put forward in these bills are a call for adapting the ethical guidelines of the Funds to the policy statement "Shared Responsibility: Sweden's policy for Global Development" (which will be further discussed in the next section), to appoint an independent committee to scrutinize the ethical and environmental work of the AP-funds and

¹⁵⁴ Compare 2008/09:FiU6, p. 20ff.

¹⁵⁵ Regeringens skrivelse 2011/12:130 p. 64 ff.

¹⁵⁶ Regeringens skrivelse 2011/12:130 p. 68.

to require that the Funds develop clear criteria and guidelines for how to handle companies that violate international conventions.¹⁵⁷ Another parliament bill requests a parliamentary commission of inquiry to investigate how the legislation and governing policies should be changed in order to allow the Funds to take ethical and environmental considerations into account to higher degree than what is possible today.¹⁵⁸ This approach sets the tone for yet another parliament bill, opposing the present policy that economic returns considerations are to be superior to ethical considerations.¹⁵⁹

From the referred proposals I draw the conclusion that there is a political will to make a greater effort to ensure that the AP-funds take ethics and human rights into consideration throughout their operations and that their conduct live up to expectations in international instruments. Unfortunately this does not seem to be the will of the majority of the parliament members.

3.2.3.4 Shared Responsibility: Sweden's policy for Global Development

The policy statement "Shared Responsibility: Sweden's policy for Global Development" was adopted in 2003.¹⁶⁰ Adopting this kind of policy, that underlines the importance of incorporating human rights considerations in all policy areas and calls for a closer collaboration between all sectors of society corresponds well with the requirement to ensure policy coherence, stated in principle 8 of the Guiding Principles.

Accordingly it is not the content that might constitute the problem in this case but rather the applicability of the policy to the AP-funds. The Ethic council working with these considerations on behalf of AP-funds 1-4 ensures that the values of the AP-funds are in line with Sweden's policy for Global Development, although emphasizing that these considerations are taken into account without deviating from the overall objective of a high rate of return.¹⁶¹ Britta Hammar, responsible for the AP-funds at the finance department goes even further and dismisses the possibility that Sweden's policy for Global Development

¹⁵⁷ Parliament bill from the Green Party/Miljöpartiet, Motion 2011/12:Fi21.

¹⁵⁸ Parliament bill from the Left Party/Vänsterpartiet, Motion 2012/13: Fi206.

¹⁵⁹ Parliament bill from the Green Party/Miljöpartiet, Motion 2012/13:Fi225.

¹⁶⁰ Regeringens skrivelse 2007/08:109 p. 7f.

¹⁶¹ *Statement on the official homepage* - <http://www.ap4.se/etikradet/Etikradet.aspx?id=928>

would be applicable to the AP-funds. Since the AP-funds are to be solely regulated through legislation and the legislation is not compatible with the demands of the Global Development Policy, the legislation must prevail.¹⁶²

An exclusion of the AP-funds from the applicability of the Global Development Policy will undoubtedly impair the aim of the policy to implement these provisions in all policy areas and to influence all actors with an impact on the Global Development. Furthermore such exclusion gives a reason to question Sweden's compliance with principle 8 of the UN Guiding Principles.

3.2.4 Discussion and preliminary conclusions regarding Pillar I

The provisions of Pillar I emphasises that the responsibility for a State to regulate the actions of a business actors is stronger in cases where the business actor is owned, controlled or in other ways associated with the State. At the same time the possibility, scope and incentive also becomes stronger in these situations. Since this is the case of the relationship between Sweden and the AP-funds, it should be a prioritized situation for the State.

However, it can be questioned whether the State meets the requirements presented in the UN Guiding Principles. The provisions of Pillar I focus on the responsibility of the State to regulate and provide guidance to the business actors, and in this regard Sweden seems to fall short in the case of the AP-funds. The legislation governing the Funds do not contain any provision requiring the Funds to respect human rights and the statement provided in the preparatory works stating that the AP-funds should take due account to ethical considerations without deviating from the overall objective of high returns is very ambiguous. Furthermore the government has not provided any guidance on how this statement should be interpreted and implemented, even though it has been demanded for.

Regarding other requirements of Pillar I progress have been made during the last years. The government has started to assess the ethical work of the Funds on an annual basis, which is one of the requirements in Principle 3. Another improvement is that the government now require the AP-funds to communicate how they address their human rights impacts, even

¹⁶² Swedfund report # 42 p. 58.

though it can be noticed that the AP-funds are not obliged to report according to GRI, which all state-owned companies must do.

When making a general evaluation of Sweden and the fulfilment of Pillar I the positive aspects consist of these improvements and the fact that these questions are on the agenda, as showed by a number of recent government investigations addressing ethical considerations in the operations of the AP-funds. There is also a lively debate in the parliament and propositions that would improve the complicity of Pillar I has been submitted, although not yet approved of.

There are other aspects that give reason to criticise the State in this case. The lack of guidance for these issues is remarkable considering the close association between the Funds and the State. The factor I consider being of most importance is however the statement that requires the AP-funds to take ethical considerations into account, and the way this statement is formulated. As has already been discussed it is a vague and ambiguous statement that hardly can be said to fulfil the requirements of principle 2 and 3 in Pillar I. Even though it is unclear it still provides the most authoritative regulation of the AP-funds and their ethical considerations and therefore sets the standard. The apprehension is that a policy as unenthusiastic and reluctant will be followed by equally unenthusiastic and reluctant measures. The fact that the statement stresses that ethical considerations are to be subordinated to the overall objective of a high rate of return will have consequences for the way the Funds implement their ethical considerations, something that is investigated in the following part of the case study.

3.3 Pillar II – Corporate Responsibility

The second pillar of the Framework and the UN Guiding Principles addresses business actors and collects a number of principles with the aim of ensuring the corporate responsibility to respect human rights. The instruments define corporate responsibility to protect as a responsibility for businesses to “act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.”¹⁶³ Whereas many other instruments have tried to identify a limited set of rights for which business actors should bear responsibility the Framework and UN Guiding Principles states that business actors should consider all rights, since they may impact them all.¹⁶⁴

To conduct the analysis regarding this pillar one must take into consideration what kind of actor the AP-funds represent. According to the UN Guiding Principles, the provisions of Pillar II apply to all business actors, regardless of size, sector, location, ownership and structure.¹⁶⁵ This implies that also institutional investors with the legal status of a government agency, such as the AP-funds, are to fulfil these provisions.

A consequence of this broad spectrum of stakeholders is the difficulty of constructing provisions that adequately address the very diverse adverse effects to human rights enjoyment that might derive from the different kinds of business actors. John Ruggie acknowledged this problem in his final report and concluded that the means by which the principles are realized must be adapted to the different circumstances of the specific situation, since one size does not fit all in terms of implementation of the principles.¹⁶⁶

The problem with formulating provisions that will cover all types of business actors is of immediate importance in the case of institutional investors. The UN Guiding Principles have been criticized for failing to recognize the importance of institutional investors in order to achieve respect for human rights. Rory Sullivan and Nicolas Hahcez consider that the principles are incapable of providing guidance to institutional investors and ensure that these

¹⁶³ *Guiding Principles on Business and Human Rights*, p. 4.

¹⁶⁴ *A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, p.14f.

¹⁶⁵ *Guiding Principles on Business and Human Rights – General principles*, p.6.

¹⁶⁶ *Guiding Principles on Business and Human Rights* p. 5.

actors use their powers and influence to improve human rights compliance.¹⁶⁷ According to Radu Mares the SRSG fell short of a fuller understanding of the responsibilities of investors and Mares considers Ruggie's treatment in this area to be tentative.¹⁶⁸

It is apparent when reading the provisions of Pillar II that the business actors in mind when constructing the principles have not primarily been institutional investors. Many of the provisions of Pillar II are applicable in situations where the operations of a business actor have or may have a direct impact on the human rights enjoyment of a stakeholder. This is very seldom the case for the AP-funds, or other institutional investors, since their impact on the human rights enjoyment is generally of indirect character. This analysis will only draw on the principles that are applicable to the AP-funds.

One important aspect of Pillar II is the requirement to take appropriate action to prevent and mitigate adverse human rights impacts. What appropriate action consists of regarding institutional investors is not defined in the UN Guiding Principles and a comparison with the UN Principles of Responsible Investments (UNPRI) has therefore been made. The UNPRI is a voluntary initiative backed by the UN, where an international network of investors work to incorporate environmental and social considerations in investment practices. UNPRI has quickly become the leading global network for responsible investment.¹⁶⁹ Many of the provisions featured in the UNPRI correlate with the requirements of the UN Guiding Principles, but are especially drawn up for institutional investors. The description of appropriate action in UNPRI is therefore a good benchmark for the analysis of the actions taken by the AP-funds.

Before conducting the analysis the first issue that will be addressed is whether the corporate responsibility to protect is legally binding according to international law. As described in the introduction to this thesis the question whether there are legally binding human rights obligations applicable to business actors has been much debated. The purpose is not to offer a

¹⁶⁷ Hachez, Nicolas and Sullivan, Rory *Human Rights Norms for Business: The missing piece of the Ruggie Jigsaw*, (2012) p. 36ff.

¹⁶⁸ Mares, Radu *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress* - In *The UN Guiding Principles on Business and Human Rights: Foundation and Implementation* edited by Radu Mares (2012), p. 32.

¹⁶⁹ *Official homepage of UNPRI* - <http://www.unpri.org/about-pri/about-pri/>.

complete investigation of this controversial question, but at least clarify the position taken in the UN guiding principles, since this provides the foundation and sets a frame for the analysis. Subsequently the evaluation of the AP-funds compliance with the provisions of Pillar II will follow.

3.3.1 Are there any international legally binding obligations in the business and human rights area?

The first mission for John Ruggie as SRSG was to shed some light on the existing governing regime, and provide a comprehensive mapping of current international standards and practices regarding business and human rights.¹⁷⁰ Except for mapping voluntary initiatives and describe existing soft law instruments that also included reflecting upon the position taken in the Draft Norms and provide an answer to the delicate question on whether the body of human rights law is directly applicable to corporations.

In the report “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts” presented to the Human Rights Council in 2007 the question is thoroughly investigated and responded with a firm no. In the report Ruggie discusses the Universal Declaration of Human Rights and its preamble which states that “every individual and every organ of society...shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”¹⁷¹ The quotation has often been used by proponents of the idea that corporations have directly legally binding obligations under human rights law, with the argument that the UDHR is acknowledged as customary international law.¹⁷²

Ruggie confirms that many UDHR provisions have entered customary international law, but considers it generally agreed that the preamble is not included. He also draws attention to the fact that even though most of its provisions have been incorporated in the Covenants and other UN human rights treaties and that corporate responsibility is often recognized in the

¹⁷⁰ SRSG Report, A/HRC/4/035, 19 Feb 2007, p.4f.

¹⁷¹ UN General Assembly Resolution, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), preamble.

¹⁷² SRSG Report, A/HRC/4/035, 19 Feb 2007, p.11f.

preambles of these instruments, the issue is never explicitly addressed in any of the operational paragraphs. Furthermore he scrutinizes how direct corporate responsibility for human rights is being understood in the core ILO conventions and the most important regional instruments on human rights. Although detecting some ambiguities, Ruggie concludes that the international human rights instruments currently do not impose direct legal obligations on corporations.¹⁷³

While rejecting the idea of direct legal obligations on corporations, the report underlines the *indirect legal obligations on corporations* pursuant to the state duty to protect. The report proclaims that “*the state duty to protect against non-state abuses is part of the international human rights regime’s very foundation.*”¹⁷⁴ Whereas the State duty to protect is assigned to the international human rights regime, Ruggie explains the business responsibility to derive from the basic expectation society has of business, and not legally binding obligations.¹⁷⁵ Consequently the UN Guiding Principles, that only sets out to reflect existing standards and obligations, do not imply legally binding human rights obligations for business actors.

3.3.2 The Guiding Principles regarding the Corporate Responsibility to Respect

According to the Framework and the UN Guiding Principles the corporate responsibility to respect human rights includes avoiding complicity, where complicity refers to an indirect involvement by a business actor in human rights abuses.¹⁷⁶ This is the kind of involvement that the AP-funds have been accused of. Complicity has both a legal and a non-legal meaning. The instruments compare legal complicity with standards for aiding and abetting in international criminal law, which means that a business actor would need to knowingly provide practical assistance or encouragement that has substantial effect on the commission of a human rights abuse in order to call it legal complicity.¹⁷⁷ However a business actor may also be non-legally complicit in the acts of another party, in the case where the business actor are seen to benefit from an abuse committed by that party.¹⁷⁸ This situation can be applied on

¹⁷³ SRSG Report, A/HRC/4/035, 19 Feb 2007 p.12f.

¹⁷⁴ *ibid*, p.7.

¹⁷⁵ *A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, p. 4f.

¹⁷⁶ *ibid*, p. 20f.

¹⁷⁷ *Guiding Principles on Business and Human Rights – Commentary to principle 17.*

¹⁷⁸ *ibid*.

most institutional investors investing in companies that commit human rights abuses. And even though this most likely would not lead to legal process it should still be avoided.

According to the foundational principles of Pillar II all business actors should avoid causing or contributing to adverse human rights impacts through their own activities, but also seek to mitigate and prevent adverse human rights impacts that could be linked to them even if they have not contributed to these impacts.¹⁷⁹ Since the AP-funds generally impact human rights indirectly this will be the focus of this analysis. In order to meet the responsibility to respect human rights there are three categories of measures to be taken: there should be a policy commitment, a due-diligence process and a process to enable remediation.¹⁸⁰ However, Pillar II does not require business actors to provide for remediation unless they are the actor causing or contributing directly to the adverse effects.¹⁸¹ Since this is not the case in the current situation of the AP-funds, these requirements will not be further analysed.

The content of the three categories are exhaustively described in the operational principles. Principle 18 contains the requirement of a human rights policy that calls on business actors to express their commitment to respect human rights in a statement of policy. This statement should be approved by the highest level and stipulate the human rights expectations of business partners, personnel and other parties linked to the business actor. It should also be publically available and communicated internally and externally. Furthermore the content of the statement should be reflected in operational policies and similar.¹⁸²

The due-diligence process consists of several different steps. The first step is to identify and assess any actual or potential adverse human rights impact with which the business actor may be involved.¹⁸³ The information obtained should thereafter be integrated across relevant internal functions and processes and appropriate action should be taken in order to prevent and mitigate the adverse human rights impacts. An effective integration requires that the responsibility for addressing adverse impacts is assigned to the appropriate level within the

¹⁷⁹ *Guiding Principles on Business and Human Rights* – Principle 13.

¹⁸⁰ *Guiding Principles on Business and Human Rights* – Principle 15.

¹⁸¹ *Guiding Principles on Business and Human Rights* – Principle 22.

¹⁸² *Guiding Principles on Business and Human Rights* – Principle 16.

¹⁸³ *Guiding Principles on Business and Human Rights* – Principle 18.

organisation of the business actor. The integration must also be enabled by internal decision-making and budget allocations.¹⁸⁴

What appropriate action means will of course differ, depending on what type of actor and adverse effects on human rights that have occurred. The UN Guiding Principles states that when the impacts are indirect, the appropriate actions will also depend on the extent of leverage. Leverage is considered to exist when the business actor has the ability to effect change in the practices of the entity that causes the adverse effects to human rights. In situations where the business actor has leverage to prevent or mitigate adverse impact, the leverage should be exercised. However, if the business actor lacks leverage to do this, and is unable to increase the leverage the commentary to this principle proclaims that the business actor should consider ending the relationship.¹⁸⁵

When comparing this with the UNPRI that especially targets institutional investors, several similarities are found. UNPRI encourages investors to build their capabilities of leverage and participate in engagement initiatives with other investors since this increases their possibilities to impact the companies in which they invest. The recommended way to take appropriate action for institutional investors in to prevent and mitigate adverse impacts is to be an active owner, according to the UNPRI. This includes exercising voting rights and file shareholder resolutions consistent with environmental and ethical considerations.¹⁸⁶

The final part of the due-diligence process for the business actors is to communicate how they address human rights impacts, particularly when concerns connected to their operations are raised.¹⁸⁷

3.3.3 The AP-funds' compliance with Pillar II

This section will evaluate how the AP-funds fulfil the provisions of Pillar II, presented in the previous section. To summarize, the categories to analyse are the following; Existence of a policy with regard to human rights, the conducting of a due-diligence process that identifies

¹⁸⁴ *Guiding Principles on Business and Human Rights* – Principle 19.

¹⁸⁵ *Guiding Principles on Business and Human Rights* – Principle 19.

¹⁸⁶ *United Nations Principles for Responsible Investments* - Principle 2.

¹⁸⁷ *Guiding Principles on Business and Human Rights* – Principle 21.

and assesses adverse human rights impacts, integrates the findings in the operations, takes appropriate action to prevent and mitigate the adverse effects and finally communicates how the adverse effects are being addressed.

The most important documents for the conduct of this evaluation are the ownership policies and policies for ethical considerations of all the AP-funds. Furthermore the last annual reports and ethical reports of the Funds will be analysed for an insight to the current and actual state of human rights considerations in the operations of the AP-funds.

Since the AP-funds are independent and autonomous entities each Fund take their own decisions and have different strategies for their human rights work. Hence, every Fund have their own ownership policy – even though the different policies show many similarities when it comes to issues regarding ethical considerations. When it comes to the measures of taking action AP-funds 1-4 have chosen to collaborate regarding these issues through an Ethical council. The last annual report of the Ethical council will also be included in this evaluation.

As a last part of this evaluation the actions taken by the AP-funds to mitigate the adverse human rights effects in illustrating cases, namely the Yanacocha mine in Peru and the Marlin mine in Guatemala, will be scrutinized.

3.3.3.1 Policy commitment

First of all it can be established that all AP-funds, clearly express their commitment to meet their responsibility to respect human rights in their ownership policies. The policies, which are approved by the Board of Directors of each Fund, are publicly available on their respective homepage.¹⁸⁸ In addition, AP 3 has a special policy where values concerning ethical and environmental issues together with the methods of work in these questions are more thoroughly described.¹⁸⁹ In this respect these Funds seem to meet the requirements of Guiding Principle 18.

¹⁸⁸ See Ownership policies of the AP-funds.

¹⁸⁹ AP 3's Policy of environmental and ethical considerations.

The content of the policies of the other AP-funds, when it comes to questions of human rights commitments, shows many similarities. They all base their values on the values of the Swedish state as expressed in the Constitution and the international conventions ratified by Sweden. The policies also refer to international initiatives that have gained support from the Swedish government, such as the UN Global Compact and the OECD Guidelines. According to the policies these conventions, instruments and legislation should guide the Funds in their work to ensure that consideration to ethical and environmental aspects are taken in their operations.¹⁹⁰

Another important requirement to meet the demand of a policy commitment in principle 18 is to stipulate human rights expectations of other parties linked to their operations, in the case of the AP-funds the companies in which they invest are the most important actors to address. The ownership policies do express this kind of expectations. First of all it is stated that the Funds consider that the companies in which they invest have a responsibility of their own not to contribute to violations of international convention, regardless of whether these conventions are directed to state-actors or non-state actors, such as companies.¹⁹¹ Besides that the Funds have set different expectations on the companies, for example AP 2 encourages companies to follow both UN Global Compact and the OECD Guidelines. In addition the AP 2 presents a list of international conventions, which it expects the companies to follow, and requires them to adopt a Code of Conduct that addresses ethics and environment.¹⁹² Without going into detail regarding every Fund and the expectations they set up, the conclusion of a comparison is that they differ a lot in content and how detailed the expectations are. In this regard the expectations presented by AP 2 are rich both in content and detail. On the other end of the scale is the AP 4 that does not explicitly state their expectations on the companies they invest in.¹⁹³

¹⁹⁰ See for example *Ownership policy of AP-fund 1*, p.9.

¹⁹¹ See for example *Ownership policy of AP-fund 1*, p.8.

¹⁹² *Ownership policy of AP-fund 2*, p.9.

¹⁹³ Compare *Ownership policy of AP-fund 4*, p.7.

3.3.3.2 Identify and Integrate

The AP-funds also claim to be identifying and assessing adverse human rights impacts that they may be involved with. This represents the first step of the due-diligence process that Pillar II requires business actors to carry out. AP-funds 1-4 have entrusted the Ethical council with the task to examine the companies that they have invested in to identify and assess adverse human rights impacts. An external consultant carries out the examination and systematically monitors approximately 4200 companies that the Funds have made investments in. Incidents are reported back to the Ethical council that chooses around 100-200 companies to be further analysed by the consultant.¹⁹⁴ It should be noted that the policies do not require the Funds to conduct this examination before taking the decision to make an investment, it is only applicable to companies that are already in the portfolio of the Funds.

Since AP 7 stands outside the cooperation in the Ethical council the Fund carry out their own examination of companies they invest in. The Policy states that every company should be examined at least two times every year. However, the policy also mentions that it cannot be guaranteed that all the requirements listed will be fulfilled. Due to the large amount of companies that the seventh AP-fund invests in, such guarantee would require unreasonable expenses according to the statement of the policy.¹⁹⁵

The following step in the due-diligence process asks business actors to integrate the findings in relevant functions and processes. This is important to ensure that the findings are properly understood and acted upon. The issue of integration is not very extensively discussed in the policy documents, but constituted one of the issues that the government particularly focused on in its latest report of the AP-funds to the parliament. In the report the government certify that integration is of importance to improve the work with ethical and environmental considerations and according to the assessment of the government the AP-funds have made significant progress on this area. The aim is to widen the group working with ethical and environmental considerations. Instead of limiting the responsibility to the specialists in these questions, the investment management of the Fund should be equally involved and implement these considerations directly. In a longer perspective, the idea is that ethical and

¹⁹⁴ Official homepage of the Ethical council – *A systematic process – description of the work of the Ethical council*: <http://www.ap4.se/etikradet/Etikradet.aspx?id=598>

¹⁹⁵ *Ownership policy of AP-fund 7*, p. 4f.

environmental considerations should constitute a natural part of the financial analysis conducted before an investment, the asset management and the corporate governance.¹⁹⁶

The integration process has not yet come that far within the AP-funds. Nevertheless, the AP 4 is brought up as a good example, for its decision to place the responsibility of integrating these considerations directly on the different management divisions.¹⁹⁷ Steps are taken, but there is more to be done before these considerations are fully integrated in the relevant functions and processes of the AP-funds.

3.3.3.3 Taking appropriate action

Next issue to analyse is whether the AP-funds take appropriate action to prevent and mitigate adverse human rights impacts. As previously stated, the Guiding Principles does not present a single definition of what appropriate action consists of and guidance has therefore been sought from the UNPRI. The AP-funds 1-4 have all chosen the direction recommended by the UNPRI and claim to be active owners in the companies they invest in. The principle for conducting an active ownership is that when companies that the Funds have invested in are alleged of causing or contributing to adverse human rights impacts the Funds should act through its role as an owner to mitigate or make the infringements cease. The Funds should also promote the implementation of systems that might prevent such infringements in the future.¹⁹⁸

The Ethical council carries out the implementation of these principles. The most important method applied is to have an active dialogue with the company in question. The dialogues are carried out both preventively and in situations where the companies are alleged of contributing to breaches of international conventions.¹⁹⁹

Every allegation will not lead to a dialogue process, in fact only a very limited number of incidents are followed by such action. According to the Ethical council it takes the initiative

¹⁹⁶ Regeringens skrivelse 2011/12:130 p. 67ff.

¹⁹⁷ Regeringens skrivelse 2011/12:130 p. 67ff.

¹⁹⁸ Compare *Ownership policy of AP-fund 4*, p.5.

¹⁹⁹ *Annual report of the Ethical council* (2011) p.14.

to start a direct dialogue with somewhere between 10-15 companies each year.²⁰⁰ This number must be considered small considering that around 4200 companies are monitored and 100-200 out of these are thoroughly investigated because of allegations that the Ethical council deem as being serious. The reason for the limited number of dialogue initiatives is a lack of resources according to the Ethical council.²⁰¹ Therefore the council selects a few companies where the problems are significant and well documented. The possibility for the Ethical council to make a difference is also of importance when choosing the companies.²⁰²

The dialogue process can take several years and the Ethical council invests lots of resources in this work, both time and money. If the companies meet the objectives set by the council at the start of the dialogue they will be removed from the dialogue list, but will be subject for special monitoring for another five years. Since the inception of the Ethical council in 2007, eleven companies have met the requirements and been removed from the dialogue list.²⁰³

As a last way out, if the dialogues do not give any result and the efforts to make a difference are deemed to be futile, the Funds are to exclude the company from their investments.²⁰⁴ Exclusions are made on the recommendation of the Ethical council, and all of these recommendations have been followed by the Funds. So far eleven recommendations of exclusion have been made, ten of these regarding companies with a connection to manufacturing or selling of cluster munitions.²⁰⁵ What factors that would lead to exclusion in other cases is hard to tell since no guidance to when progress should be deemed as futile or when a process is considered to have taken to much time is provided in the Funds policies or in the reports of the Ethical council.

²⁰⁰ Official homepage of the Ethical council – *A systematic process – description of the work of the Ethical council*: <http://www.ap4.se/etikradet/Etikradet.aspx?id=598>

²⁰¹ Swedwatch report # 42, p. 13.

²⁰² Official homepage of the Ethical council – *A systematic process – description of the work of the Ethical council*: <http://www.ap4.se/etikradet/Etikradet.aspx?id=598>

²⁰³ Official homepage of the Ethical council – *List of companies that have met the objectives*: <http://www.ap4.se/etikradet/Etikradet.aspx?id=694>

²⁰⁴ See for example *Ownership policy of AP-fund 1* p. 9f and *AP 3's policy for ethical and environmental considerations*, p.2.

²⁰⁵ *Annual report of the Ethical council* (2011), p.25.

It should also be mentioned that the Ethical council takes a range of preventive measures, since appropriate actions to prevent adverse effects on human rights is equally important according to the Guiding Principles. Among other measures preventive dialogues are carried out with companies that run the risk of causing adverse human rights impacts. What companies that are subjects to these dialogues and the result are not accounted for, the Ethical council proclaims that discretion is a requirement for the dialogues to be successful.²⁰⁶ Moreover the council collaborates with other investment actors in different preventive initiatives, which increases the leverage of the AP-funds in these areas.²⁰⁷ To increase leverage is yet another measure that is being recommended by the Guiding Principles.²⁰⁸

The seventh AP-fund has chosen a different way to act in cases where the companies they invest in breach international conventions. The policy of AP 7 proclaims that no investments in companies that do not follow the international conventions ratified by Sweden are allowed. To establish that a company has failed to follow a convention a judgement from an international court or that the company admits to be responsible is required.²⁰⁹ The method, which is a sort of negative screening, is not very unusual or controversial, but not the one recommended in the UNPRI, which has been discussed above. It can also be questioned whether this method can be seen as an appropriate action to mitigate or prevent adverse human rights impacts. Since the AP 7 sells all holdings in companies that infringe human rights the leverage of AP 7 and their possibility to change the wrongful practices of those companies will be lost. The method forms a sharp contrast to the recommendations of the UN Guiding Principles that calls on business actors to exercise and increase their leverage, and to consider the ending of these business relationships as a last resort.

3.3.3.4 Communication

The last requirement of a due-diligence process is for the business actors to show that they respect human rights in practice and communicate this.²¹⁰ All the AP-funds do communicate to some extent, how they work with ethical and environmental considerations. AP-funds 1-4

²⁰⁶ *ibid.* p.14.

²⁰⁷ *ibid.*, p.7.

²⁰⁸ *Guiding Principles on Business and Human Rights* – Commentary to principle 19.

²⁰⁹ *Ownership policy of AP-fund 7*, p.4f.

²¹⁰ Compare *Guiding Principles on Business and Human Rights* - Principle 19.

all mention their commitment to incorporate ethical and environmental considerations in their operations in the Annual reports, although these statements are described in very general terms with references to their ownership policies.²¹¹ Information regarding the practical measures taken during the year is instead found in the special corporate governance reports that each fund publishes. Furthermore the Ethical council presents its work in an annual report.²¹² The seventh AP-fund does also communicate how they address human rights impacts in their annual report, where the list of companies excluded (also known as the “black list”) is incorporated.²¹³

The basic requirements of principle 21 can be considered fulfilled. The Funds have a communication and the reports are easily accessible and recurring. However the content of the communication could be subject for discussion. According to principle 21 (b) in the UN Guiding Principle the provided information must be sufficient to evaluate the adequacy of the business actor’s response to the adverse human rights impacts it is involved in.²¹⁴ The AP-funds has been criticised for being vague in this sense, and the dialogues are surrounded by secretiveness. A statement saying that dialogues are on-going with a number of companies cannot be considered sufficient information to evaluate if the actions taken are adequate and appropriate.

3.3.3.5 The measures taken in the cases of Marlin and Yanacocha

This section will briefly describe the actions taken by the AP-funds on account of the human rights violations that have taken place in connection to the Marlin mine, the Yanacocha mine and the new Minas Conga project, as described under chapter 2.3. All funds except AP 6 currently have holdings in both Newmont that runs the Yanacocha mine and Minas Conga, and Goldcorp that owns Marlin mine through a subsidiary.

The description of the actions taken by the seventh AP-fund will be very brief, since the Fund has not taken any action. Neither Goldcorp nor Newmont are featured on the list of excluded

²¹¹ See for example *Annual report of AP-fund 4* (2011), p.21.

²¹² *Annual report of the Ethical council* (2011).

²¹³ *Annual report of the AP-fund 7* (2011) p. 10.

²¹⁴ *Guiding Principles on Business and Human Rights – Principle 21.*

companies and no other information regarding these companies is provided in the annual reports of the Fund.²¹⁵

AP-funds 1-4, represented by the Ethical council, have had a different approach to these issues. The situation regarding the Marlin mine was brought to the council's attention in 2008. In that year a representative visited the mine due to the troubles in the area. After the visit the Funds decided to submit a shareholder resolution together with a group of other investors, demanding that an independent HRIA should be conducted. The resolution never reached the Goldcorp's year meeting, since the group of investors agreed to withdraw it in exchange for a promise from Goldcorp that a HRIA would be conducted.²¹⁶ Goldcorp has also been one of the companies featured on the Ethical council's dialogue list since 2008. The objectives set up by the Ethical council is that Goldcorp should develop policies and programmes to manage their human rights impacts and ensure that they respect the rights of the indigenous people in the area.²¹⁷ The Ethical council states that the dialogue has been constructive and that the company has taken good measures and is working to solve the problems that were brought up in the HRIA. Still there are issues that must be attended to, and for that reason the dialogue is still on-going.²¹⁸

As described previously the Yanacocha mine has also been surrounded by problems since the start, many of them similar to the ones in the Marlin case. Even so, the reaction from the Ethical council has failed to appear in this case. Neither Newmont nor Buenaventura is or have been on the dialogue list and the Funds have not taken any other actions to prevent or mitigate the adverse human rights impacts connected to these companies and their operations in the Yanacocha area.

²¹⁵ See *Annual report of AP-fund 7* (2011) p.10.

²¹⁶ *Annual report of the Ethical council* (2011) p. 16.

²¹⁷ *Annual report of the Ethical council* (2011) p. 22.

²¹⁸ *ibid.* p. 17.

3.3.5 Discussion and preliminary conclusions regarding Pillar II

After conducting the analysis regarding the AP-funds and their compliance with the requirements in Pillar II in the UN Guiding Principles the general impression is that none of the Funds completely fail to meet any of the different sets of requirements. All Funds follow the provisions, at least on a fundamental level and there have been improvements in the way the Funds address adverse human rights impacts.

The quality of the performances and the policies can be said to differ among the Funds. One example is the ways the Funds stipulate the human rights expectations they have on the companies in which they invest. It must be assumed that the Funds that specify their expectations more exhaustively and set up detailed requirements are more likely to achieve a good result.

Every Fund takes measures to identify adverse human rights impacts and have also started the process to integrate these findings in their operations, even though further steps must be taken to meet this requirement. Next step in the due-diligence process requires the Funds to take appropriate action to prevent and mitigate adverse human rights impacts. It can be questioned whether the AP 7 meets this requirement. Unlike AP 1-4 that have all chosen the method recommended by UNPRI and take action by using their leverage to influence companies in which they invest, the AP 7 chooses to sell their holdings if a company would adversely impact human rights.

The method that AP 7 uses is often advocated by NGOs and may seem efficient and attractive. My opinion is however that the approach recommended by the UNPRI and the UN Guiding Principles that the investors take their responsibility and try to influence the companies in which they invest, will prove to be more efficient to ensure the enjoyment of human rights in the long run. To sell all holdings in companies that have been accused of violating human rights might be an efficient way of avoiding association, but is unlikely to lead to change as long as other investors are staying.

I started out by stating that all Funds seem to follow the provisions, at least at a fundamental level. The question is however, whether a fundamental level is enough in this case. Since the

UN Guiding Principles focuses on the process rather than the outcome, this analysis is harder to conduct with the help of this instrument. It is however stated in one of the foundational principles that the means through which the business actor meets its responsibility to respect human rights should be proportional to among other factors its size and potential to impact human rights.²¹⁹

It is therefore legitimate to question the reasonableness of the fact that only 10-15 companies are being contacted for a dialogue process each year, when more than 4200 are being monitored. The number of dialogues being limited to 10-15 is a question of resources according to the Ethical council. Today the Funds only places a few thousandths of their administrative budget on their work with ethical and environmental considerations and the Funds are currently seeking to reduce administrative costs.²²⁰ This makes it unlikely that more resources will be allocated to the Ethical council, even though budget allocation to enable appropriate action to be taken is required according to Principle 19 in the UN Guiding Principles. I trace the fact that both the ambition and the budget is so low to the low ambition of the policy statement from the government, proclaiming that ethical considerations are to be subordinated to economical aspects. These priorities are also stated in the ownership policies of the Funds and the seventh AP- fund even reserves from fulfilling the parts of the policy concerning ethical considerations referring to a lack of resources.

When looking at the actions taken by the AP-funds in the two examples that have been used as illustration, the result seems very arbitrary. When actions have been taken, as in the case of the Marlin mine it seems to have given result and mitigated the adverse human rights impacts, even though not all issues are solved. However, the situation in connection to the Yanacocha mine that is similar in many ways and have resulted in serious violations of the right to health, right to water and even the right to life, has not led to any measures being taken. This suggests that there are not enough resources to address all adverse human rights impacts that the Funds have been associated with.

²¹⁹ Compare *Guiding Principles on Business and Human Rights* – Commentary to principle 14.

²²⁰ Swedwatch report #42, p. 54ff.

4. Conclusion

The purpose of this thesis has been to further investigate the legal responsibilities for Sweden and the AP-funds with regard to the human rights infringements that the Funds have been associated with. The intention with conducting this investigation was to be able to determine if these actors could be criticised for not fulfilling international principles of business and human rights.

The field of Business and human rights has been growing in importance during the latest decades along with the increasing influence of business actors. In 2011 the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights. The instrument is the final result of John Ruggie's mandate as a SRSG, during which he has clarified the standards of the state duty to protect and the corporate responsibility to respect human right and incorporated these standards in a coherent and operational instrument. These principles has served as the benchmark for the analysis carried out in this thesis and the research question to which an answer has been sought is whether Sweden and the AP-funds meet the requirements of the UN Guiding Principles on Business and Human Rights.

After having carried out an evaluation and analysis of Sweden's and the AP-funds' compliance with the provisions of the UN Guiding Principles, both positive and negative aspects can be brought up for discussion. On the positive side is that the question of human rights and other ethical considerations has received a lot of attention both at the governmental level, but also at the level of the AP-funds. There have been governmental investigations with the mission of investigating these issues and the question is still on the agenda and being debated in the parliament. During the course of the recent years changes have been made that constitute an improvement for the fulfilment of the UN Guiding Principles, among these changes are the fact that the government has started to evaluate the ethical work of the Funds on an annual basis and that the government now demands that the AP-funds communicate how they address human rights impacts within their operations.

The AP-funds have also made improvements lately, new ownership policies that more explicitly addresses ethical considerations have been adopted and the Funds have started the

process to integrate these considerations in their operations. Although there are much more to be done, these changes constitute steps in the right direction. As of today the Funds seem to have developed a set of tools and a system to address adverse human rights impacts that in many ways follow the requirements of the UN Guiding Principles.

However, there are also reasons to criticise Sweden and the AP-funds, and on a number of matters the actors currently fail to meet the requirements set up in the UN Guiding Principles. Examples of such failures is the State's decision to exclude the AP-funds from the applicability of Sweden's Global Development Policy, which risks the fulfilment of the demand for policy coherence. Another example is the method AP 7 applies in situation where companies in which they have investments are being accused for violating human rights. To sell all holdings and cut the possibility to influence can hardly be said to correspond with using and increasing leverage and think of ending the relationship as the last solution, which is advocated in the UN Guiding Principles.

My most severe critic is however not connected to a particular principle, but rather to the striking lack of ambition and dedication to these issues, most clearly illustrated by the statement in the proposition to the Public Pension Funds Act, where the Funds are demanded to take ethical considerations into account, but without deviating from the overall objective of a high rate of return. The statement gives the impression that ethical considerations will have a negative impact on the economical results, which cannot be accepted. This limits the scope for the AP-funds to what extent they are able to take these considerations into account, since many measures might impact the high rate of return at least in a short-term.

When taking a closer look at the content of the ethical work of the Funds this lack of ambition is present also on this level. A system to address adverse human rights impacts has been constructed and set in place, but the level of ambition seems to be limited. The ownership policies where the values regarding human rights that should be taken into account are presented also contain reservations, stating that the overall objective of a high rate of return must be prioritized and that the policy might not be fulfilled due to a lack of resources. Furthermore the extent to which measures are being taken most also be considered as very limited, both in amount of resources spent and number of companies affected by these

measures, possibly too limited to be considered as appropriate action according to the UN Guiding Principles.

I would therefore answer my research question with a yes and a no. On certain aspects the AP-funds and Sweden do meet the requirements of the UN Guiding Principles, but there are also parts where compliance can be questioned and the ways measures are taken must be discussed.

What will be the consequences of the conclusion that the actors fail to meet some of the requirements presented in the UN Guiding Principles? From a legal perspective I would consider it very unlikely that it will bring any consequences at all. The UN Guiding Principles is not a legally binding instrument to which States or business actors have signed up, it should be seen as an instrument to guide actors and the principles are not enforceable.

Instead I hope that the increased awareness of this issue in Sweden and the on-going debate in combination with the incorporation of these principles in other international instruments that affect Sweden, such as the OECD Guidelines and EU's CSR-policy, will lead to a change of direction in these issues and a better compliance with the UN Guiding Principles in the future.

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