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Regulating Natural Resource Funds

by

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A THESIS
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Abstract

Natural resource funds are created to advance their home state interests. However, because they are more active as sovereign wealth funds invested within host states, overwhelming attention has been on their regulation to safeguard transnational interests. Meanwhile, they are only effective when they achieve their policy objectives within home states as against host states.

The study asks how polities should regulate natural resource funds to be effective. Using qualitative methods in law and policy— comparative case study, literature review, and narration and description— to analyse primary and secondary legal data along with secondary empirical data, it claims that polities should regulate natural resource funds to be effective by adopting strong regulatory options and minimum regulatory essentials. It develops these options and essentials based on four regulatory features: legal framework and objectives, ownership regime, structure and functionality, and governance and operation. It makes a recommendation, and concludes thereafter.

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List of Symbols, Abbreviations and Nomenclature

NRF.....	Natural Resource Fund
SWF.....	Sovereign Wealth Fund
GPF.....	Government Pension Fund
APF.....	Alaska Permanent Fund
AHTF.....	Alberta Heritage Trust Fund
USA.....	United States of America
IWG.....	International Working Group of Sovereign Wealth Funds
GAPP.....	Generally Accepted Principles and Practices
IMF.....	International Monetary Fund
OECD.....	Organization for Economic Co-operation and Development
ARCO.....	Atlantic Richfield Company
AIMCo.....	Alberta Investment Management Corporation

CHAPTER 1

1. GENERAL INTRODUCTION

This chapter introduces the concept of natural resource fund (NRF). It identifies the features, purposes and public policy objectives of NRFs. It then outlines the research problem, justification and question, and provides a structure showing the summary of the chapters of the thesis.

1.1. INTRODUCTION

NRF is a label used to describe monies pooled from the exploitation of non-renewable natural resources.¹ Nonetheless, it could be derived from the exploitation of both renewables and non-renewables.² Given these commodity sources, NRF is also seen as a subset of sovereign wealth fund (SWF)³ called commodity fund.⁴ As a commodity fund, NRF does not

¹ NRFs are also loosely called oil funds. See, for example, Richard Allen & Dimitar Radev, "Managing and Controlling Extrabudgetary Funds" (2006) 6:4 OECD J on Budgeting 7; Thomas I Palley, "Combating the Natural Resources Curse with Citizen Revenue Distribution Funds: Oil and the Case of Iraq" (2003) Foreign Policy in Focus Special Report, online: Author's Website <http://www.thomaspalley.com/docs/articles/economic_development/natural_resources_curse.pdf >.

² See, for example, Macartan Humphreys & Martin E Sandbu, "The Political Economy of Natural Resource Funds" in Macartan Humphreys, Jeffrey Sachs & Joseph E Stiglitz, eds, *Escaping the Resource Curse* (New York: Columbia University Press, 2007) 194; Andrew Bauer, ed, *Managing the Public Trust: How to Make Natural Resource Funds Work for Citizens* (New York: Revenue Watch Institute and Yale Columbia Centre, 2014); Benjamin K Savacool, "Countering a corrupt oil boom: Energy justice, Natural Resource Funds, and São Tomé e Príncipe's Oil Revenue Management Law" (2016) 55:1 Environmental Science & Policy 196.

³ Andrew Rozanov coined the term "Sovereign Wealth Fund" in 2005. Andrew Rozanov, "Who Holds the Wealth of Nations?" (2005) 15:4 Central Banking J 52-57.

⁴ Sovereign wealth funds (SWFs) constitute one form of sovereign investments, others being state-owned enterprises, international reserves, and public pension funds. See Robert M Kimmitt, "Public Footprints in Private Markets" (2008) 87:1 Foreign Affairs 119 & 126, 120. Sometimes these forms may overlap, hence the reason many authors conflate them. The sources of SWFs may also explain this further. SWFs could be derived from balance of payment surpluses, returns from foreign currency operation, profits arising from privatization, fiscal surpluses, employee contributions, and revenues from commodity dealings. The first five are non-commodity funds while the last is a commodity fund. Natural resources funds are a type of commodity funds derived from the exploitation of natural resources which could be renewable or non-renewable. See generally Gawdat Bahgat, "Sovereign Wealth Funds: Dangers and Opportunities" (2008) 84:6 Intl Affairs 1189; Udaibir S Das, Yinqiu, Christian Mulder, & Amadou Sy, "Setting up a Sovereign Wealth Fund: Some Policy and Operational Considerations" (2009), online: International Monetary Fund Working Papers <www.imf.org/external/pubs/ft/wp/2009/wp09179.pdf>; Maurizia De Bellis, "Global Standards for Sovereign Wealth Funds: The Quest for Transparency" (2011) 1 Asian J Intl L 349.

ordinarily consist of funds pooled from non-commodity sources such as returns on stocks and bonds.

NRFs date back to the 1950s when governments started realizing the need to save special SWFs from oil wealth. The oldest NRF in the world is the Kuwait Investment Authority, established in 1953 as the Kuwait Investment Board⁵ after the country had discovered crude oil in 1938 at the Burgan Field.⁶

1.1.1. FEATURES AND PURPOSES

With regards to features, NRF is often said to have three major features as a subset of SWF: state ownership, separate management from general government revenues, and freedom from major liabilities.⁷ States bear ownership on behalf of citizens who are usually the inherent

⁵ The Kuwait Investment Authority is also the oldest sovereign wealth fund in general, although in a strict sense, one may, as Truman has done, identify the Revenue Equalization Reserve Fund of Kiribati Island established in 1956 to save money derived from bird droppings export as the first real sovereign wealth fund designed to save wealth rather than an investment agency such as the predecessor to the Kuwait Investment Authority, the Kuwait Investment Board, established in 1953. See Kuwait Investment Authority, "Overview", online: <<http://www.kia.gov.kw/en/Pages/default.aspx>>; Edwin M. Truman, "Sovereign Wealth Fund Acquisitions and Other Foreign Government Investment in the United States: Assessing the Economic and National Security Implications: Testimony before the Committee on Banking, Housing, and Urban Affairs, United States Senate, November 14, 2007" in Thomas N Carson & William P Litmann, eds *Sovereign Wealth Funds* (New York: Nova Science Publishers Inc, 2009) 83, 84; Martin A Weiss, "Sovereign Wealth Funds: Background and Policy Issues for Congress" in Thomas N Carson & William P Litmann, eds *Sovereign Wealth Funds* (New York: Nova Science Publishers Inc, 2009) 1, 6.

⁶ Kuwait Oil Company, "Brief History of Kuwait Oil Company", online: <<https://www.kockw.com/sites/EN/Pages/Profile/History/KOC-History.aspx>>.

⁷ Several definitions emphasize various aspects of SWFs, perhaps from their institutional perspectives. See Simone Mezzacapo, "The So-called 'Sovereign Wealth Funds': Regulatory issues, financial stability, and prudential supervision" (2009) European Economy, online: <http://ec.europa.eu/economy_finance/publications/publication15064_en.pdf>. However as a concept, it does not have a precise definition due to its "definitional challenges". See Andrew Rozanov, "Definitional Challenges of Dealing with Sovereign Wealth Funds" (2011) 1 Asian J Intl L 249. See also George Gilligan, "Multilateral Governance of Financial Markets: The Case of Sovereign Wealth Funds" (2010) 61:4 Northern Ireland Leg Q 391, 395; Paul Rose, "Sovereign Investing and Corporate Governance: Evidence and Policy" (2013) 18:4 Fordham J Corp & Fin L 913, 916. For discussions on the features of sovereign wealth funds, see generally Benjamin J Cohen, "Sovereign Wealth Funds and National Security: The Great Tradeoff" (2009) 85:4 Intl Affairs 713 (outlining the three agreed features of a sovereign wealth fund as state ownership, lack of major liabilities, and separation from general revenues). Also compare Rumu Sarkar, "Sovereign Wealth Funds as a Development Tool for ASEAN Nations: From Social Wealth to Social Responsibility" (2010) 41 Geo J Intl L 621,622 (providing three additional features of sovereign wealth funds as high foreign currency exposure, high risk tolerance and long-term investment horizons); De Bellis supra note 4 at 352 (adopting the definition provided by the Santiago Principles) In any case, it entails two major concepts: political sovereignty and financial wealth. It is set apart from other similar financial entities because its primary beneficiaries are the citizens of its home jurisdiction. See Sven Behrendt, "Sovereign Wealth Funds in Non-democratic Countries: Financing Entrenchment or Change?" (2011) 65:1 J Intl Affairs 65. See also Cohen Ibid.

and beneficial owners of natural resources; funds are managed separately from government revenues to put the government at arms-length, hence enhancing management independence, transparency and accountability; and the reason for avoiding major liabilities is to prevent encumbrances, resulting in sustenance.

Concerning the purposes, NRFs are established to save, invest, and appropriate the resource wealth of an economy.⁸ Generally, saving and investing NRFs, popular across developed countries, mostly serve a “budgetary purpose”, and appropriation of NRFs, popular across developing countries, serves a “development purpose.”⁹ As a saving vehicle serving a budgetary purpose, NRFs are used to maintain revenues over the short-term and long-term. As an investment vehicle still for budgetary purposes, they could also be directed towards ventures that yield profits. As an appropriation vehicle serving development purposes, they may be used to fund social services, welfare projects and state emergencies.

Bearing the features of NRFs in mind, this thesis focuses mostly on budgetary purposes as predominantly applicable to developed countries. However, it also reflects on some aspects of development purposes as might be mostly applicable to developing countries.

1.1.2. PUBLIC POLICY OBJECTIVES

⁸ See generally Arina V Popova, “Sovereign Wealth Funds: To be or Not to be is Not the Question; Which One to Choose, is” (2009) 40 *Geo J Intl L* 1191, 1194; Sarkar *ibid* at 625; Chen Meng, “Sovereign Wealth Fund Investments and Policy Implications: A Survey” (2015) 23:3 *J Financial Regulation & Compliance* 210, 211; Anna Sandor, “Leveraging International Law Incentivize Value-added Shareholding: Why Foreign Sovereign Wealth Funds Still Matter and How they can Improve Shareholder Governance” (2015) 46 *Geo J Intl L* 947, 953 (all citing the International Monetary Fund’s classification of sovereign wealth funds, based on objectives, as stabilization funds, savings funds, reserve investment funds, development funds, and contingent pension reserve funds). See also Harry McVea & Nicholas Charalambu, “Game theory and sovereign wealth funds” (2014) 22:1 *J Financial Regulation & Compliance* 61, 63 (outlining savings funds, fiscal stabilization funds, pension reserve funds and investment reserve corporations as the categories of SWFs).

⁹ Saving and investment NRFs are more popular in developed countries because the majority of these countries could afford to keep wealth for a longer time as they already have systems that meet the immediate needs of their citizens, for example housing, roads, power and health care. Conversely, because most developing countries are currently putting these systems in place, they seem to require more expenses at the moment, hence the reason they appropriate NRFs more rapidly. See also Ilias Bantekas, “Natural Resource Revenue Sharing Schemes (Trust Funds) in International Law” (2005) *LII Nethl Intl L Rev* 31, 39.

Whether for budgetary or development purposes, NRFs are trust funds that have public policy objectives.¹⁰ As such, governments, as trustees, are accountable to citizens, not only for NRFs based on non-renewable resources but also, in principle, those derived from the exploitation of renewable natural resources.¹¹ This issue of accountability makes how they are handled important.

Hence, NRFs ought to be carefully regulated to achieve their public policy objectives. The main actor involved in regulation is the government, but it could also delegate its duties to agents such as fund managers. Whatever the case may be, the regulation of NRFs needs to be tailor-made to drive specific public policy objectives underlying them, whether relating to budgetary or development purposes.

Three objectives appear to be most popular across NRFs. These are intergenerational justice, intragenerational justice, and economic resilience.¹² The first two revolve around justice as relating to citizens, while the last focuses on the economy as a whole. Note however that while these three objectives could appear across all NRF schemes, they are more representative of developed countries than developing countries.

Starting with the first objective, intergenerational justice, the prevailing attitude is that this flows from the right of future generations over non-renewable natural resources, and is beginning to be recognized as a principle of customary international law.¹³ Non-renewable

¹⁰ See generally Jonathan Anderson, “The Alaska Permanent Fund: Politics and Trust” (2002) 22:2 Public Budgeting & Finance 57 (elucidating the idea of a public purpose trust fund).

¹¹ While renewable natural resources funds are not common, they are possible. For example, jurisdictions may develop funds based on forest resources, fishery and renewable energy. For example, the Forest Act provides for the contributions into the forest component of the natural resources funds. See *Regulation Respecting Contributions to the Forest Component of the Natural Resources Fund*, CQLR c F-4.1, r2.

¹² It is worthy of note that intergenerational and intragenerational interests are also becoming issues in the regulation of renewable natural resources due to the continued disruption of the dichotomy between renewable and non-renewable natural resources. Renewable natural resources are fast becoming non-renewable due to overexploitation and resource depletion.

¹³ In the context of the environment, Judge Weeramantry of the International Court of Justice, in his separate opinion, refers to intergenerational equity in the *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* [1993] ICJ Rep 38. Also in his dissenting judgement in the *Nuclear Tests Case (New Zealand v. France)* [1974] ICJ Rep 457, he provides a more detailed similar comment. See Gordon L Clark & Eric RW Knight, “Temptation and the Virtues of Long-Term Commitment: The Governance of Sovereign Wealth Fund Investment” (2011) 1 Asian J Intl L 321.

natural resources accumulate over many years but could be depleted within a relatively short time. It seems unfair if past generations accumulate and bequeath them, the current generation inherits and depletes them, but future generations inherit the repercussions of resource overexploitation and depletion, including associated environmental problems. The implication is that the current generation inherits assets from past generations but bequeaths liabilities to future generations. This is therefore an environmental justice issue.

To address this situation, many polities have established one form of future generations' fund or the other, identifying future citizens as having ownership titles, normally held collectively. Such funds attempt to turn non-renewable natural resources into renewable and sustainable wealth. They could stand alone as a future generation pool such as Australia's Future Fund, the Ghana Heritage Fund or Nigeria's Future Generations Fund, or form an inherent part of a current-future generation pool without having a nomenclature distinguishing it as such, for example the Government Pension Fund (GPF) of Norway, Alaska Permanent Fund (APF), Alberta Heritage Trust Fund (AHTF), and Angola Sovereign Wealth Fund (Fundo Soberano de Angola).

Moving to the second objective, intragenerational justice, it is not clear what it conclusively entails when compared to its intergenerational justice counterpart. At the most basic level, it encompasses the rights of all current citizens over non-renewable natural resources, thus covering often recognized interests such as pension support and economic development which stem from collective ownership, given that many people may be entitled. If citizens severally own natural resources as a collective pool, then they all have equal rights over these resources. However, this equality of rights may not necessarily transform into

access, as individual rights may be lost within joint ownership frameworks.¹⁴ Intragenerational justice therefore borders on the classic notion of social justice.¹⁵

One way to satisfy the demands of intragenerational justice is through the redistribution of wealth, which governments often do by providing social services. Major problems with this approach are that it is subject to regulatory discretion which may be abused, and there is difficulty in measuring what share goes to which citizen. For example, where the government applies natural resource revenues to lower taxes or provide public utilities, people would not equally benefit since not everyone pays taxes or uses public utilities comparably.¹⁶ These examples imply that the predominant model of NRF administration involving applying funds to defray public costs and provide social services might not be adequate. Alternatively, an effective way might be to complement the provision of public and social services with an allocation of measurable resource dividends like the APF does.

As for the third objective, economic resilience, although also characteristic of other subsets of SWF, it has a unique contextual application to NRFs. As applicable to SWFs generally, it mostly addresses macro-economic problems, and revolves around the interests of the political unit as a whole. As for its specific application to NRFs, it could be designed to protect an economy from booms and busts arising from resource-dependence which may also directly affect current generations or indirectly affect future generations. Due to overflowing wealth within an economy that is not able to absorb it, booms may lead to socio-political problems such as poor fiscal policies, public corruption and the absence of transparency in

¹⁴ See Anna Di Robilant, “The Virtues of Common Ownership” (2011) 91 BUL Rev 1359; Anna Di Robilant, “Common Ownership and Equality of Autonomy” (2012) 58:2 McGill LJ 263.

¹⁵ See generally Stefanie Glotzbach & Stefan Baumgartner, “The Relationship between Intragenerational and Intergenerational Ecological Justice” (2012) 21:3 Environmental Values 331 (identifying intragenerational justice as justice between people of the same generation).

¹⁶ Rögnvaldur Hannesson, *Investing for Sustainability: The Management of Mineral Wealth* (New York: Springer, 2001) 60.

resource management, captured by concepts such as the resource curse¹⁷ and the petrostate,¹⁸ and socio-economic problems such as financial waste and misappropriation, poor investments decisions, inflation and unemployment captured by the concept of the Dutch disease.¹⁹ Busts affect current generations directly through public repercussions such as the loss of jobs, the decline in the standard of living and political cum economic insecurity of a people, and may indirectly affect future generations where these repercussions become cross-generational, for example where children grow into economic turmoil. While Alberta, Russia, Venezuela, and Nigeria are typical examples of polities that have often faced and/or now face these problems, other places such as Iran, Iraq and Saudi Arabia are either already facing or may face some of them in the current oil glut.

Therefore, the thinking is that, to prevent the problems of booms and prepare for busts, economies should reserve and carefully manage excess wealth from booms, which could then absorb the pressure of booms and serve as buffers during busts. Countries such as Kuwait, Qatar and United Arab Emirates have done this.²⁰ One way to do so is by creating special NRFs, often called stabilization or stability funds. Examples include the Stabilization Funds of

¹⁷See Michael L Ross, "The Political Economy of the Resource Curse" (1999) 51 World Politics 297; Erling Røed Larsen, "Escaping the Resource Curse and the Dutch Disease? When and Why Norway Caught up with and Forged ahead of its Neighbours" (2004) 65:3 The Am J Economics & Sociology 605; Graham A Davis & John E Tilton, "The Resources Curse" (2005) 29 Natural Resources Forum 233; Emeka Duruigbo, "The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa" (2005) 26:1 U Pa J Intl L (formerly U of Pennsylvania J Intl Economic L) 1; Andrew Rosser, *The Political Economy of the Resource Curse: A Literature Survey* (Brighton: Institute of Development Studies, 2006); Michael Watts, "Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria" (2010) 9:1 Geopolitics 50; Terra Lawson-Remer & Joshua Greenstein, "Beating the Resource Curse in Africa: A Global Effort" (2012) Council on Foreign Relations <www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780>.

¹⁸ See Terry L Karl, *The Paradox of Plenty: Oil Booms and Petro-states* (Berkeley: University of California Press, 1997); Terry L Karl, "The Paradox of Plenty: Oil Booms and Petro-states" (1998) 36:02 The J Modern African Studies 333; Shah M Tarzi & Nathan Schackow, "Oil and Political Freedom in Third World Petro States: Do Oil Prices and Dependence on Petroleum Exports Foster Authoritarianism?" (2012) 29:2 J Third World Studies 231.

¹⁹ See Larsen supra note 17; Theresa Sabonis-Helf, "The Rise of the Post-soviet Petro-States: Energy Exports and Domestic Governance in Turkmenistan and Kazakhstan" in Dan Burghart & Theresa Sabonis-Helf, eds *The Tracks of Tamerlane* (Washington DC: Institute for National Strategic Studies, 2005) 159; Remer & Greenstein supra note 17; Shai Bernstein, Josh Lerner, & Antoinette Schoar, "The Investment Strategies of Sovereign Wealth Funds" (2013) 27:2 J Economic Perspectives 219; The Economist Explains, "What Dutch Disease is, and Why it's Bad" (2014) The Economist <www.economist.com/blogs/economist-explains/2014/11/economist-explains-2>.

²⁰ Matt Egan, "Saudi Arabia to Run Out of Cash in Less than 5 Years" (26 October 2015) online: CNN Money <<http://money.cnn.com/2015/10/25/investing/oil-prices-saudi-arabia-cash-opec-middle-east/>>.

Russia, Iran, Ghana and Nigeria, the Mongolia Fiscal Stability Fund, the Pension Reserve Fund and Economic and Social Stabilization Fund of Chile, and the Venezuela Macroeconomic Stabilization Fund. Some NRFs may also not be designated as stabilization funds but, nonetheless, primarily perform stabilization functions. Examples include the Sovereign Fund of the Gabonese Republic (Fonds Souverain de la Republique Gabonaise), Kazakhstan National Oil Fund, and the National Fund for Hydrocarbon Reserves (Fonds National des Revenus des Hydrocarbures) of Mauritania. As a general rule, NRFs such as the AHTF, APF and GPF established for broader purposes also perform stabilization functions.

1.2. RESEARCH PROBLEM

Once NRFs are to be established, polities would identify relevant objectives, often but not always exclusively about intergenerational justice, intragenerational justice and economic resilience. Popular examples of actual objectives around the world include the preservation of wealth,²¹ the preparation for future exhaustion of resources,²² and the prevention of the overflow of resource revenues.²³ In so far as polities identify these objectives, they strive to create suitable regulations. These regulations could take several forms,²⁴ but the leading ones are command and control, employing law and administrative instruments, and economic, otherwise known as market-based,²⁵ approaches.

²¹ Almost all sovereign wealth funds have this goal. Hence, it is not limited to natural resources funds.

²² For example, Alberta Permanent Fund and the Nigerian Sovereign Wealth Fund.

²³ This features in most non-renewable natural resource funds. Examples include the Government Pension Fund, Alaska Permanent Fund, Alberta Heritage Trust Fund, and Nigerian Sovereign Wealth Fund.

²⁴ See Barry Barton, "The Theoretical Context of Regulation" in Barry Barton, Alastair Lucas, Lila Barrera-Hernández & Anita Rønne, eds, *Regulating Energy and Natural Resources* (Oxford: Oxford University Press, 2006) 11.

²⁵ Note that the practice of polarising regulatory (meaning command/control) and economic/ market-based systems has become outdated. This is because many neoliberals and post-modernists would now classify economic/market-based systems as regulations. See also David Driesen, "Alternatives to Regulation?: Market Mechanisms and the Environment" in Martin Cave, Rob Baldwin, Martin Lodge, eds, *Oxford Handbook on Regulation* (Oxford: Oxford University Press, 2009) 1, 4, online: Syracuse University Surface <<http://surface.syr.edu/cgi/viewcontent.cgi?article=1028&context=lawpub>>. Neoliberals and postmodernists they may be generous enough to qualify it with "traditional or conventional". This is because of the expansion of the concept of regulation. In fact, the concept of regulation now has economic justifications.

Command and control and economic regulations are often polarized. Command and control regulations, with lexical roots in military procedure,²⁶ involve government imposition and enforcement of rules,²⁷ while using standards and sanctions emanating from “political institutions engaged in formal procedures—the legislature, the courts, and the regulatory agency”²⁸ to compel performance. Economic or market-based regulations, often classified as self-regulation and considered “a clever form of government regulation,”²⁹ use market forces and the institutions arising from them,³⁰ although scholars now argue for a modest level of government involvement on the basis of public good.³¹

Further, law and administrative regulations, as command and control instruments, could also be polarized. It is common knowledge that law emanates from binding normative prescriptions, whether of the legislature, based on the Westminster system of government, as executed by the executive and interpreted by the judiciary, or from other acceptable rule-setting under legal systems such as case law under the common law tradition or customary law under the Scandinavian legal tradition. Conversely, administrative regulations, which often document

²⁶ Ross Pigeau & Carol McCann, “Re-Conceptualizing Command and Control” (2002) *Can Military J* 53.

²⁷ Just like in the militaristic term, by command, governments dictate rules and prescribe standards, and by control, they enforce these rules through sanctions and punishments.

²⁸ Timothy F Malloy, “The Social Construction of Regulation” (2010) 58:2 *Buff L Rev* 267.

²⁹ Paul R Portney, “Approaches to Environmental Policy: A ‘Refresher’ Course” (2003) *Resources* 15.

³⁰ Economic or market-based systems now work within command/control frameworks, leading to a blur between the two. This might be the reason tax and subsidy regimes are popularly classified as economic instruments. See Sandi Zellmer, “The Virtues of ‘Command and Control’ Regulation: Barring Exotic Species from Aquatic Ecosystems” (2000) 4 *U Ill L Rev* 1233. However, although a majority of scholars agree that taxes and subsidies are economic or market-based regulations, one could contend whether they really are given that they are entirely deployed and controlled by traditional government institutions at the market stage. Under classical and neo-classical economic approaches, governments only design and monitor policy frameworks, rather than directly influence market forces, in this case price; increased or reduced taxes and subsidies eventually reflect in prices. Perhaps, an explanation could be that these instruments pass as market or economic instruments under leftist economic approaches that justify government strong hold on market forces. Another explanation could be the popular claim that governments intervene to remedy market failures. Alternatively, it might be safer to consider tax and subsidy economic instruments under command/control regulations, rather than forms of economic or market-based regulations. It is my claim that trading may qualify better as an economic or market-based system. Critiques may argue that governments also set the performance standards that lead to trading schemes, for example carbon or emissions trading. However, the difference is that, under trading schemes, governments do not directly influence any of the market forces, i.e. price, demand and supply.

³¹ See Gerald P O’Driscoll Jr & Lee Hoskins, “The Case for Market-Based Regulation” (2006) 26:3 *Cato J* 469.

administrative procedures,³² provide flexible prescriptions of the executive arm of government. They are originally designed to steer social reform,³³ and could allow a lot of discretion.

In any case, the suitability of NRF regulations, whether law or administrative instruments, as command and control regulation, or market instruments as part of economic regulation, might vary based on contexts. The variables may include the socio-legal culture, political system, existing policy framework, and policy priorities. For example, where a polity needs flexibility so that the regulation could fit into the existing policy framework, it might opt for administrative and market instruments rather than law. Also, where a polity wants to entirely prohibit an action, it might consider law rather than economic or administrative instruments. In essence, the dynamics of regulation largely determine the nature of the regulatory support NRFs receive.

Hence, how governments and fund managers advance NRF objectives depends on the form of regulation. Administrative and economic instruments allow more discretion than law. Given this fact, the more the regulation allows discretion, the easier it is to meddle with NRF. For instance, administrative discretion in Alberta is probably the reason the government has meddled with the AHTF. Conversely, law reduces discretion. For example, successive government regimes in Alaska have had no choice but to stick with the permanent fund dividend system of the APF probably because the regime is backed by strict law in the form of the constitution, and Norway's GPF has successfully saved abundant wealth perhaps because of its statutory provisions that limit government discretion. The thesis explores these situations with the AHTF, APF and GPF.

³² See, for example, Pablo T Spiller, "A Positive Political Theory of Regulatory Instruments: Contracts, administrative law or regulatory specify" (1996) 69 Southern Carolina L Rev 477; Organization for Economic Co-operation and Development, *The OECD Report on Regulatory Reform: Synthesis* (Paris: Organization for Economic Co-operation and Development, 1997).

³³ Mary Gardiner Jones, "The Role of Administrative Agencies as Instruments of Social Reform" (1966) 19 Administrative L Rev 279.

In summary, NRFs would ordinarily have a mix of law and administrative instruments, collectively making up command and control regulation set by government to prescribe standards, and perhaps economic regulation, involving business operators in setting standards: government implements law and administrative instruments, and may involve fund managers and businesses in the implementation of economic instruments. Law compels performance and employs penalties; administrative instruments use flexible executive prescriptions; and economic instruments employ market variables such as price, demand and supply. With a mix of these instruments, the expectation is that there would be a balance of discretion, meaning that while the government and fund managers would have a reasonable level of decision-making freedom that comes with administrative and economic regulations, they would also be constrained by law.

But then, a problem that remains is that even where this mix exists with the expectation that there would be a balance of discretion, whether or not NRFs achieve their objectives is another issue. For example, despite the fact that the AHTF³⁴ is backed by this mix like the GPF and APF, the latter two have largely achieved their objectives, while the former has largely failed in this respect.³⁵ As such, it becomes an issue how, despite being comparably backed by a desirable mix of regulations, the AHTF has failed to live up to expectation, when compared to the GPF and APF. This issue suggests the existence of other variables, beyond the legal-administrative-economic regulatory dichotomy, that might be contributing to its failure to

³⁴ See AF Collins, "The Alberta Heritage Savings Trust Fund: An Overview of the Issues" (1980) 6 Can Public Policy 158; Michael D Hoffman, "The Economic Impact of the Alberta Heritage Savings Trust Fund on the Consumption-Savings Decision of Albertans" (1996) 36 Western Centre for Economic Research Information Bull 1.

³⁵ One can hardly come by stakeholders that consider Alberta successful in its prudent stewardship mission, perhaps apparat from the government. This obviously accounts for most commentators find one problem or the other with it. See, for example, Kelly McParland, "How Alberta turned its Heritage Fund into a Cash Machine for Big-Spending Politicians" (2014) National Post <<http://news.nationalpost.com/full-comment/kelly-mcparland-how-alberta-turned-its-heritage-fund-into-a-cash-machine-for-big-spending-politicians>>; Justin Giovannetti, Michael Pereira, & Julia Wolfe, "What Happened to Alberta's Cash Stash: The Life and Death of the Province's Rainy-Day Fund" (2015) The Globe and Mail <<http://www.theglobeandmail.com/news/alberta/what-happened-to-albertas-cash-stash/article24191018/>>.

perform up to expectation. One wonders what has made the GPF and APF largely achieve their objectives, and caused the AHTF to have largely failed to do the same.

Notably, this problem of whether NRFs achieve their objectives appears across many territories around the world, and not only in Alberta, Norway and Alaska. To understand the cause of this problem and potential solutions that might be available, there is the need to examine how NRFs are regulated.

1.3. RESEARCH JUSTIFICATION

The prevailing NRF policy has not addressed the problem of whether or not NRFs achieve their objectives. This is because it has not focused on home state interests, but rather host state interests.

The gap in the prevailing policy is partly due to the predominant embeddedness of NRFs in SWFs. As far as mainstream policy is concerned, NRFs are lumped together with SWFs. As such, they are merely treated as investments, and receive no special attention as instruments for local objectives. This lumping also subjects NRFs to problems associated with SWFs generally. As SWFs are primarily designed for foreign investment, the attention has been on the structure, transparency and governance of investments of NRFs, in form of SWFs, going into host states, mostly the United States of America (USA),³⁶ with American policy makers

³⁶ One of the major SWFs that has been a source of worry for the USA is the China Investment Corporation, established in 2007. The major concerns have been that its creation may mean that China intends to divert its foreign exchange holdings away from government securities in the US; its investment activities might have negative implications on the USA's financial market and overall economy; it could drive geopolitical interests in establishing Asia as a financial power of the world; and it may give China too much control over the USA as to result in security risks. This fund receives its inputs from foreign investments, it is a non-commodity fund. See Michael F Martin, "China's Sovereign Wealth Fund" in Thomas N Carson & William P Litmann, eds *Sovereign Wealth Funds* (New York: Nova Science Publishers Inc, 2009) 21; Gordon L Clark, Adam D Dixon, & Ashby HB Monk, *Sovereign Wealth Funds: Legitimacy, Governance, and Global Power* (Princeton: Princeton University Press, 2013). See also Patrick A Mulloy, "Testimony of A. Mulloy before the Senate Committee on Banking, Housing & Urban Affairs Hearing on 'Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the U.S.: Assessing the Economic and National Security Implications', November 14, 2007" in Thomas N Carson & William P Litmann, eds *Sovereign Wealth Funds* (New York: Nova Science Publishers Inc, 2009) 107.

and scholars calling for increased regulation,³⁷ and then Europe, with European countries prescribing restrictions as well as investment and transparency principles.³⁸

So, the prevailing policy has emphasized transnational implications, and failed to sufficiently entrench home state interests which form the essence of NRFs. This could be explored further.

1.3.1. SANTIAGO PRINCIPLES

The climax of SWF policy started with the inauguration of the International Working Group of Sovereign Wealth Funds (IWG) established at a meeting of the International Monetary Fund (IMF) member-states having SWFs between 30 April and 1 May 2008 in Washington, District of Columbia, USA.³⁹ The mandate of the IWF was to “identify and draft a set of generally accepted principles and practices (GAPP) that properly reflects their investment practices and objectives, and agree on the Santiago Principles at its third meeting.”⁴⁰ It eventually released a document entitled the “Sovereign Wealth Funds Generally Accepted Principles and Practice,” otherwise known as the Santiago Principles, in October 2008.

A first look at the Santiago Principles would suggest they are adequate, but this is far from true. They are organized in three parts: Part I outlining the principles; Part II discussing them; and Part III listing the appendices and references. They also focus on three broad areas:

³⁷ Note, however, that while most stakeholders and scholars have called for restrictions or increased regulation of sovereign wealth funds, few have argued somewhat otherwise. See generally David Marchick, “Testimony of David Marchick, Managing Director and Global Head of Regulatory Affairs, The Carlyle Group, Before the United States Senate, Committee on Foreign Relations, June 11, 2008” in Thomas N Carson & William P Litmann, eds *Sovereign Wealth Funds* (New York: Nova Science Publishers Inc, 2009) 309 (testifying on why sovereign wealth funds do not pose security threats to the USA and how a stricter regulation of them could be detrimental to the foreign policy and economy of the country); Truman supra note 5 at 84 (outlining the activities of sovereign wealth funds in the USA and how the increased activities of these funds could be covered by the existing regulatory framework).

³⁸ See generally Weiss supra note 5 at 1 (distinguishing the response of the USA and Europe to transnational investment activities of SWFs).

³⁹ The International Working Group of Sovereign Wealth Funds had 26 members countries and was co-chaired by Hamad Al Hurr Al Suwaidi, Undersecretary of Abu Dhabi Finance Department, and Jaime Caruana, Director of the Monetary and Capital Markets Department of the International Monetary Fund

⁴⁰ International Working Group of Sovereign Wealth Funds, “Sovereign Wealth Funds: Generally Accepted Principles and Practices” (October 2008) 1, online: <<http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>>.

“(i) legal framework, objectives, and coordination with macroeconomic policies; (ii) institutional framework and governance structure; and (iii) investment and risk management framework.”⁴¹

Moreover, some of the principles are captivating, and could be seen as likely to entrench home state interests of SWFs by giving people titles and protecting their economic liberties. Principle 1 recommends that the legal framework of SWFs should be sound and support them to achieve their stated objectives. Principle 2 builds on principle 1 by stating that the policy purpose of SWFs should be clearly defined and publicly disclosed. Principle 3 also urges that where SWFs have domestic macroeconomic implications, national fiscal and monetary authorities should regulate them to ensure coherence with the existing policy framework. Other principles focus on the issues of transparency, accountability, and efficiency. But then, these principles and others, when considered together, are not flawless.

First, because the primary agenda behind the principles is the regulation of the inter-state and not the intra-state activities of SWFs,⁴² they do not provide for what happens where domestic and foreign objectives clash. SWFs are owned by home states, but are more operational within host states. Domestic objectives mostly focus on national interests such as social welfare, economic resilience, development, intergenerational justice, and intragenerational justice, while foreign investment objectives are essentially designed to ensure the realization of the domestic objectives through profitability, transparency and accountability. However, these foreign investment objectives, constituting the “means,” have

⁴¹ Ibid at 5.

⁴² Before the global financial meltdown of 1997/1998, concerns of western politicians originally brought the activities of SWF into question: What are they and how do they operate? However, upon the economic downturn, the developed countries where these politicians raised these concerns welcomed SWF investments to cushion their economies. Leading among these was the USA. To accommodate these funds while making attempts to reduce the security threat they could pose by dominating host economies, the USA Treasury Secretary, Henry Paulson, worked with the International Monetary Fund to inaugurate the International Working Group of Sovereign Wealth Funds. The implicit idea behind this was to promote transparency and disclosure among SWFs, and reduce the doubt about their commercial nature. See Adam D Dixon, “Enhancing the Transparency Dialogue in the ‘Santiago Principles’ for Sovereign Wealth Funds” (2014) 37 Seattle U L Rev 581. See also Behrendt *supra* note 7 at 68.

been receiving far more attention than the domestic objectives which make up the “end.” The implication of this is that, without a reaffirmation of the primary domestic objectives, governments and fund managers may continue to prioritize foreign investment objectives. The result is that host state interests get to take priority over home state interests.

Second, the Santiago Principles are designed to improve the regulation of SWFs without noting the peculiarities of NRFs as a subset. NRFs are a peculiar type of SWFs, given the nature of their source. While SWFs often generally emphasize economic resilience and development interests, NRFs as a subset further present intergenerational and intragenerational justice ramifications that may stem from resource depletion— because non-renewable natural resources could be depleted, every generation has a stake that could be acknowledged through NRF distribution schemes. This difference makes NRFs a more normative subset of SWF, bordering on the stakes of several human generations. Therefore, the general regulation of SWF is unsuited to reflect the justice implications of NRFs.

One could argue that Principle 1 of the Santiago Principles reflects these peculiarities of NRFs by stating that the legal frameworks of SWFs should support their policy objectives.⁴³ This argument might be viable where national policies domesticate the principle. However, where otherwise, even if due to political misfeasance, the principle becomes helpless. This brings to mind the utility the principle might have if it specifically advocates for home state interests which might then advance justice-based goals. In any case, the obvious reason for the provision’s abstract nature is that it is designed as a general principle that could govern SWF investments,⁴⁴ not home state interests.

Third, the fact that the Santiago principles are a voluntary undertaking makes them inadequate for SWF regulation within home states. The IWG has no legal authority to enforce

⁴³ See also Paul Rose, “The Management of Public Natural Resource Wealth” (2013) 3 Brazilian J Public Policy 80.

⁴⁴ See also Paul Rose, “Sovereign Wealth Fund Investment in the Shadow of Regulation and Politics” (2009) 40 Geo J Intl L 1207, 1214.

them within domestic boundaries, and as such, the principles are invariably subject to national discretion.⁴⁵ Where states decide to go against them, there are no virile remedies. Potential enforcement strategies may include the use of diplomatic strategies such as trade and import sanctions, but these are currently more active within the mainstream international trade and investment frameworks, not the “sovereign wealth fund framework.” SWFs currently have no clear identity within these international economic frameworks, so there is low domestic compliance. For instance, compliance with the Santiago principles as at 2010 was between 50 and 60 percent, and was uneven among signatories.⁴⁶

1.3.2. OECD DECLARATION

The Organization for Economic Co-operation and Development (OECD) has also produced a guidance collection applicable to SWFs. This guidance collection has three documents: OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies, made in 2008⁴⁷; Guidance that Reaffirms the Relevance of Long Standing OECD Investment Principles,⁴⁸ first adopted in 1961; and Guideline for Recipient Country Investment Policies Relating to National Security 2008.⁴⁹ Among these, the OECD Declaration is the most important for the regulation of SWFs specifically.

Ministers representing 33 countries developed the declaration at the OECD Meeting of the Council at Ministerial Level in June 2008 based on the 1961 guideline, providing for the

⁴⁵ Joseph J Norton, “The ‘Santiago Principles’ and the International Forum of Sovereign Wealth Funds: Evolving Components of the New Bretton Woods II Post-Global Financial Crisis Architecture and Another Example of Ad Hoc Global Administrative Networking and Related ‘Soft’ Rulemaking?” (2009-2010) 29 R Banking & Fin L 465, 513.

⁴⁶ See Behrendt supra note 7 at 69.

⁴⁷ Organization for Economic Co-operation and Development, “OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies” (5 June 2008), online: OECD <<http://www.oecd.org/daf/inv/investment-policy/41816692.pdf>>.

⁴⁸ Organization for Economic Co-operation and Development, “OECD General Investment Policy Principles” (2008), online: OECD <<http://www.oecd.org/daf/inv/investment-policy/41811096.pdf>>.

⁴⁹ Organization for Economic Co-operation and Development, “OECD Guidelines for Recipient Country Investment Policies Relating to National Security” (2008), online: OECD <<http://www.oecd.org/daf/inv/investment-policy/41807723.pdf>>.

investment principles of non-discrimination, transparency and liberalization,⁵⁰ together with the 2008 guidelines for protecting host countries adopted along with it, providing for non-discrimination, transparency/predictability, regulatory proportionality and accountability. The declaration now serves as a twin document of the Santiago Principles in regulating SWFs.

Like the Santiago Principles, the declaration focuses mainly on the transnational implications of SWFs as investments rather than as a scheme designed to drive home state interests. In fact, its primary concern is the behaviour of recipient countries, including the prevention of protectionist barriers, avoidance of investment discrimination, and the creation of investment safeguards,⁵¹ which focus on mainstream international economic issues.⁵²

Arguably, its most relevant provision for home state interest is on how countries and SWFs should enhance transparency and accountability. Unfortunately, it does not stipulate strategies for achieving this. It might have left the strategies out believing that the Santiago Principles have covered them, oblivious to the latter's limitations. Also, the provision focuses on making SWFs attractive at the international stage, not how they could achieve the objectives for which their home states originally established them.

The declaration shares other problems with the Santiago Principles. It treats all SWFs the same, hence giving no acknowledgement to the justice implications of NRFs and, as such, treats them like non-commodity funds. This treatment removes the unique interests underlying NRFs from the equation, and might lead to regulatory decisions based on inchoate assumptions. Further to this, the declaration is not enforceable within domestic boundaries. Where citizens oppose how governments handle SWFs, it does not provide for how the opposition could be

⁵⁰ The Organization for Economic Co-operation and Development (OECD) general investment policy principles could be found in the OECD Code of Liberalization of Capital Movements 1961 and the Organization for Economic Co-operation and Development Declaration on International Investment and Multinational Enterprises of 1976 as revised in 2000.

⁵¹ See also Efraim Chalamish, "Protectionism and Sovereign Investment Post Global Recession" (2009) OECD Global Forum on International Investment 7-8 December 2009, 6, online: <<http://www.oecd.org/investment/globalforum/44231385.pdf>>.

⁵² Ibid at 7.

addressed or the authority with control, perhaps because it is pointless to do this as an international regulatory instrument with no binding force within domestic territories.

1.3.3. POLICY BLUEPRINT

Some policy analysts have also made attempts to augment the fundamentals of the Santiago Principles and the OECD declaration. The most popular is by Truman who develops a blueprint based on a scoreboard for the practices of 44 SWFs as at 2008.⁵³

Truman identifies the two major tensions that SWFs have caused within the international economic community. First, they reflect the redistribution of wealth by showcasing the financial wherewithal of countries that have traditionally not been major economic forces.⁵⁴ Second, they show governments as the owners of redistributed wealth, marking the arrival of state actors into a global market initially dominated by the private sector and run by market forces.⁵⁵

Truman stipulates elements of SWFs similar to those of the Santiago Principles and the OECD Declaration. These include the structure, governance, accountability and transparency, and management behaviour of SWFs. He gives home state interests more attention than the Santiago Principles and OECD Declaration by ascertaining whether SWFs provide confidence and accountability to citizens of home states.⁵⁶ However, he does not discuss the specifics of how SWFs should achieve their home state interests.

⁵³ Edwin M Truman, "A Blueprint for Sovereign Wealth Fund Best Practices" (April 2008) Policy Brief 08-3, online: Peterson Institute for International Economics <<http://www.petersoninstitute.org/publications/pb/pb08-3.pdf>>; Edwin M Truman, "A Blueprint for Sovereign Wealth Fund Best Practices" (2009) *Revue D'économie Financière* (English ed.). *Hors-série/ Sovereign wealth funds: Special Issue* 429.

⁵⁴ Truman "A Blueprint for Sovereign Wealth Fund Best Practices" (2008) *ibid*; Truman "A Blueprint for Sovereign Wealth Fund Best Practices" (2009) *ibid*. See also Rumu Sarkar, "Sovereign Wealth Funds: Furthering Development or Impeding It?" (2009) 40 *Geo J Intl L* 1181.

⁵⁵ Truman "A Blueprint for Sovereign Wealth Fund Best Practices" (2008) *supra* note 53; Truman "A Blueprint for Sovereign Wealth Fund Best Practices" (2009) *supra* note 53.

⁵⁶ Truman "A Blueprint for Sovereign Wealth Fund Best Practices" (2009) *supra* note 53 at 435.

1.4. RESEARCH QUESTION

The key problem with the prevailing policy on SWFs is the failure to substantially address home state interests, particularly as associated to NRFs.⁵⁷ This problem justifies investigating the regulation of NRFs as pools essentially designed to drive home state interests, as distinct from SWFs which seem to lay more emphasis on transnational investment.

As such, the relevant question is: how should polities regulate NRFs to be effective? Beyond the transnational issues that policy makers and other stakeholders have mostly focused on, it seems that whether or not NRFs are effective depends on how well they advance their stated home state objectives. Where they advance these objectives, then they would be effective, but where they fail to do so, then they would be ineffective.

Employing qualitative methods, the thesis claims that polities should regulate NRFs to be effective by adopting strong regulatory options and minimum regulatory essentials. This means that where they can, they should choose the strongest regulatory option available to them, but where they cannot, for instance where the circumstances do not allow, then they should not descend below certain minimum regulatory essentials. These regulatory options and essentials, outlined in the recommendation section of the thesis, concern four regulatory features: legal framework and objectives, ownership regime, structure and functionality, and governance and operation. The options and essentials provide a holistic regulatory picture that could inform how NRFs might achieve their objectives.

For conceptual clarification, many policy approaches and instruments could be classified under the concept of “regulation” because regulatory culture may emanate from a variety of sources.⁵⁸ Also, this is the case because of the expansion of the concept of

⁵⁷ See, for example, Bantekas *supra* note 9; Anna Gelpern, “Sovereignty, Accountability, and the Wealth Fund Governance Conundrum” (2011) 1 *Asian J Intl L* 289; LI Hong, “Depoliticization and Regulation of Sovereign Wealth Funds: A Chinese Perspective” (2011) 1 *Asian J Intl L* 403; Ondotimi Songi, “Defining a Path for Benefit Sharing Arrangements for Local Communities in Resource Development in Nigeria: The Foundations, Trusts and Funds (FTFs) Model” (2015) 33:2 *J Energy & Natural Resources L* 147.

⁵⁸ Errol Meidinger, “Regulatory Culture: A Theoretical Outline” (1987) 9:4 *L & Policy* 355.

government into the idea of governance, the extension of the national into the transnational, and the multiplicity of actors in contemporary public policy.⁵⁹ However, regulation is used in this thesis primarily to mean law along with administrative and economic mechanisms. Governments employ law and administrative mechanisms to create and run NRFs as a public policy agenda, and use economic mechanisms, through agents such as fund managers, to manage NRFs as a profitable venture.

1.5. THESIS STRUCTURE

Four other chapters follow this first chapter. Chapter two outlines the methodology. Chapter three is the literature review. Chapter four reports the result and discusses it. Chapter five then concludes the thesis.

Chapter 2, being the methodology section, describes the research plan and outlines the methods and the data. The methods are case study, literature review, and narration and description. The data are primary and secondary legal data, and secondary empirical data. The section explains why, where and how the methods and the data are used.

Chapter 3 is the stand-alone literature review which organizes and synthesizes relevant bodies of literature under two major themes: transnational interest discourse and home state interest discourse. Its goal is to ascertain what we know or not know about the regulation of NRFs. So, the chapter reveals the gap in the literature, and identifies the specific contribution of the study, locating it within the literature.

Chapter 4 is the result section that compares the three units of the case study: the AHTF, GPF and APF. It discusses the socio-political context of each unit, including the history, surrounding cultural and geographical factors, population peculiarity, process and form of

⁵⁹ See also Pierre Lascoumes & Patrick Le Gales, "Introduction: Understanding Public Policy through Its Instruments— From the Nature Instruments to the Sociology of Public Policy Instrumentation" (2007) 20:1 *Governance: An Intl J Policy, Administration & Institutions* 1.

creation, relevant features, and inherent limitations. Then it compares the regulatory features of each unit with the others under the same themes, and draws comparative lessons along the way. It concludes with a summary of the comparative lessons.

Chapter 5 revisits the research question and the claim, makes the recommendation of the study, and concludes with the major result and the significance of the study. It ensures that the thesis answers the research question, and that the claim supports the result and vice versa.

1.6. CONCLUSION

While the attention has mostly been on the transnational activities of NRFs as SWFs, these funds remain domestic properties which ought to serve home state interests enshrined in relevant public policy objectives. Hence, regulation should adequately entrench home state interests while not undermining host state interests. The study proceeds on this understanding.

Both transnational and national regulation could play a role. Transnational regulation could facilitate mechanisms that emphasize home state interests while not undermining host state interests. For instance, transnational actors could facilitate self-regulation and co-regulation, such as licensing and certification schemes, that balance interests in the foreign investment of SWFs. This could ensure that where NRFs are invested, they also achieve specific home state goals they are originally created for. At the national level, governments and other relevant actors could domesticate suitable transnational schemes. In addition, they could design local regulation to enhance home state interests of NRFs.

The rest of the thesis focuses on the second leg of the roles that national governments and other relevant actors could play. They could enhance local regulation, as opposed to transnational regulation, in their handling of NRFs. To explore this, the thesis addresses how governments and their agents could enhance home state interests associated with NRFs through regulation, locating the discussion within the broader SWF discourse.

CHAPTER 2

2. METHODOLOGY

This chapter introduces the research plan, and delves into the methods and data. The methods are comparative case study, literature review, and narration and description. The thesis employs these methods to analyse primary and secondary legal data along with secondary empirical data.

2.1. INTRODUCTION

The research and writing process started with a literature search and ended with the final revision prior to the submission of the thesis. These took about four academic terms.

I started by searching for relevant materials on online databases⁶⁰ and the University of Calgary libraries⁶¹. I searched for secondary materials first, then primary sources. Doing this

⁶⁰For secondary sources, I searched “HeinOnline,” “Weslaw Next,” “Quicklaw,” “Havard Research in International Law,” and “Oxford Reference” for legal sources. I also searched “Scopus,” “Ebrary,” “JStore,” “ScienceDirect,” “SSRN” and “Google Scholar” for broader policy and interdisciplinary sources. For primary sources, I searched for statutes on “Weslaw Next” and “Quicklaw” because these databases have Alberta and foreign contents. Also, they show the history of their contents which is useful for ascertaining any previous changes. I looked for cases on “Weslaw Next,” “Quicklaw,” and “Hein Online” because they provide local and foreign content, classifications, history, and summary of cases. This study needs foreign contents to ascertain the development in jurisdictions around the world; the classifications make cases easy to find; the history reveals the factors that might have contributed to cases; and having the summary of cases reduces the time spent going through the complete case files. I also checked “CanLi” for relevant Alberta cases because it provides the largest volume of reports on Canadian cases. My initial search terms for secondary sources and primary sources included “sovereign wealth funds,” “natural resource funds,” “resources rent distribution,” “Alberta Heritage Fund,” “Government Pension Fund,” and “Alaska Permanent Fund.” Because the search tended to return too many results, I sometimes adjusted the search terms to reflect law, regulation, policy or governance. For example, I searched “law of sovereign wealth funds,” “natural resource fund regulation,” “resources rent distribution policy,” and “Alberta Heritage Trust Fund regulation.” I also truncated my search terms with specific source words such as “act,” “common law,” “by-law,” “case,” “judgement,” and “decision” to reflect the type of source. The modification of search terms was to ensure that I had a variety of word combinations that would return every relevant result. My subsequent searches depended on the specific materials I needed. In these cases, I employed specific search terms. For example, I used “oil discovery in Alberta,” “when Alaska became a state,” and “Santiago Principles” to search for historical materials, and “the meaning of law,” “administrative instruments,” “market-based approaches,” “economic instruments,” and “command and control mechanisms” to find materials discussing types of regulations. For every specific search, I scanned the materials to identify the most relevant.

⁶¹ I searched the Bennet Jones Law Library and the Taylor Francis Digital Law Library for hard copy materials focusing on natural resources law and policy, environmental law and policy, law and economics, taxation, international trade law, international economic law, international development law, international governance, and international political economy. These are the specific sections of the library containing materials on SWFs. I also searched generally for international and transnational law materials that I could come across. I concluded the search with previous graduate dissertations at the University of Calgary Faculty of Law from 1991.

facilitated my inquiry into what had been covered and the gaps existing in the literature, to avoid a pointless repetition in the study. The search goal was not to include every conceivable material, but to prevent a significant exclusion that might affect the outcome of the research. As such, there might have been minor exclusions.

I filed the materials retrieved as necessary.⁶² Based on this filing, I prepared an annotated bibliography of the materials that seem to be the most relevant, showing the connection between them in the annotation.⁶³

Based on the annotated bibliography and other relevant materials, I then started the first draft of the thesis while going on with the actual research. I drafted each chapter as an independent paper, with its own rounds of editing, before advancing to the next chapter.⁶⁴ I shuttled between the writing and the research, and this helped create coherence in the study.

2.2. METHODS

Qualitative methods used in law and policy provide room for suitable analysis in the study. This is because the study addresses more of a practical socio-legal problem than a

⁶² I filed soft copies on Dropbox and hardcopies in my graduate lounge cabinet. I arranged them in order of relevance to specific sections of my research. This was to make them easy for identification. For example, I filed the materials that discuss public natural resource rights, SWF, and natural resource funds for use under the introductory and literature review sections involving setting the background and synthesizing the literature. Materials focusing on the Alberta Heritage Fund, Norway's Government Pension Fund and Alaska Permanent Fund were filed separately for use in the section of the thesis on the result and discussion of the comparative case study because they provided information contextualizing these NRF models. Despite this cataloguing, I did not fail to use filed materials across sections as necessary.

⁶³ The purpose of the annotation was to have a workable starting point for analysing key arguments. This made it easy to construct arguments when drafting the chapters of the thesis. However, I visited and used, as necessary, many other materials not annotated.

⁶⁴ The literature review chapter was the first draft, prepared in the fall of 2015. However, its complete version was based on my class exercise in Graduate Seminar Legal Theory (Law 705), prepared in the winter of 2016. Its purpose was to reveal what authors have said about the regulation of NRFs. The result part of the comparative case study followed based on an initial draft in the fall of 2015 and an improved draft in the winter of 2016. This was an extended version of my research paper in Oil and Gas Law, prepared in the fall of 2015. Its purpose was to analyse the contexts of and compare the NRFs. I drafted the bulk of the discussion part of the comparative case study, following the result part, in the summer of 2016. Its purpose was to evaluate the lessons from the comparative case study. The conclusion and recommendation chapter came after this, prepared in the fall of 2016. Its purpose was to summarize the study and answer the question. It was finalized along with the general introduction, initially drafted based on the research proposal prepared in Graduate Seminar in Legal Research and Methodology (Law 703) course in the fall of 2015, refined in Winter 2016, and finalized in the fall of the same year. The general introduction served as the road map.

doctrinal legal one.⁶⁵ Moreover, although not native to law, legal research often refers to external factors not necessarily legal by nature,⁶⁶ so a reasonable level of interaction with other disciplines is allowed. This interaction further justifies the use of qualitative methods often associated with social science research.

The qualitative methods employed are comparative case study, literature review, and narration and description. The comparative method is mainly used in the result and discussion chapter. The literature review has a chapter to itself where it frames the existing academic discussions, but is also integrated within other chapters of the thesis. Narration and description are used across chapters.

2.2.1. COMPARATIVE CASE STUDY

I used the comparative case study method because it allowed me to find functional equivalencies across the AHTF, APF and GPF based on a comparison that shows contextual dynamics. It appears that this method is not yet explicitly acknowledged in doctrinal legal research,⁶⁷ but has been acknowledged in law and society⁶⁸ and some other social science fields.⁶⁹ It is therefore suitable for this study which has a socio-legal focus.

⁶⁵ Qualitative methods are used to conduct qualitative analysis. Qualitative analysis is originally a method of data analysis in core social science fields that deal directly with humans such as sociology, political science and anthropology. It involves the identification and evaluation of non-measurable data, such as human behavior. Interdisciplinary legal scholarship, particularly socio-legal study, has adopted employed it over the years.

⁶⁶ See Paul Chynoweth, "Legal Research" in Andrew Knight and Les Ruddock, eds, *Advanced Research Methods in the Built Environment* (West Sussex: Wiley-Blackwell, 2008) 28. Note, however, that socio-legal scholars now undertake studies explicitly identified as qualitative legal research within the broader framework of empirical legal research. See, for example, Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Peter Cane and Herbert M. Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010) 926.

⁶⁷ To some extent, legal scholars employ this method implicitly. Where they analyse the contexts of a case study before making a comparison of the case units, this could be described as comparative case study. Most existing "comparative" studies first discuss unit A of the compared subjects under section X, then unit B under another Section Y. Then they discuss the comparisons or comparative lessons under section Z. This is a comparative case study, often with more of the comparative component than the case study component.

⁶⁸ See, for example, Demetra M. Pappas, "The Politics of Euthanasia and Assisted Suicide: A Comparative Case Study of Emerging Criminal Law and the Criminal Trials of Jack 'Dr. Death' Kevorkian" (Ph.D. Thesis: London School of Economics and Political Science, 2009). Note, however, that this thesis only states the use of the comparative case study method but does not analyses it or contribute substantially to its development.

⁶⁹ See, for example, Alexander L George, "The Method of Structured, Focused Comparison" in Alexander L George & Andrew Bennet, eds, *Case Studies and Theory Development in the Social Sciences* (Cambridge and

The method involves the application of the comparative method⁷⁰ to the case study method.⁷¹ Its comparative element, taking a functional comparative approach, allowed me to compare the regulatory features of each NRF scheme that are playing similar roles while the case study element, mostly descriptive and exploratory, helped me to see how the contextual dynamics of the regulatory approaches lead to broader lessons. While it is also possible to provide a reasonable level of context within a comparative method,⁷² I chose to make the case study method explicit. This is so that I could make the contribution on the socio-political background of the comparative study substantial.

Since nothing could be accurately compared strictly speaking, the comparison only aimed at drawing reasonable lessons based on the contextual similarities and differences of my case study units.⁷³ With regards to the contextual similarities, the AHTF, APF and GPF derive their inputs from crude oil, are owned by developed polities, and have legal frameworks governing them. Despite these similarities, most stakeholders believe that APF and GPF have similarly desirable outcomes but the AHTF has had largely undesirable outcomes. This belief also makes it interesting to compare APF and GPF as against AHTF.

London: MIT Press, 2004) 67; Juliet Kaarbo & Ryan K Beasley, "A Practical Guide to the Comparative Case Study Method in Political Psychology" (1999) 20:2 Political Psychology 369; Gervase R. Bushe, "A Comparative Case Study of Appreciative Inquiries in one Organization: Implications for Practice" (2009) 29 Review of Research and Social Intervention 7.

⁷⁰ The comparative method used is explicit, not implicit. As such, it focuses on revealing functional equivalencies that eventually lead to the conclusion. For discussions on this type of comparative method, see John C Reitz, "How to Do Comparative Law" (1998) 46 American J Comparative L 617-636; Jaakko Husa, "Methodology of Comparative Law Today: From Paradoxes to Flexibility" (2006) 4 Revue Internationale De Droit Comparé 1095.

⁷¹ The case study method used is qualitative, not quantitative. A qualitative case study focuses on the analysis of contexts, the generalizations made therefrom, how these generalizations could affect the findings, and the inference of the implications of the findings. For discussions on how new researchers use this type of case study method, see Pamela Baxter & Susan Jack, "Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers" (2008) 13:4 The Qualitative Report 544; Donner M Zucker, "How to Do Case Study Research" (2009), online: University of Massachusetts <http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1001&context=nursing_faculty_pubs>.

⁷² See Reitz supra note 70 at 634.

⁷³ Comparisons legal systems are more like comparing apples and oranges. No perfect equivalents exist. As such, reasonable conclusions can only be made based on the degrees of similarities and differences. See Reitz supra note 70 at 621.

The AHTF, APF and GPF also have different historical, legal,⁷⁴ governance,⁷⁵ cultural⁷⁶ and population⁷⁷ contexts. However, these differences are important for the determination of the regulatory configurations of the respective NRF models and how these might influence the governance of the models, but not for whether NRFs should be regulated to advance their stated objectives which is the central focus of my thesis. Where necessary, I note the implication(s) of the contextual differences when analyzing the regulatory systems comparatively or disconnectedly.

Another reason that I compared the AHTF, APF and GPF was to have multiple comparable units in my case study. Having multiple units of a case study ensures substantial premises, in this case across the three NRFs compared, from which reasonable conclusions, stemming from the multiple sources, could be drawn. This approach also has the tendency to reduce hasty generalization, and might lead to more nuanced results by expanding the comparison beyond “the shades of white and black” into the “grey areas.” These grey areas might reveal variables that could make the results of a comparative case study having three units more comprehensive than the one with two units.

⁷⁴ The AHTF and the APF operate within common law systems of Alberta and Alaska respectively, but the GPF operates within a Scandinavian law system. Common law and Scandinavian law, also called Nordic Law, are slightly different. Common law relies both on statutes and case law, but Scandinavian law employs the civil law tradition of codification, and has some elements of customary law. These differences bear on their principles and procedures.

⁷⁵ First, Norway is a unitary country while Alberta and Alaska are federating units. Second, Norway and Alberta have parliamentary democracies and constitutional monarchies, but Alaska has a presidential system.

⁷⁶ Norway has a romantic nationalistic way of life, and appears to be on the conservative side. Given the mixture of native and settler populations, Alaska and Alberta are not as conservative, and might be more on the “democratic liberationist” end, although the latter is moreso than the former. Due to its romantic nationalism, the Norwegian government derives its political legitimacy from the ‘natural’ unity of the people, stemming from their shared roots, history and way of life. This makes it easier to enforce laws, as these are considered as common norms. On the other hand, what I term “democratic liberationist” view, applicable more to Alberta than Alaska, is the idea of freedom, choice and the “artificial” unit created through democratic processes in the indigenous-settler Americas. In both Alberta and Alaska, governments have to consciously make efforts to promote the unity of people, starting from those of indigenous peoples and settlers, and within these two groups. This is because the people have no common roots, premodern history and ways of life. The arrival of immigrants into all the three polities also influence their ways of life and governance. In order of degree, this affects Alberta, Alaska and Norway.

⁷⁷ The population figures of Norway and Alberta are closer and way higher than that of Alaska. See Chapter three of this thesis.

2.2.2. LITERATURE REVIEW

The literature review method helped ascertain the state of knowledge in and useful lessons from the existing studies. I reviewed five substantive bodies of literature.

The first was on public natural resource regimes to ascertain what rights and duties people and governments have over non-renewable natural resources and the revenues therefrom. The second was on NRFs to identify legal and regulatory principles already addressed by commentators. The third, fourth and fifth were on the AHTF, the GPF, and the APF respectively to understand the regulatory regimes of these respective NRFs and how they have operated within their contexts. I also went through relevant literature on the doctrinal, comparative case study, hermeneutics, literature review and qualitative analysis methods. However, these were not substantive for the study. They only helped frame the methodology.

I guided the study with Cooper's Taxonomy of literature reviews, focusing more on coverage.⁷⁸ The review of the bodies of literature on public natural resource regimes and the NRF is representative⁷⁹ since there are distinct perspectives. The review of the AHTF literature is exhaustive or comprehensive⁸⁰ because it is the primary focus of my study and comparably little legal literature exists on it. The review of the bodies of literature on the GPF and the APF is exhaustive based on publications on public interest approaches to natural resources from the databases that I used.⁸¹ Publications employing public interest approaches are my focus because these have a larger focus on home state interests, and the databases chosen seem to have the largest volume of legal literature on NRFs. Moreover, the AHTF, the GPF and APF

⁷⁸ Based on Cooper's taxonomy, literature reviews could be characterized by focus, goal, perspective, coverage, organization, and audience. See Harris M Cooper, "Organizing Knowledge Synthesis: A Taxonomy of Literature Reviews" (1988) 1:1 Knowledge in Society 104.

⁷⁹ A representative literature review relies on selected publications representing a sample of commentators. See Ibid; see also Justus J Randolph, "A Guide to Writing the Dissertation Literature Review" (2009) 14:13 Practical Assessment, Research & Evaluation 1.

⁸⁰ This involves searching and scanning every relevant literature. The most relevant materials are then included in the literature review. See Randolph *ibid*.

⁸¹ Literature review could be "exhaustive based on selective citations." The criteria for selecting citations could be explicit. See generally Cooper *supra* note 78 (identifying literature review based on selective citation as a category when one characterizes literature review by coverage); see also Randolph *supra* note 79 at 3.

have a large volume of literature that cannot be exhaustively reviewed within the duration of this study, and commentators have addressed specific issues that could be grouped into logical iterative categories. The review of the bodies of literature on the methods are mostly purposive.⁸²

2.2.3. NARRATION AND DESCRIPTION

I employed narration and description. These are helpful for building a discussion in a non-quantitative text.

I used narration mainly to present histories and stories, for instance how AHTF, GPF and APF started. I used description for the presentation of issues, ideas, concepts, and scenarios, for instance how legal frameworks of NRFs are designed, and how NRFs are governed and operated.

2.3. DATA

I employed primary and secondary legal data along with secondary empirical data. The primary and secondary legal data are mostly used in the result and discussion chapter, and the secondary empirical data are mostly used in the introduction, literature review, and result and discussion chapters.

The primary legal data are provisions that come mainly from the Alaskan constitution and relevant statutes in Alberta, Norway and Alaska, and case law from Alaska and the International Court of Justice, while the secondary legal data provide the interpretation of the primary legal data, and come mainly from books, journal articles, and online government documents. The secondary empirical data are mainly qualitative and quantitative observations

⁸² Pivotal reviews focus on the pivotal or leading articles on the subject discussed. See Cooper *supra* note 78; Randolph *supra* note 79.

that are already recorded in sources such as books, journal articles, and online materials which include newspapers, government documents, and blog publications.

Using the primary legal data allows for independent evaluation as well as the verification of secondary sources. This evaluation and verification process enhances the original contribution of the thesis. Secondary legal data provide clues about the existing interpretation of primary legal data, and secondary empirical data are helpful as evidence in support of relevant arguments. The various data sources also serve as a check on one another, hence reducing the possibility of interpretation errors.

2.4. CONCLUSION

After writing the first draft of each chapter based on the steps and methods outlined so far, I did rounds of editing.⁸³ Upon completing the rounds for each chapter, I submitted the chapter to my supervisors. I received feedback on these drafts, and incorporated them as necessary.

After incorporating the feedback in the drafts, I combined the chapters and ascertained whether I had answered my research question by proving my thesis. This process revealed the following: the general introduction lays the background to my research question and thesis, and refers to the answer to the research question, but does not really flesh out the answer; the methodology chapter provides how to answer the research question, but provides no answer;

⁸³ The first round of editing was to ensure that the information was accurate. I also crosschecked the information in the chapter against the sources. The second round of editing was to check if the arguments were sound and consistent with one another and the claim. Where there was a discrepancy between arguments, I reconciled it based on the evidence that I gathered from other literature. Where there was a discrepancy between the arguments and the claim, I adjusted the claim to fit into the argument, not otherwise. The major reason for this is that letting arguments prevail over initial claims show more objectivity and academic sincerity because arguments are a product of evidence and logic, as opposed to claims which might only be a product of desire, preference or bias. Also, adjusting the claim to fit into the arguments involves less work than adjusting the arguments to fit into the claim. The third round of editing was to check the transitions of each successive sections of the chapter, and how each section fitted into the structure of the chapter. This was to ensure coherence. The fourth round of editing focused on the style, to ensure the accuracy of the footnotes and the conformity of the chapter to the McGill guide. After going through rounds one to four, then I left the chapter for a week before doing the fifth round of editing to see if I had missed anything. The one week gap helped to take my mind off the chapter so that I could look at the draft with fresher eyes.

the literature review chapter shows what other scholars have done without answering the question; the result and discussion chapter introduces and compares the regulatory systems of the case study units, revealing their similarities and differences, without answering the question; then the recommendation and conclusion chapter answers the research question.

Once I confirmed that I had answered the research question and proved the thesis, then I started a final structural editing to harmonize the chapters and ensure their flow. Upon receiving further feedback based on the draft emanating from this process, then I reflected the corrections and continued editing until I got to a standard that satisfied me and my supervisors. Then, I submitted the thesis.

Following the research plan outlined, the next chapter reviews relevant bodies of literature. This review helps frame home state interests in the regulation of NRFs from the broader SWF literature. It also reveals the contribution of the study.

CHAPTER 3

3. LITERATURE REVIEW

This chapter introduces the discourse on NRFs, scoping it mostly from the broader SWF literature. It examines the prevailing transnational economic and political interests associated with SWFs, and builds the argument for home state interests of NRFs therefrom.

3.1. INTRODUCTION

How to regulate resource revenues has been a foremost discussion in some places while only emerging in others.⁸⁴ It has recently been receiving considerable attention around the world due to resource revenue fluctuations in the oil and gas sector. Who owns resource revenues? What are the rights and duties associated with these revenues? How should these revenues be handled? These are key questions that have been gaining traction.

On the first question above, governments have owned and controlled rights over resource revenues in most jurisdictions, often on behalf of citizens. This is a duty which originally flows remotely from the Westphalian model of sovereignty and more immediately from the international doctrine of permanent sovereignty over natural resources.⁸⁵

Moving to the second question, in their exercise of ownership and control rights, governments have pooled resource revenues as foreign investment and reserve as well as SWFs. Foreign investment involves keeping funds active in the economy of a foreign state; foreign reserve entails keeping assets in foreign currencies; and a SWF is designed to save, invest and appropriate revenues for short-term and long-term purposes. It is also common to invest or save SWFs in foreign states or currencies, but this is only a policy option among a

⁸⁴ Rose “The Management” *supra* note 43.

⁸⁵ See Temitope Tunbi Onifade, “Peoples-based Permanent Sovereignty over Natural Resources: Toward Functional Distributive Justice?” (2015) 16:4 Human Rights Rev 343.

host of others. For example, Norway and Nigeria have somewhat polarized policies as the former has a pool that it invests exclusively within foreign economies while the latter has pools that it mainly invests at home.

Unlike the first two questions, there is a grossly misleading discussion on the third question. This discussion mostly portrays handling SWFs in terms of investing and saving them in foreign territories. This could be described as the transnational interest discourse. Meanwhile, not much attention has been given to discussing how to handle SWFs to drive domestic goals. This desired discussion could be couched as the home state interest discourse.

3.2. TRANSNATIONAL INTEREST DISCOURSE

Many scholars have discussed the implications of natural resource claims for the regulation of natural resource revenues, with some considering what the actual objectives of regulation should be,⁸⁶ mainly focusing on transnational ramifications within host states. Others have discussed governance issues such as taxation, nationalism and expropriation, hence not directly addressing actual justice-based and economic interests of home states.

Across the discussions, scholars unavoidably rely on the rich broader body of literature on SWF to analyse NRFs. This is reasonable because at least 34 of the 50 SWFs currently in existence are derived from natural resource revenues,⁸⁷ so many conclusions on SWFs hold true for NRFs. Also, scholars often inadvertently discuss home state issues associated with NRFs when generally addressing transnational SWF policy issues within host states.

⁸⁶ See, for example, Jennifer Drysdale, "Five Principles for the Management of Natural Resource Revenue: The Case of Timor-Leste's Petroleum Revenue" (2008) 26:1 J Energy & Natural Resources L 151; Anthony Wong, "Sovereign Wealth Funds and the Problem of Assymetric Information: The Santiago Principles and International Regulations" (2009) 34:3 Brook J Intl L 1081; Sarkar *supra* note 7; Clark and Knight *supra* note 13.

⁸⁷ See Evaristus Oshionebo, "Managing Resource Revenues: Sovereign Wealth Funds in Developing Countries" (2015) 15 Asper Rev Intl Business & Trade L 217, 218.

⁸⁷ See Mathew Saxon, "It's Just Business, Or Is It?: How Business and Politics Collide With Sovereign Wealth Funds" (2009) 32:2 Hastings Intl & Comp L Rev 693 at 693.

Contributions on economic and political interests form the two major strands across these discussions. Economic interest issues project more of the economic risks that might be associated with SWF investment in host states and less of the economic implications of SWFs in home states, while political interest issues address more of the ambitions and security concerns of SWF host states than decision-making in and governance of home states. Nevertheless, these economic and political interest strands give ideas about more specific home state interests that might underlie NRFs.

Notably, the two strands cannot be entirely divorced. Economic and political interests are distinct, but the concerns they embed overlap.⁸⁸ At the least, they both address public interest issues. Hence, they could be separated only for analytical purposes.

3.2.1. ECONOMIC INTERESTS

Surprisingly, economic interests are not explored as much as political interests in the SWF discourse. This is perhaps because most economic issues fall squarely within the territory of international economic law and policy as, generally, SWFs are financial players in the global economy like other forms of foreign investments, providing liquidity in capital markets.

But then, SWFs are first a domestic creation. Governments establish them, for instance as a means of investing in economic growth and stabilization, given that they allow diversification for greater returns than could be derived from investing or saving official reserves.⁸⁹ They also seem to function considerably as a means of national financial management, hence an internal macroeconomic instrument, and arguably less as a means of

⁸⁸ See also Jackie VanDerMeulen & Michael J Trebilcock, “Canada’s Policy Response to Foreign Sovereign Investment: Operationalizing National Security Options” (2009) 47 Can Bus LJ 392, 403.

⁸⁹ Michael Green & John I Forry, “Sovereign Wealth Funds: International Growth and National Concerns” (2010) 127 Banking LJ 965, 966.

extraterritorial projection of financial power.⁹⁰ Further, governments could employ them to “rescue their ailing economies,” for example as done in Norway and Kuwait;⁹¹ on this point, Gulf countries are generally known to draw from their funds during oil crashes.⁹²

However, it seems that the international economic ramifications of SWFs have overshadowed their domestic significance. This is likely due to the size and potential effects SWFs might have within host states.

While the total value of SWF assets are unclear, conservative estimates put them at between US\$3 trillion and US\$35 trillion.⁹³ The composition of these estimates ranges from US\$875 billion value of the Abu Dhabi Investment Authority to under US\$1 billion value of SWFs owned by Kiribati and Mauritania.⁹⁴ Therefore, SWF assets “are already large enough to be systematically significant... [and] are likely to grow larger over time, in both absolute and relative terms.”⁹⁵ As such, they have significant effects on the global financial market and capital flow.⁹⁶

Given their size and significance, there are uncertainties about how SWFs could behave within the international economy. SWFs are believed to be capable of distorting markets, for example where their home states withdraw them when their host states need them the most,⁹⁷ and there is the concern that they may move markets on their own due to their cumulative size

⁹⁰ Larry Catá Backer, “International Financial Institutions (IFIs) and Sovereign Wealth Funds (SWFs) as Instruments to Combat Corruption and Enhance Fiscal Discipline in Developing States” (2015) *Intl Rev L* 1 at 3 online: <www.qscience.com/doi/pdf/10.5339/irl.2015.swf.5>.

⁹¹ Jennifer Cooke, “Finding the Right Balance for Sovereign Wealth Fund Regulation: Open Investment vs. National Security” (2009) 2 *Colum Bus L Rev* 728, 735.

⁹² *Ibid* at 736.

⁹³ Oshionebo *supra* note 87 at 218.

⁹⁴ Cohen *supra* note 7 at 716.

⁹⁵ Kimmitt *supra* note 4 at 122. See also Phillip Hildebrand, “Phillip Hildebrand: The Challenge of Sovereign Wealth Funds” (18 December 2007), online: <<http://www.bis.org/review/r071219d.pdf>>; Joel Slawotsky, “Sovereign Wealth Funds and Jurisdiction under the FSIA” (2009) 11:4 *U Pa J Bus L* 967, 969-970; Rose “Sovereign Investing” *supra* note 7.

⁹⁶ Roland Beck & Michael Fidora, “The Impact of Sovereign Wealth Funds on Global Financial Market” (July 2008) European Central Bank, online: <<https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp91.pdf>>.

⁹⁷ Cohen *supra* note 7 at 717-718; Bart De Meester, “International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State” (2009) 20:6 *Eur Bus L Rev* 779, 787; Saxon *supra* note 87.

and strength.⁹⁸ The implication is that they could create volatility in the market⁹⁹ and create financial instability within host states.¹⁰⁰ Another concern is that private investors might not be protected where SWF liabilities arise.¹⁰¹ This concern is because the existing regulatory framework does not provide for adequate remedies.¹⁰²

Some also worry about whether creating SWFs could lead to undesirable macroeconomic and financial policies—this point is more applicable to non-commodity funds as against commodity funds¹⁰³ since non-commodity funds are excess reserves saved mainly to accumulate foreign assets in order to keep local currencies from appreciating. Hence, they worry that non-commodity funds could gain comparative competitive low currency advantages.¹⁰⁴

It also appears that the directional change in the flow of capital generally disturbs host economies.¹⁰⁵ Capital initially flowed from global economic strongholds such as the USA, Canada and Europe which constitute the major developed bloc, to the hitherto periphery economic centres in the Middle-East, Asia and Africa where there is a concentration of developing countries.¹⁰⁶ There is the perception that the reverse is now the case, with the USA, Canada and Europe absorbing capital from the periphery.¹⁰⁷ This perception makes some people from these developed countries economically uneasy.

⁹⁸ Cohen supra note 7 at 717-718. See also Saxon supra note 87; Kimmitt supra note 4 at 122-123; Rose “Sovereign Investing” supra note 7; Meester *ibid*.

⁹⁹ Amy Keller, “Sovereign Wealth Funds: Trustworthy Investors or Vehicles of Strategic Ambition? An Assessment of the Benefits, Risks and Possible” (2009) 7 *Geo J L & Public Policy* 333, 345; Kimmitt supra note 4 at 122-123.

¹⁰⁰ Hildebrand supra note 95 at 4.

¹⁰¹ Daniel Etlinger, “Sovereign Wealth Fund Liability: Private Investors Left Out in the Cold” (2010) 18 *U Miami Bus L Rev* 59.

¹⁰² *Ibid*.

¹⁰³ Kimmitt supra note 4 at 122.

¹⁰⁴ See also Thomas supra note 1 at 463.

¹⁰⁵ See Hildebrand supra note 95; See Truman “A Blueprint for Sovereign Wealth Fund Best Practices” (2008) supra note 53; Truman, “A Blueprint for Sovereign Wealth Fund Best Practices” (2009) supra note 53.

¹⁰⁶ See also Hildebrand supra note 95.

¹⁰⁷ See Hildebrand supra note 95; Popova supra note 8.

Closely tied to the capital flow concern is the uncertainty about the economic impacts SWFs might have during crises. Hatton and Pistor illustrate this uncertainty, employing the SWFs of Kuwait, Abu Dhabi, Singapore and China as a case study.¹⁰⁸ They argue that SWFs have roots in the political economy of sovereign owners, emphasizing the connection between the ruling elites and the economic stance of their polities. SWFs thus exist as autonomy-maximizing institutions, not entirely neutral within the international market, but not also uprightly detrimental to the economy of foreign sponsors.

There is also the ideological concern that SWFs challenge free market forces under liberalism and capitalism.¹⁰⁹ This concern is mainly expressed in the context of the USA's market economy.¹¹⁰ Because SWFs represent a form of conservatism and socialism, given that governments control them, they represent an opposition to liberalism and capitalism which position the private sector as the economic driver, championed by the USA. Hence, in the American view, the arrival of governments as financial super powers in the private sector is a source of worry.¹¹¹

There is no holistic regulatory response to these economic concerns. The reason might be because there is no body of laws or other regulatory instruments that specifically govern SWFs as an economic tool. Even the Santiago Principles and the OECD Declaration do not exclusively represent holistic economic responses as they operate in the general economic terrain. As an economic tool, SWFs are broadly regulated under diverse economic law regimes. These include several international investment instruments developed by organizations such as the United Nations, OECD, and World Bank.

¹⁰⁸ Kyle Hatton and Katharina Pistor, "Maximizing Autonomy in the Shadow of Great Powers: The Political Economy of Sovereign Wealth Funds" (2011) 50 Colum J Transnat'l L 1.

¹⁰⁹ See Hildebrand *supra* note 95, 4.

¹¹⁰ See Keller *supra* note 99 at 345.

¹¹¹ See also Truman "A Blueprint for Sovereign Wealth Fund Best Practices" (2008) *supra* note 53; Truman, "A Blueprint for Sovereign Wealth Fund Best Practices" (2009) *supra* note 53.

3.2.2. POLITICAL INTERESTS

Political interests receive far more attention in the SWF discourse. Its emphasis is at the international level. This emphasis probably stems from the political struggle between the USA and the major Middle Eastern and Asian SWF superpowers, given that the USA is the leading proponent of political concerns, and Middle Eastern and Asian SWFs have always been its major source of worry.

Nevertheless, political interests relating to SWFs are mostly transnational as they affect both home and host states. Political interests within home states refer mainly to the political ambition and motives of state governments, while political interests of host states refer mainly to security concerns associated with SWF investments and the protectionist response of host states.

At home, political concerns are raised in the context of political constituencies, governance and institutions. Illustrating this point, Hatton and Pistor posit that SWFs are used to pacify domestic constituencies, sometimes expanding institutional opportunities to placate political opponents and at other times to fund the government during crises.¹¹² Also, in a specific context applicable to NRFs as Tsani¹¹³ and Baena et al¹¹⁴ show, SWFs rely on governance and institutions, and their performance depends on governance and institutional quality. Conversely, with regards to host states, political concerns are raised in the context of perceived threats arising from the political ambitions of home governments. Host states are worried about the unspoken intentions of SWF schemes. Overall, while home states concerns about SWFs focus on potentials, host state concerns emphasize threats.

¹¹² Hatton & Pistor *supra* note 108 at 11-12.

¹¹³ Stella Tsani, “Natural Resources, Governance and Institutional Quality: The Role of Resource Funds” (2013) 38 *Resources Policy* 181; Stella Tsani, “On the Relationship between Resource Funds, Governance and Institutions: Evidence from Quantile Regression Analysis” (2015) 44 *Resources Policy* 94.

¹¹⁴ Ce’sar Baena, Benoît Sévi, & Allan Warrack. “Funds from Non-renewable Energy Resources: Policy Lessons from Alaska and Alberta” (2012) 51 *Energy Policy* 569-577.

But then, political concerns raised within host states of SWFs have overshadowed those raised by home states. Historically, SWFs were not associated with political activities within foreign territories, but this changed around 2006-2007 when they began diversifying into sensitive sectors such as equity, real estate, energy and farming.¹¹⁵ Despite this change, SWFs claimed that they were not interested in exercising foreign control over companies and governments.¹¹⁶ However, some stakeholders and scholars have alleged that this claim might not be true, and have described the problems of SWFs, like state-owned enterprises generally, as political.¹¹⁷

The general political concern is that home governments may mix business with politics,¹¹⁸ hence not playing by the “rules of the game” as already defined by developed countries.¹¹⁹ There are several specific arguments that have emerged from this general one.

The most popular argument is that SWFs are associated with secrecy, a point almost every commentator has made. They lack transparency in that they typically release little or no information,¹²⁰ at least based on the western standard.¹²¹ This lack of transparency makes them have informational advantages that may put other actors at a disadvantage.¹²² They may also have no clearly defined obligations, exist with unclear investment results and fiduciary

¹¹⁵ See Backer supra note 90 at 2; Joel Slawotsky, “Incipient Activism of Sovereign Wealth Funds and the Need to Update United States Securities Laws” (2015) *Intl Rev L* 1 at 2. Online: <www.qscience.com/doi/pdfplus/10.5339/irl.2015.swf.8>.

¹¹⁶ Slawotsky *ibid*.

¹¹⁷ Kathryn Lavelle, “The Business of Governments: Nationalism in the Context of Sovereign Wealth Funds and State-owned Enterprises” (2008) 62:1 *J Intl Affairs* 131.

¹¹⁸ Cohen supra note 7.

¹¹⁹ VanDerMeulen & Trebilcock supra note 88 at 402.

¹²⁰ See Truman “A Blueprint for Sovereign Wealth Fund Best Practices” (2008) supra note 53; Truman “A Blueprint for Sovereign Wealth Fund Best Practices” (2009) supra note 53; Allie E Bagnall & Edwin M Truman, “Progress on Sovereign Wealth Fund Transparency and Accountability: An Updated SWF Scoreboard” (August 2013), online: <<https://piie.com/publications/pb/pb13-19.pdf>>; Peterson Institute for International Economics ; Bahgat supra note 4; Dixon supra note 42. See also De Bellis supra note 4; Zhao Feng, “How Should Sovereign Wealth Funds be Regulated” (2009) 3 *Brooklyn J Corporate, Financial & Commercial L* 483; Keller supra note 99; Eric Langland, “Misplaced Fears Put to Rest: Financial Crisis Reveals the True Motives of Sovereign Wealth Funds” (2009) 18 *Tul J Intl & Comp L* 263; Yvonne CL Lee, “A Reversal of Neo-colonialism: The Pitfalls and Prospects of Sovereign Wealth Funds” (2009) 40 *Geo J Intl L* 1103; Oshionebo supra note 87 at 245.

¹²¹ See Saxon supra note 87 at 693.

¹²² Rose supra note 44 at 1210; Joel Slawotsky, “Sovereign Wealth Funds as Emerging Financial Superpowers: How U.S. Regulators should Respond” (2009) 40 *Geo J Intl L* 1239, 1241.

standards, and be associated with corruption, especially given the lack of separation between the regulator and the regulated.¹²³ These problems are typically associated with Asian, Middle Eastern and African SWFs.

The second most popular argument is that SWFs have what has been described as an “activist investment approach,”¹²⁴ sometimes framed as a national security issue,¹²⁵ in that they may pursue geopolitical objectives.¹²⁶ These objectives may include using SWFs to benefit home countries or harm host countries, obtain information to manipulate investments, and gain sensitive intellectual property knowledge.¹²⁷ These may also be expressed in other forms, for example where SWFs are generally described as conducting questionable transactions, appropriating strategic assets, threatening economic security, influencing diplomatic negotiations, and gaining access to critical infrastructures.¹²⁸ Putting these more bluntly, some commentators have shown concerns that “SWFs owned by US Rivals will pursue their country’s military and strategic objectives rather than ordinary business goals,”¹²⁹ and have viewed them suspiciously for this reason or simply because they emanate from Islamic states.¹³⁰ Some also believe that investments in host firms could generally constrain policy,¹³¹ and investments through host central banks may be seen as targeting other political objectives.¹³²

¹²³ Keller *supra* note 99 at 343. See also Sarkar *supra* note 7 at 630.

¹²⁴ Slawotsky *supra* note 115.

¹²⁵ See, for example, Langland *supra* note 120; Gilligan *supra* note 7 at 400; Locknie Hsu, “Sovereign Wealth Funds: Investors in Search of an Identity in the Twenty-first Century” (2015) 1 *Intl Rev L* 14; Kimmitt *supra* note 4 at 123; Meester *supra* note 97 at 785.

¹²⁶ See Slawotsky “Sovereign Wealth Funds and Jurisdiction” *supra* note 95 at 969, 973; Cohen *supra* note 7 at 718-719. See also VanDerMeulen & Trebilcock *supra* note 88 at 402; Feng *supra* note 120; Keller *supra* note 99 at 344; Sarkar *supra* note 7 at 629; Thomas *supra* note 1 at 463; Salar Ghahramani, “Sovereign Wealth Funds, Transnational Law, and the New Paradigms of International Financial Relations” (2013) 8 *Yale J Intl Affairs* 52.

¹²⁷ Green & Forry *supra* note 89 at 971. See also Edward F Greene & Brian A Yeager, “Sovereign Wealth Funds—A Measured Assessment” (2008) 3:3 *Capital Markets L J* 247; VanDerMeulen & Trebilcock *supra* note 88 at 402.

¹²⁸ Cooke *supra* note 91. See also Slawotsky *supra* note 115; Sarkar *supra* note 54; Cohen *supra* note 7 at 719; Ghahramani *supra* note 126 at 58.

¹²⁹ Peter Heyward, “Sovereign Wealth Fund Investments in US Financial Institutions: Too Much or Not Enough?” (2008) 27:5 *Banking & Fin Serv Policy Rep* 19, 20.

¹³⁰ Rose *supra* note 44 at 1208-1209.

¹³¹ See *ibid* at 1209.

¹³² Greene & Yeager *supra* note 127 at 249-250.

Another argument is that, stemming from government control, SWF governance, accountability and transparency arrangements mirror the quality of their regulatory political institutions, leading to the polarity between those owned by democratic states and authoritarian states.¹³³ The SWFs of western countries are often seen as democratic while those of the Middle-East are considered authoritarian.

It is also argued that there is no separation of SWFs as institutions from their owners. This point is illustrated by the oldest models in the Middle East. In most of the Arab states, with a reasonable exclusion of Kuwait, SWFs are controlled by ruling families, hence the difficulty in distinguishing them, as public sovereign wealth, from the personal wealth of those families.¹³⁴ Also, there may be no distinction between SWFs and other government funds.¹³⁵ Hence, SWFs lack accountability in the western sense.¹³⁶

Closely related to this identity concern is the fact that SWFs may claim immunity in certain circumstances because of their government affiliations. In many countries, this claim could be raised where legal disputes arise.¹³⁷ In the United States, the claim is often raised in the context of tax exemptions. In essence, the ability to claim immunity gives SWFs a public privilege while functioning as a private institution.

There are other more subtle political agenda of SWFs that create concerns. The most notable is that governments push foreign policy under the guise of SWFs. For example, Norway is alleged to advance its international law agenda on human rights and ethics through its SWF.¹³⁸ One should note however that this problem applies more to SWFs owned by countries, for instance the GPF, not those owned by subnational entities such as states and provinces

¹³³ Behrendt *supra* note 7.

¹³⁴ *Ibid.*

¹³⁵ Hong *supra* note 57 at 99-101.

¹³⁶ Saxon *supra* note 87 at 693.

¹³⁷ Thomas *supra* note 1 at 463.

¹³⁸ Slawotsky *supra* note 115 at 6-7.

which do not normally pursue foreign policies,¹³⁹ for instance the APF and AHTF. Another notable agenda is the tendency of governments to employ SWFs as a political tool which seems to increase during political strife.¹⁴⁰ Such an action brings in extra-economic considerations. For example, in a struggle with the USA, the Soviet Union did not mind losing money to Cuba just to maintain its political alliance with the latter, and Russia enticed Ukraine to form an economic federation with it by offering cheap gas.¹⁴¹ These examples illustrate extra-economic SWF considerations that might arise from politics.

Overall, in response to the threats that might arise from the political interests of SWF home states, host states have responded by subjecting SWFs to laws applicable to domestic investors, and have restricted the activity areas of the funds. For example, SWFs going into the USA have been subjected to the country's federal securities and antitrust laws and state corporate law, and restriction from sensitive sectors such as nuclear energy and airlines.¹⁴² The bottom line of this approach seems to be that the regulatory response should address the risks.¹⁴³ Similar regulatory responses which address risks have appeared at the international and regional levels. These have also appeared within specific countries especially in Europe. Specific examples could be found in countries such as Germany, Italy and the United Kingdom.¹⁴⁴

3.3. HOME STATE INTEREST DISCOURSE

It appears that the current discourse on transnational economic and political interests clearly rooted in the SWF literature has failed to emphasize home state interests associated with NRFs.

¹³⁹ Cohen *supra* note 7 at 715.

¹⁴⁰ Slawotsky *supra* note 115 at 10.

¹⁴¹ *Ibid* at 10.

¹⁴² Richard A Epstein & Amanda M Rose, "The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow" (2009) 76 U Chicago L Rev 111, 118.

¹⁴³ See generally McVea & Charalambu *supra* note 8 (discussing how to address risks using the game theory).

¹⁴⁴ See Seth Robert Lindberg, "Sovereign Wealth Fund Regulation in the E.U. and U.S.: A Call for Workable and Uniform Sovereign Wealth Fund Review within the E.U." (2009) 37:1 Syracuse J Intl L & Com 95.

Nevertheless, the foundation for home state interests of NRFs could be traced initially to mainstream international law, and explored further based on the SWF literature.

Home state claims over SWFs based on natural resources might arise from three major reasons whose justifications may be found in international law.¹⁴⁵ First, states might have acted to significantly increase the value of natural resources which then enhances resource revenues, without which the value of the resources would be lower. Second, states might have made national plans that are dependent on access to natural resources and the revenues therefrom, thus relying on these resources for survival. Third, people's self-determination might only be possible where there is access to natural resources and their revenues. Each of these arguments, rooted in international law, endorses the rights of home states to natural resources and the revenues therefrom, hence giving rise to home state interests of NRFs.

But then, these interests have no coherent shape. There might be several home state interests of NRFs, and SWF schemes address them in no particular order. Gelpern categorizes these interests as relating to citizens at home and in diaspora, the public community at home, and a smaller group of people, say shareholders, whose stakes stem from business.¹⁴⁶ The diversity of these interests arises from the nature of SWFs as public-private hybrids which necessitate answering to governments, the general public, and the private sector.¹⁴⁷

Hence, that SWFs address associated interests in no particular order is perhaps the reason the interests are often sparsely organized. So, the interests have no agreed hierarchy of importance or of any other clear criteria. As such, they may revolve around wide-ranging issues such as poverty alleviation, development, and savings, and may also be about equity¹⁴⁸ and

¹⁴⁵ See Chris Armstrong, "Sovereign Wealth Funds and Global Justice" (2013) 27:4 Ethics & Intl Affairs 413.

¹⁴⁶ Gelpern *supra* note 57 at 294.

¹⁴⁷ See also Gelpern *supra* note 57 at 294.

¹⁴⁸ See generally Bantekas *supra* note 9 (distinguishing the purpose of natural resources trust funds in developed and developing countries).

anti-corruption¹⁴⁹ within and across boundaries. In essence, these interests depend on circumstances and priorities that may change from time to time.

3.3.1. PUBLIC INTEREST

Most notably however, SWFs often address a notable body of interests which capture most diverse interests. These are public interests, defined in terms of public good. While public interests may traverse economic and political realms, they require a separate discussion because they often refer to rights of people in societies as distinct from political and economic entities.

It should be noted that, given the diversity of interests associated with the public, people may use “public interests” to also refer to interests within home and host states. So, several public interests interact, and could be seen in SWF regimes.¹⁵⁰ The major ones are: the citizens of a home state have an ownership stake and might have an investment stake; the government of a home state has regulatory and management stakes; the government and citizens of the host state have a regulatory and security stake; and the private sector of the host state has an investment stake. However, while public interests within host states have been explored significantly, often espoused as economic and political interests, scholars have mostly neglected public interests applicable to home states.¹⁵¹

In any case, the term public interest in general parlance is mostly used to mean people’s collective interests, generally a collation of private interests operating within the public realm,¹⁵² and how these could be measured¹⁵³ and regulated¹⁵⁴ within home states.¹⁵⁵ These

¹⁴⁹ Savacool supra note 2.

¹⁵⁰ See generally Larry Catá Backer, “Sovereign Investing and Markets-based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets” (2013) 29 Am U Intl L Rev 1 (highlighting some of the public and private aspects and actors in the home and host states of SWFs).

¹⁵¹ See also Popova supra note 8 at 1191; Sarkar supra note 7 at 642.

¹⁵² See also Carol W Lewis, “In the Pursuit of Public Interest” (2006) Public Administration Rev 694.

¹⁵³ See Glen Mumey & Joseph Osterman, “Alberta Heritage Fund: Measuring Value and Achievement” (1990 XVI: 1 Can Pub Policy 29; Greene & Yeager supra note 127; Peter A Glicklich & Megan J Grandinetti, “Sovereign Wealth Funds” (2012) January-February Intl Tax J 5, 44; Savacool supra note 2.

¹⁵⁴ See Epstein & Rose supra note 142; Backer supra note 90.

¹⁵⁵ See ibid at 1191-1192.

interests could take various forms, for instance the handling of or claim over SWFs¹⁵⁶ which relate to the issue of ownership and management as they affect public good.

As a reflection of this understanding of public interest, it appears that the essence of SWFs is to advance public good. To emphasize this point, Slawotsky asserts that SWFs are “entrusted with the advancement of the public good of their respective citizenry.”¹⁵⁷ Clarifying this emphasis, Gilligan, O’Brien and Bowman demonstrate that, from a political economy point, public good might refer to the idea of the collective will of people about what is good for them, and from an economics theory viewpoint, might be goods consumed by the individual without subtracting from the interests of another individual.¹⁵⁸

The central idea of public interest from these contributions is that at its basic, the first duty of SWFs is to domestic citizens, and the crux of this duty is how to handle and distribute them.¹⁵⁹ Even where invested abroad, that SWFs are primarily designed to benefit domestic citizens distinguishes them from other forms of investment.¹⁶⁰ As such, they might not be driven by standard economic or financial concerns in the face of domestic economic needs,¹⁶¹ so they mainly aim at addressing internal concerns of their home states, for example saving during booms¹⁶² and providing economic backup for busts.¹⁶³

3.3.2. POLICY INCORPORATION

¹⁵⁶ See also Andrew Baur (Ed.), “Managing the Public Trust: How to make natural resource funds work for citizens” (New York: Revenue Watch Institute and Vale Columbia Centre on Sustainable International Investment, 2014).

¹⁵⁷ Slawotsky supra note 115 at 2.

¹⁵⁸ George Gilligan, Justin O’Brien, & Megan Bowman, “Sovereign Wealth Funds: The *Good Guy* Investment Actors?” (May 2014) Centre for International Finance and Regulation 7, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443237>.

¹⁵⁹ See Armstrong supra note 145 at 414.

¹⁶⁰ Behrendt supra note 7.

¹⁶¹ See Rose supra note 44 at 1211. See also Slawotsky “Sovereign Wealth Funds as Emerging Financial Superpowers” supra note 122 at 1241. See also Keller supra note 99 at 344.

¹⁶² See Sarkar supra note 7.

¹⁶³ See Behrendt supra note 7 at 68.

SWF schemes incorporate public interests in the form of public policy objectives. The most popular objectives across SWFs that summarize the various interests are macro-stability and development, intergenerational savings, foreign exchange reserve investment, and pension reserve.¹⁶⁴

However, while SWFs almost always address macro-stability and development as well as intergenerational savings, they may not always be designed for foreign exchange reserve investment and pension reserves.¹⁶⁵ For example, the Nigerian SWF is not designed for foreign exchange reserve investment, and most SWFs are not designed for pension reserves; even the GPF, hitherto established for pension reserve, does not serve this purpose anymore. Foreign exchange and pension reserve could be alternatively done through government investment companies and state owned enterprises,¹⁶⁶ rather than SWFs.

The significance of distinguishing SWFs from foreign exchange and pension reserves is that once a SWF is invested in a foreign state, it simply becomes a foreign concern,¹⁶⁷ subject to international and foreign laws. Becoming a foreign concern might undermine the domestic goals of SWFs for macro-stabilization and intergenerational savings, forming part of home state interests. However, this is not to say that SWFs cannot function as foreign exchange and pension reserve, but to say that these are not its essence. As a result, where there is a clash between the domestic objectives of SWFs as against foreign exchange and pension reserve, the former ought to supersede.

Given the domestic priority of SWFs therefore, they focus on four major goals which revolve around macro-stability and intergenerational savings. These are economic

¹⁶⁴ See also Meng *supra* note 8 at 217.

¹⁶⁵ See also Andrew Rozanov, “Definitional Challenges of Dealing with Sovereign Wealth Funds” (2011) 1 *Asian J Intl L* 249.

¹⁶⁶ See Green & Yeager *supra* note 127 at 251-254.

¹⁶⁷ See Hong *supra* note 57 at 406.

stabilization, economic development, intergenerational savings, and intragenerational purposes. These may be interwoven and are not equally popular within specific SWF schemes.

To rank these objectives across the board, economic stabilization is the most prominent domestic function of SWFs.¹⁶⁸ For stabilization, SWFs serve efficiency purposes in developing economies.¹⁶⁹ A stabilization fund would “provide budgetary support, particularly in the case of commodity-producing countries, when commodity prices fall.”¹⁷⁰ This point is also true of developed economies that are largely dependent on natural resources. Popular examples include Alaska, Norway and Alberta. In sum, stabilization funds are often regarded as almost exclusively applicable to natural resources and commodities.¹⁷¹

Following stabilization is economic development, forming the most popular objective across African countries.¹⁷² The main idea here is to pool these funds so as to apply them to capital intensive projects, for example road construction, housing and power. The situation in the Middle-East and Asia is a little different. Most countries in these regions do not exhaust their SWFs comparably, but rather save and invest larger portions for future use. For example, Kuwait and China have large SWF investments in Europe and North America.

Designing SWFs for intergenerational savings is the next dominant function. This objective seems to be the most problematic¹⁷³ because of the ethical issues surrounding saving for unascertainable future citizens. Nonetheless, a majority of stakeholders and scholars agree that future generations have a stake in public revenues. Hence, SWFs may be designed as a “source of capital for future generations, especially in countries where future generations may

¹⁶⁸ See generally Bahgat supra note 4 at 1192-1193 (discussing NRFs as stabilization and savings funds). See also Popova supra note 8 at 1192; Bernstein, Lerner & Schoar supra note 19 at 222.

¹⁶⁹ Oshionebo supra note 87 at 219.

¹⁷⁰ Greene & Yeager supra note 127 at 250.

¹⁷¹ See also McVea & Charalambu supra note 8 at 63.

¹⁷² See Thouraya Triki & Issa Faye, “Africa’s Quest for Development: Can Sovereign Wealth Funds Help?” (December 2011) African Development Bank Group, online: <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WPS%20No%20142%20Africas%20Quest%20for%20Development%20%20Can%20Sovereign%20Wealth%20Funds%20help%20AS.pdf>>.

¹⁷³ See Lewis supra note 152 at 698.

no longer be able to rely on commodities for a steady stream of revenue.”¹⁷⁴ For example, according to the history of the Kiribati Islands, the territory derived funds from *guano*, bird droppings, exported for use as fertilizer, long after the resource was exhausted.

While performing their stabilization, development and intergenerational functions, SWFs might also create intragenerational benefits. Intragenerational benefits are possible through storage of wealth for specific short-term and medium-term purposes within domestic territories. These may be strategic or actual. For instance, SWFs could hold companies for strategic investments¹⁷⁵ which yield profits for funding important government functions, or public endowment applied to actually fund retirement payments.¹⁷⁶ In both instances, the primary goal is to ensure that certain needs of current citizens are met. This goal serves an intragenerational function in that it is aimed at ensuring a fair share of resources among current citizens.

There are other domestic functions associated with SWFs not clearly falling under economic stabilization, development, intergenerational and intragenerational purposes. For example, SWFs may be designed to meet the aspirations of current citizens, not by giving them access to resources, but by giving them access to and a sort of say over resource decisions. Green and Forry illustrate with the ethical principles that might underlie some SWFs, stating the Government Pension Fund Global of Norway as an example.¹⁷⁷ Under this Norwegian model, citizens endorse environmental and social policies that influence the making, voting and termination of investment decisions.¹⁷⁸

It seems this kind of practice could be best described as a procedural justice aspect of SWF regulation. This description is suitable because the practice deals with the exercise of

¹⁷⁴ Bernstein, Lerner & Schoar supra note 19 at 222.

¹⁷⁵ Bernstein, Lerner, & Schoar supra note 19.

¹⁷⁶ Greene & Yeager supra note 127 at 250-251.

¹⁷⁷ Green & Forry supra note 89.

¹⁷⁸ See also Green & Forry supra note 89 at 972.

people's liberty to be involved in decision-making processes concerning issues that may affect their interests. However, the practice deals with decision-making in the investment of SWFs, as against the distribution of returns from SWFs which the other home state interests revolve around. Hence, it does not fit squarely within the context of home state interests envisaged in this study which deal more with distribution as against investment. For this reason, the study does not give it much attention, although it makes reference to it where necessary.

3.4. TOWARDS EFFECTIVENESS THROUGH REGULATION

So far, one could see that the literature has rather subtly established that home states own and have a claim over SWFs. The ownership and claim, constituting home state interests, are couched as SWF objectives. But even where these objectives are not in doubt, there are still challenges on how SWF schemes drive them.¹⁷⁹ This borders on the issue of effectiveness.

The literature views driving SWF objectives in terms of enhancing the benefits that citizens and the economy derive. As such, reflecting the public policy objectives of SWFs, the International Monetary Fund has identified the major benefits of SWFs to their home states as the facilitation of savings and intergenerational transfer of proceeds from non-renewable resources, and the reduction of boom and bust cycles driven by changes in commodity export prices.¹⁸⁰ Savings and intergenerational transfer benefits broadly deal with intergenerational justice and development as they would provide funding for the development of future generations,¹⁸¹ and the reduction of boom and bust cycles clearly aims at boosting economic resilience. Then, once SWFs achieve savings, economic resilience, and development, this might guarantee the provision of social services, especially public necessities, and might lead

¹⁷⁹ Paul Segal, "How to Spend It: Resource Wealth and the Distribution of Resource Rents" (2012) 51 Energy Policy 340.

¹⁸⁰ International Monetary Fund (IMF), "Sovereign Wealth Funds— A work Agenda" (29 February 2008) 4, online: <<https://www.imf.org/external/np/pp/eng/2008/022908.pdf>>. See also Popova supra note 8 at 1193.

¹⁸¹ See Greene & Yeager supra note 127 at 250-251.

to better equity among current citizens.¹⁸² This means that achieving savings, economic resilience, and development might lead to a sort of intragenerational justice.

Although often conflating these home state interests, several commentators have tried to contextualize how the design of SWF schemes have enhanced them by driving underlying public policy objectives.¹⁸³ Across the board, there seems to be a consensus that the most popular SWFs that have substantially driven their objectives could be found in Alaska and Norway. The leading models that have considerably failed to drive their objectives could be found in developing countries in Africa, for example Nigeria and Angola, and to a reasonable extent some developed polities, for example Alberta.¹⁸⁴

Some commentators have also pointed out that, to improve how SWF schemes across the board drive their objectives, hence advancing their home state interests, relevant institutions and major actors should be made to be accountable legally and market-wise.¹⁸⁵ Legal accountability deals with the governance of SWFs based on law; market accountability centres

¹⁸² See Bantekas supra note 9.

¹⁸³ Popova supra note 8; Gelpert supra note 57; Hong supra note 57; Jason Clemens & Mark Milke, “Alberta’s Heritage Fund an Abject Poverty” (6 March 2013), online: Troy Media <www.troymedia.com/2013/03/06/albertas-heritage-fund-an-abject-failure/>; Graham Hicks, “Hicks on Biz: Alberta Heritage Savings Trust Fund Used, Abused” (4 July 2014), online: Edmonton Sun <www.edmontonsun.com/2014/07/03/hicks-on-biz-alberta-heritage-trust-fund-used-abused>; McParland supra note 35; Mark Milke, “Alberta Fritters away its Trust Fund” (3 September 2013), online: Winnipeg Free Press <www.winnipegfreepress.com/opinion/analysis/alberta-fritters-away-its-trust-fund-196658761.html>; Songi supra note 57; Giovannetti, Pereira & Wolfe supra note 35; Janet Davison, “Sovereign Wealth Funds: What does it take to Succeed? Transparency, Governance Considered Critical to Saving Resource Income for Future Generations” (27 March 2015), online: CBC News <www.cbc.ca/news/business/sovereign-wealth-funds-what-does-it-take-to-succeed-1.3002020>.

¹⁸⁴ For example, Baena, César, and Warrack submit to the effect that the APF has advanced these interests while the AHTF has substantially failed, and Nikiforuk submits to the effect that the GPF has advanced these goals while the AHTF has failed. See Baena Sévi, & Warrack supra note 114; Andrew Nikiforuk, “Slip Sliding Away: Compared with Norway’s Bulging Bank Account, Alberta’s Heritage Fund Falls Well Short of its Potential” (2008) Alt J www.alternativesjournal.ca/policy-and-politics/slip-sliding-away. A majority of commentators has towed this line of argument one way or the other. See Collins supra note 34; Hoffman supra note 34; Bev Dahlby & Niloo Hojjati, “The Challenge of Saving Natural Resources Revenues: An Overview of the Alberta Heritage Trust Fund”, online:<www.iticnet.org/images/19th%20Special%20Report/3.%20Bev%20Dahlby.pdf>; Mumei & Osterman supra note 153; Ted Morton & Meredith McDonald, “The Siren Song of Economic Diversification: Alberta’s Legacy of Loss” (2015) 13:8 School of Public Policy Research Papers, online: University of Calgary <<http://www.policyschool.ucalgary.ca/?q=content/siren-song-economic-diversification-albertas-legacy-loss>>.

¹⁸⁵ Hong supra note 57 at 406.

on the operation of SWFs in a profitable and transparent manner based on economic regulation; and administrative regulation helps shape legal and market accountability.

Therefore, making institutions and major actors accountable is the job of regulation, whether legal, market or administrative. This means that regulation is the primary process that could help SWFs drive their objectives within home states. Where regulation helps SWFs drive their home state objectives, then it makes NRFs effective.

The demonstration of Humphreys and Sandbu shows how regulation could make NRFs effective.¹⁸⁶ They argue that “(1) withdrawal decisions should be regulated in part by clear rules rather than general guidelines, (2) key decisions should be made by bodies representing the interests of diverse political constituencies, and (3) there should be high levels of transparency regarding their status and operation.”¹⁸⁷ The Revenue Watch Institute and the Vale Columbia Centre on Sustainable International Investment also elaborate on this argument. They provide necessary steps for regulation as setting clear fund objectives, establishing fiscal and investment rules, separation of regulatory and operational powers, enhancing disclosures, and creating strong oversight bodies.¹⁸⁸ While not exhaustive, these contributions provide a starting point for discussing how NRFs should be regulated for effectiveness.

3.5. CONCLUSION

This chapter has contextualized the home state interest discourse as against the broader transnational interest discourse of SWFs. It appears that home state interests that ought to be associated with NRFs take the form of public interests underlying SWFs.

¹⁸⁶ Humphreys & Sandbu *supra* note 2.

¹⁸⁷ *Ibid* at 194.

¹⁸⁸ Revenue Watch Institute & Vale Columbia Centre on Sustainable International Investment, “Natural Resource Fund Governance: The Essentials” (April 2014), online: <http://www.agora-parl.org/sites/default/files/nrf_overview_en.pdf>.

Public interests underlying SWFs are couched as public policy objectives. Economic stabilization, intergenerational and intragenerational purposes are the most common SWF interests couched as public policy objectives across countries, perhaps more so in developed than developing blocs. It also appears that development interests underlying SWFs are also couched as a public policy objectives apparently more in developing countries, especially in Africa, than developed countries.

In any case, for SWFs to perform their duty of achieving these interests by advancing the relevant policy objectives, hence making NRFs effective, institutions and major actors, for instance governments and fund managers, ought to be accountable. Accountability could be driven by regulation. Although there is little written on how regulation for accountability could play out within home states, there are a few hints.

These hints come from the contributions of Humphreys and Sandbu as well as the Revenue Watch Institute and the Vale Columbia Centre on Sustainable International Investment. Among other potential hints, objectives and withdrawal rules should be clear; citizens should be involved in decision-making; there should be information disclosure and functional transparency; regulatory and operational powers should be separated; and suitable institutions should perform oversight. However, since there is currently no standard model for regulation, these contributions are currently piecemeal, hence the need for further investigation.

To comprehensively investigate how regulation could advance home state interests, the next chapter is a comparative case study of the regulatory features of AHTE, GPF and APF. This comparative work provides the most important bases for general conclusions eventually drawn and recommendations made at the end of the thesis.

CHAPTER 4

4. RESULT AND DISCUSSION

This chapter introduces the NRF regimes of Alberta, Alaska and Norway, and comparatively examines their regulatory models as a case study. It first provides the socio-political contexts of the NRF schemes, and then evaluates their most prominent regulatory features. It employs intergenerational justice, intragenerational justice and economic resilience, being well established public policy objectives of SWFs that embody home state interests of NRFs in the literature, as the criteria for analysis.

4.1. INTRODUCTION

The APF, AHTF, and GPF developed after the discoveries of crude oil in commercial quantities in Alaska, Alberta and Norway respectively. These came after intense exploration, dry wells and sometimes small initial discoveries.

Alberta first discovered oil at Waterton Lakes National Park in 1902, but this was not of commercial significance.¹⁸⁹ A subsequent exploration at Dingman No. 1, a well in Turner Valley in the Calgary Region, in 1914 led to a substantial discovery initially considered the ignition of oil wealth in the province.¹⁹⁰ However, the discovery that marked Alberta's ascension as an oil-based economy was at Leduc, South of Edmonton, in 1947,¹⁹¹ once graphically depicted as “showers of oil” to illustrate its commercial grade.¹⁹² Upon this

¹⁸⁹ Calgary Herald, “May 14, 1914- Dingman Discovery No. 1 blows in Turner Valley” (15 May 2012), online: Calgary Herald website <<http://calgaryherald.com/news/local-news/may-14-1914-dingman-discovery-no-1-blows-in-turner-valley>>.

¹⁹⁰ Calgary Herald *ibid*; Historical Society of Alberta, “Turner Valley Oil Discovery” (2014) 62.2 *Alberta History* 38 [*Academic OneFile*]; Laura Golebiowski, “Oil Discovery in Turner Valley: Press Reactions” (2007) 55.3 *Alberta History* 20.

¹⁹¹ Theo A Link, “Leduc Oil Field, Alberta, Canada: (An Example of Transgressive and Regressive Bioherm Growth)” (1949) 60:3 *Geological Society of America Bull* 381; Emir Crowne & Barbero C Michael, “Oil and Gas Law: From *Habendum* to Patent Law” (2014) 5:2 *Wash L J Energy, Climate & Environment* 295; Alberta Energy, “Oil” <www.energy.alberta.ca/Oil/Oil.asp>.

¹⁹² Historical Society of Alberta, “1947: Discovery of Oil at Leduc” (2005) 53.2 *Alberta History* 22.

discovery, many people started buying shares in oil companies operating in the province,¹⁹³ eventually turning Alberta into a profitable resource economy, and making Canada into an oil exporting giant.¹⁹⁴

Just over two decades after the Alberta discovery, Alaska also found oil. The Atlantic Richfield Company¹⁹⁵ (ARCO) came across a reservoir at a field called Prudhoe Bay on the North Slope of the Brooks Mountain Range on the Arctic Coast in 1967¹⁹⁶—some commentaries report the year as 1968¹⁹⁷ perhaps because the 1967 discovery which was in the last month of that year appears not to have been fully confirmed to be of commercial grade.¹⁹⁸ ARCO and other experts estimated that the field had the capacity to yield 9.6 billion barrels of oil at a time when the total oil reserve of the USA was 30 billion barrels.¹⁹⁹ Major oil companies with leaseholds on the North Slope “rushed” to explore the field, submitting bids for 179 of land totalling 450,000 acres.²⁰⁰ This discovery eventually brought substantial revenues in 1969, derived from oil field leases,²⁰¹ and some more revenues in 1974 from investments in the

¹⁹³ Calgary Herald supra note 189.

¹⁹⁴ Crowne & Michael supra note 191.

¹⁹⁵ Alan G Stone, “The Trans-Alaska Pipeline and Strict Liability for Oil Pollution Damage” (1975) Urban L Annual; J Urban & Contemporary L 179, 179.

¹⁹⁶ Alaska History and Cultural Studies, “Modern Alaska: Oil Discovery and Development in Alaska”, online: <<http://www.akhistorycourse.org/articles/article.php?artID=140>>; Alaska Oil and Gas Conservation Commission, “AOGCC Pool Statistics: Prudhoe Bay Unit, Prudhoe Oil Pool”, online: Alaska Department of Administration <http://doa.alaska.gov/ogc/annual/current/18_Oil_Pools/Prudhoe%20Bay%20-%20Oil/Prudhoe%20Bay,%20Prudhoe%20Bay/1_Oil_1.htm>; Jacob D Unger, “Regulating the Arctic Gold Rush: Recommended Regulatory Reforms to Protect Alaska’s Arctic Environment from Offshore Oil Drilling Pollution” (2014)31: 2 Alaska L Rev 263, 267.

¹⁹⁷ See Alaska Oil and Gas Association, “History- 1960’s”, online: <<http://www.aoga.org/industry/history-1960s>>; Anderson supra note 10 at 58; Hannesson supra note 16.

¹⁹⁸ See generally Alaska History and Cultural Studies supra note 196 (providing details of how the discovery started in December 1967 and extended to 1968 when the oil richness of the reservoir was confirmed).

¹⁹⁹ See Andrew Simon, “The Trans Alaska Pipeline: A Struggle for Balance”, 2, online: Washington History <http://www.washingtonhistory.org/files/library/history-day-sample_004.pdf>.

²⁰⁰ Stone note 195 at 179-180.

²⁰¹ Alaska Permanent Fund Corporation, “Landmarks in Permanent Fund History”, online: <<http://www.apfc.org/home/Content/aboutFund/fundHistory.cfm>>; Alaska had become the 59th state of the United States of America (USA) in January 1959,²⁰¹ at time before the AHTF was created. ²⁰¹ Hannesson supra note 16.

construction of the Trans-Alaska pipeline.²⁰² In any case, the bulk of the production began around 1977 when the Trans-Alaska pipeline was completed.

Roughly a year after the Prudhoe Bay discovery, Norway followed with its own discovery of oil. It first found oil at Balder, but this was not economically viable at that time.²⁰³ Phillips Petroleum then discovered another field at Ekofisk on the North Sea of the Atlantic Ocean in 1969.²⁰⁴ This field has remained one of the largest in the country.²⁰⁵ Many investors became interested in the field. Acting on their interest led to the increased market flow of exploration and production licenses in the two years that followed.²⁰⁶ Subsequently, commercial production began in 1971.²⁰⁷

The situation that followed commercial discoveries of oil across these territories was similar. At first, there was overwhelming oil investments and wealth, leading to the issue of

²⁰² Stakeholders debated how to transport oil products from Prudhoe Bay, considering several options such as highways for trucks, ice breaking tankers to go through the Northway passage to the East coast, railroad cars travelling through an extension of the Alaska railroad, and submarine tankers. They eventually settled for a pipeline, but then had to also decide the better route, whether to start at North Slope, proceed through Canada, and terminate at Chicago; or whether to proceed from Prudhoe Bay across Alaska through the ice free shipping port at Valdez, Alaska, where tankers could transport the oil to the West Coast. They settled for the latter. When the pipeline was eventually constructed, it brought enormous revenues, serving as a turning point for Alaska's economy. See Andrew Simon, "The Trans Alaska Pipeline: A Struggle for Balance", online: Washington History <http://www.washingtonhistory.org/files/library/history-day-sample_004.pdf>; Stone supra note 195 at 180-181. The construction of the Trans-Alaska Pipeline had begun a year before, in 1973, and continued until 1977. See Alaska History and Cultural Studies supra note 196; Unger supra note 196.

²⁰³ Norwegian Petroleum, "Norway's Petroleum History", online: NORSK <<http://www.norskpetroleum.no/en/framework/norways-petroleum-history/>>.

²⁰⁴ The company had offered USD 160,000 per month as rent for exploring Norway's portion of the North Sea. Norway considered this to be an attempt to take an exclusive control of the Norwegian continental shelf. Rather, it decided to give rent its portion of the continental shelf to different companies. Before this, it proclaimed sovereignty over the continental shelf in question, and delimit boundaries with Denmark and the UK, concluding this in 1965. It then initiated its first licensing round that same year, awarding 22 production licenses 78 geographically delimited areas. see Norwegian Petroleum *ibid*; Stig S Kvendseth, *Giant Discovery: A History of Ekofisk through the First 20 Years* (Tananger: Phillips Petroleum Company Norway, 1988) Malte Humpert & Andreas Raspotnik, "Norway's Energy Resource Policy and the Future of Bilateral Cooperation in the Barents Sea", online: Institute of the North <https://www.institutenorth.org/assets/images/uploads/articles/Norway%E2%80%99s_Energy_Resource_Policy_and_the_Future_of_Bilateral_Cooperation_in_the_Barents_Sea_By_Malte_Humpert_Andreas_Raspotnik.pdf>;

²⁰⁵ Norwegian Petroleum supra note 203; JC Hansen, "This Changing World: Oil and the Changing Geography of Norway" (1983) 68:2 *Geography* 162.

²⁰⁶ Kjell Stenstadvold, "Regional and Structural Effects of North Sea Oil in Norway" (1977) 1:1 *GeoJ* 71, 72.

²⁰⁷ Norges Bank Investment Management, "History" <www.nbim.no/en/the-fund/history/>. See also Alanna Hartzok, "Citizen Dividends and Oil Resource Rents: A Focus on Alaska, Norway and Nigeria" (2004), online: <www.earthrights.net/docs/oilrent.html>; Halvor Mehlum, Karl Moene, & Ragnar Torvik, "Mineral Rents and Social Development in Norway" (2008), online: <ideas.repec.org/p/hhs/osloec/2011_014.html>.

how to properly handle the inflow. As oil wealth continued to overflow, these territories became somewhat “addicted” to it; for one, oil revenues eventually became the mainstay of their economies. To ensure that they appropriated these revenues wisely, they each decided to establish a pool of monies derived from the revenues, called NRF. Accordingly, they all have typical NRFs that depend largely on their respective socio-political contexts.

4.2. SOCIO-POLITICAL CONTEXTS

Alberta, Alaska and Norway developed the AHTF, GPF and APF respectively to address certain local interests. As such, these funds have arisen from and been influenced by their domestic socio-political contexts.

4.2.1. ALBERTA

Alberta, Canada’s “foremost energy-resource province,” is home to the oil sands, the largest oil reserve in the country and the third largest in the world.²⁰⁸ The province is generally considered to be wealthy as a result of its oil revenues. A key issue has been how to handle this wealth in view of its implications.

Perhaps the most notable implications of Alberta’s oil wealth are immigration and rapid population growth. These implications are further made possible because the province is easily accessible, geographically, so people come in and out. As at 2014, the province had about 4,121,692 people,²⁰⁹ a heterogeneous mixture of indigenous peoples, settlers, and a relatively high number of immigrants. This mixture makes Alberta a very diverse province.

²⁰⁸ Robert M Stamp, “Alberta” (2009) The Canadian Encyclopedia, online: Historica Canada <<http://www.thecanadianencyclopedia.ca/en/article/alberta/>>.

²⁰⁹Treasury Board and Finance Office of Statistics and Information-Demography, “Population Projection: Alberta 2015-2041” (31 July 2015), online: Alberta Government <<http://finance.alberta.ca/aboutalberta/population-projections/2015-2041-alberta-population-projections.pdf>>.

To create a balance in the allocation of resources in such a diverse society, there is the need for a culture that gives as much liberty to individuals and groups to avoid interest-laden conflicts, and at the same time creates regulatory measures to balance the multifarious exercise of liberties. This idea seems to have shaped the ethos of the province like most of its other North American counterparts.

Hence, Alberta is said to have what one could call “‘frontier ethos’ that emphasizes economic materialism and rugged individualism”²¹⁰ — this ethos is also characteristic of the cultural ethos of most states in the USA.²¹¹ Commentators claim this ethos emphasizes “personal happiness, optimism about the future, and hard and focused work.”²¹² An implication of the ethos is a sort of competition for the maximization of social, economic and political opportunities. To manage this competition, the government of Alberta has carefully designed a resource revenue management system that balances diverse interests.

Since Alberta benefited from the energy boom of the 1970s, it started looking for a natural resource management scheme that would address diverse interests of current Albertans, future Albertans, and Alberta as a political unit. At the same time, it needed to maximize the returns from the energy boom and, as such, planned to take measures that would address inflationary pressures that increased revenues could have, unprecedented economic-triggered immigration into Alberta and its social cost, and the future challenges that might arise in readjusting when non-renewable resources become exhausted.²¹³ Thus, a former premier of Alberta between 1971 and 1985, Peter Lougheed, decided to set aside non-renewable natural resources revenues from royalties and other sources, to be saved as a NRF called the AHTF.

²¹⁰ Stamp *supra* note 208.

²¹¹ See Shinobu Kitayama et al, “Ethos of Independence across Regions: The Production-Adoption Model of Cultural Change” (2010) 65:6 *Am Psychologist* 559.

²¹² Kitayama et al *ibid* at 561.

²¹³ Collins *supra* note 34.

The government originally set three goals for the AHTF: save excess revenues for future generations, protect and diversify the economy, and improve the quality of life of Albertans.²¹⁴ The first goal addresses intergenerational justice, providing the basis for long-term savings, originally to be sourced from a 30 percent deposit of entire oil revenues.²¹⁵ The second goal addresses economic resilience, designed to finance long-term economic growth,²¹⁶ and to provide economic buffer. The last goal focuses more on intragenerational justice, most prominent in the redistribution of wealth: Albertans have enjoyed low taxes as the province has relied more on natural resource revenues.²¹⁷

However, since the province is a component unit of the Canadian federation, the broader national governance has impacted its management of the NRF. It has constitutional monarchy and parliamentary systems under its common law, stemming from the original constitutional design of Canada.²¹⁸ What does this connote? The constitution is supreme, while, generally, the legislature and the cabinet make and administer regulations. Based on this system and federalism, Alberta has extra-provincial financial commitments, and this bites off part of the AHTF.²¹⁹ Any assessment of the AHTF must therefore take these dynamics into consideration.

4.2.2. NORWAY

²¹⁴ See Mumey & Osterman supra note 153; McParland supra note 35; Alberta Treasury Board and Finance, “A History of the Heritage Fund” (2015) Heritage Fund- Historical Timeline <www.finance.alberta.ca/business/ahstf/history.html>; Giovannetti, Prereira & Wolfe supra note 35; Dahlby & Hojjati supra note 184

²¹⁵ Giovannetti, Prereira & Wolfe supra note 35.

²¹⁶ Mumey & Osterman supra note 153.

²¹⁷ Stamp supra note 208.

²¹⁸ See AHF Lefroy, *Canada's Federal System* (Toronto: Carswell Co Limited, 1913).

²¹⁹ Gary Lamphier, “Lamphier: How Much Money has flowed out of Alberta to Ottawa? A Lot”, Edmonton J (21 February 2016), online: <<http://edmontonjournal.com/opinion/columnists/gary-lamphier-how-much-money-has-flowed-out-of-alberta-to-ottawa-a-lot>>

Norway is the world's third largest exporter of petroleum. A lot of activities in the Norwegian society are affected by the oil industry,²²⁰ and there is a consensus that the country's wealth has been driven by its oil sector. The attitude to the management of this wealth has been based on the Norwegian way of life, traceable to the country's history.

Historically, Norsemen or Vikings periodically raided and eventually ruled Norway, before the country came under the influence of Christianity in the 10th and 11th century.²²¹ Since the coming of Christianity, the religion has pervaded its way of life,²²² although there have been recent immigration of non-Christians from Western Europe and Islamic countries.²²³

Given this background, Norway, with a population of 5,265,158,²²⁴ is largely a homogenous society, constituting about 98 percent Norwegians, and a minority comprising Danish, British, Swedish and Pakistanis.²²⁵ Like other Nordic countries, the government provides social services for the population, and class differences are not noticeable.²²⁶ Thus, it appears Norway's social value is largely egalitarian.²²⁷

Perhaps as a result of its homogenous society together with its Christian and egalitarian ways of life, Norway appears to have a sort of non-frontier ethos that emphasizes conservatism. Its society has the tendency to hold together and exclude strangers, even to the extent of being said to have high racist tendencies.²²⁸ To add to this already closed system, the country also has constitutional monarchy and unitary governance structures with a dominant socialist

²²⁰ Hansen.

²²¹ Thomas White International, "Norway: Lighting Up Europe", online: <<http://www.thomaswhite.com/world-markets/norway-lighting-up-europe/>>.

²²² Ibid.

²²³ Olav F Knudsen, "Norway: Domestically Driven Foreign Policy" (1990) 512 *Annals American Academy Political & Social Science* 101.

²²⁴ Central Intelligence Authority, *The World Fact Book*, online: <<https://www.cia.gov/library/publications/the-world-factbook/geos/no.html>>.

²²⁵ Thomas White International *supra* note 221.

²²⁶ Knudsen *supra* note 223.

²²⁷ Ibid.

²²⁸ Ibid.

ideology.²²⁹ The overall significance is that Norway has a compact society which has determined the direction of its resource regime.

Hence, Norway has focused its resource regime on the maintenance of its compact society. The country first debated how to appropriate oil wealth in 1974 as presented in a parliamentary report entitled “The Role of Petroleum Activity in Norwegian Society,” followed by the Tempo Committee report in 1983 which proposed that the country should save oil revenues derived from selling exploration rights, joint-venture participation via its national oil company called Statoil, and taxation of oil industry activities.²³⁰ The savings was to become the NRF of Norway.

According to the Tempo committee, the NRF would serve as backup for future oil price fluctuations and the economic destabilization that could follow, address financial challenges facing the aging population, and protect the country from excessive inflow of petroleum revenues that might create inflation.²³¹ While the first and last objectives focus on economic resilience, the second objective focuses more on intragenerational justice, although only as applicable to a segment of the Norwegian society.

Based on the outcomes of the parliamentary procedures especially in adopting the Tempo Committee report, the country created its NRF as the Government Petroleum Fund in 1990. It later changed its name to the GPF in 2006.²³²

It is worthy of note that Norway has a Scandinavian legal system, which is more on the side of civil law than common law. Generally, experts commend this system for fostering administrative effectiveness. As such, this is expected to have some bearing on the country’s resource governance, particularly in the performance of government.

²²⁹ Ibid.

²³⁰ See Norges Bank Investment Management, “History” supra note 207.

²³¹ Compare Clark, Dixon & Monk supra note 36 (stating the reasons for the establishment of the Government Pension Fund as the prevention of macro-economic problems captured by resource curse and Dutch disease, and managing the potential short-term costs associated with the fluctuation of resource revenues).

²³² Ibid; see also Norges Bank Investment Management, “History” supra note 207

4.2.3. ALASKA

Alaska's oil sector is the major source of government revenue in the state, although it generates relatively lower percentage of jobs.²³³ Nevertheless, this sector is generally considered to be driving the wealth of the state. The appropriation of this wealth has been shaped by Alaska's unique terrain.

Alaska's unique terrain could be understood by looking at the state's population and geographical dynamics. As for the population, Alaska had about 738, 432 people as at 2015, with a heterogenous mixture of indigenous peoples, settlers, and relatively few immigrants.²³⁴ Turning to the geography, the state, originally acquired from Russia in 1867, has unique climatic and social circumstances which have restrained the growth of its population.²³⁵ It is considered to be cut off from the rest of the USA, leading to certain challenges,²³⁶ some particularly affecting the oil and gas industry.²³⁷ Overall, the population and the geographical dynamics of Alaska have largely informed the Alaskan way of life.

Hence, Alaska's small population and geographical dynamics seem to have kept a lot of immigrants out and prevented the population from growing rapidly, and have influenced the ethos of the state. The state is mainly dominated by settlers and indigenous peoples, hence embedding the dominant cultures of these two groups. This character gives it a sort of mixture of frontier and non-frontier ethos, with the frontier ethos traceable to the influence of the larger American settler society,²³⁸ and the non-frontier ethos seemingly traceable to the strong footprints of the indigenous peoples and their communal way of life. There is a substantial

²³³ See William S Brown & Clive S Thomas, "The Alaska Permanent Fund: Good Sense or Political Expediency?" (1994) 37:5 Challenge 38.

²³⁴ United States Census Bureau, "Quick Facts: Alaska" <<http://www.census.gov/quickfacts/table/PST045215/02>>.

²³⁵ See Peggy Wayburn, "Alaska: The Great Experiment" (1984) 13:4 Ambio 249.

²³⁶ See *ibid*.

²³⁷ Brown and Thomas *supra* note 233.

²³⁸ See generally Kitayama et al *supra* note 211.

representation of the culture of both groups because unlike many other settler societies, the Alaskan indigenous community is extremely virile,²³⁹ so it has arguably been difficult for the settler community to dominate it culturally. In any case, Alaska has been a very inclusive society for settlers and indigenous peoples, and this inclusivity has reflected in its resource regime.

Alaska held several meetings and public hearings to decide how to spend its oil wealth.²⁴⁰ It eventually decided to boost economic development with the wealth, launching largely unsuccessful projects such as the one paying farmers to cut down trees and grow barley on the land as well as another one on the establishment of dairy farms in the state.²⁴¹ As at 1976, it realized that it had dissipated its initial wealth derived from oil field leases, thus sensing the need to handle its oil wealth with care.²⁴²

As an alternative to the failed projects, representative stakeholders and individuals in Alaska agreed that an investment fund should be established from the oil wealth. Meanwhile, Keith Harvey Miller, a governor of Alaska from 1969 to 1970, had unsuccessfully introduced a bill to establish a trust fund.²⁴³ Latter attempts by Jay Hammond, another governor of Alaska between 1974 and 1982, then oversaw the creation of a NRF known as the APF.

The APF had one overarching goal at the time: to save excessive incomes from oil exploration and production for future generations that might not have access to oil resources due to possible depletion.²⁴⁴ This is clearly an intergenerational justice objective. There was a debate as to whether this goal should be achieved by saving or investing the APF, but the state

²³⁹ See generally Paul Ongtooguk, “ANCSA: What Political Process?” Alaska History and Cultural Studies <<http://www.akhistorycourse.org/alaskas-cultures/ancsa-what-political-process>>.

²⁴⁰ Hannesson supra note 16.

²⁴¹ Ibid.

²⁴² Anderson supra note 10.

²⁴³ Ibid.

²⁴⁴ See Karl Widerquist & Michael W Howard, “Introduction: Success in Alaska” in Karl Widerquist & Michael W Howard, eds *Alaska’s Permanent Fund Dividend: Examining its Suitability as a Model* (New York: Palgrave Macmillan, 2012) 3; Christopher Griffin Jr, “The Alaska Permanent Fund Dividend and Membership in the State’s Political Community” (2012) 29:1 Alaska L Rev 79.

eventually settled for a mix of both. The proposal was to save 50 percent of the income in the APF but the state legislature approved 25 percent instead.²⁴⁵ There were also some discussions around the types of investments.

Notably, as a component unit like Alberta, Alaska belongs to the federal and presidential systems of the USA, and practices a constitutional democracy under its common law system. These all affect its resource governance. As such, the state shares its resource revenues with the federal government, and is subject to constitutional provisions and presidential discretion in broader public matters that could affect its resource governance.

4.2.4. COMPARATIVE LESSONS

Overall, the three NRFs developed against different socio-political contexts which influence them and affect their performance. As such, they differ greatly in details, and have very little in common. Nevertheless, the few similarities they have, on their reliance on oil, and particularly with regards to the objectives of their establishment, are significant.

Concerning the reliance on oil as affected by their socio-political contexts, all three polities developed their NRFs to properly manage this reliance. The idea that connects them is the maximization of oil by saving, investing, and/or appropriating its revenues as a special pool of monies for specific objectives.

With regards to these objectives, one could see that, at the inception of the three NRFs, economic resilience featured prominently across them. It is followed by intergenerational justice which appears to be present in the AHTF and APF, but not in the GPF. Intragenerational justice follows with appearances in the AHTF and GPF but not in the APF, although these appearances are arguably not as clear as we have for intergenerational justice and economic resilience; for instance, the policies on insurance scheme for aging population under the GPF

²⁴⁵ Hannesson *supra* note 16.

cannot be considered to be a flawless intragenerational idea since it does not apply to the whole population as would ideally be expected. One could therefore rank the objectives in order of popularity as economic resilience, intergenerational justice, and intragenerational justice.

To be clear, this ranking is not universal. Admittedly, economic resilience has continued to be on the rise as the foremost objective underpinning NRFs in some developing countries, for example the Sovereign Fund of the Gabonese Republic (Fonds Souverain de la Republique Gabonaise), the National Fund for Hydrocarbon Reserves (Fonds National des Revenus des Hydrocarbures) of Mauritania, and the Pension Reserve Fund and Economic and Social Stabilization Fund of Chile.²⁴⁶ Nonetheless, it takes a secondary position in many least developed countries, especially in Africa, where the primary objective has been savings for development rather than for economic resilience per se, apparently because of the fiscal challenges of all sorts, including those relating to poverty and ill-health, that these countries face which could be addressed through development projects.²⁴⁷ Then comes intergenerational justice which has become even more common across developed countries, especially following its popularization by the report of the Brundtland commission. The popularity it gained from the commission is apparently why it is foremost across the NRFs of Alberta, Alaska and Norway which are developed economies. Overall, NRF objectives generally vary across and within the blocs of developed and developing countries.

4.3. REGULATORY FEATURES

The main regulatory features of the AHTF, APF and GPF could be traced to the principal laws governing each of them. Apart from these laws however, it seems that

²⁴⁶ See also Larry Catá Backer, “Law at the End of the Day” (2014), online: LC Backer Blog <lbackerblog.blogspot.ca/2014/03/part-21-sovereign-wealth-fund-of-gabon.html>.

²⁴⁷ See Louise Redvers, “Analysis: Do Sovereign Wealth Funds Make Sense for Africa?” (2015), online: Daily Maverick <www.dailymaverick.co.za/article/2015-04-08-analysis-do-sovereign-wealth-funds-make-sense-for-africa/#.VpzlACorLIU>.

institutional support has also played important roles. Law and institutional support make up the regulatory architecture.

The functional roles law and institutional support play across the three NRFs could be summed up under four dominant themes. These are the legal framework and objectives, ownership regime, structure and functionality, and governance and operation.

4.3.1. LEGAL FRAMEWORK AND OBJECTIVES

The legal framework and objectives form the core of law in NRF regimes. Politics ordinarily design NRFs based on policy processes, and then transmit the original policy objectives, as set out during the design, into law.

Alberta, Alaska and Norway decided to create the AHTF, APF and GPF respectively with law rather than administrative instruments. Choosing law over administrative instruments is perhaps because the former is considered stronger in driving policy objectives than the latter which seems to allow a considerable level of government discretion. Also, administrative instruments could create too much uncertainty as they allow governments, through administrative discretion, to make decisions that may not be predictable.

Alberta, Alaska and Norway created their legal instruments in 1976, 1990 and 2005 respectively. While the legal instruments of Alberta and Norway were created through the enactment of acts of legislature, Alaska's was enshrined in its constitution. In 1976, Alberta passed the Alberta Heritage Trust Fund Act 1976 as its major NRF statute. This statute created and has regulated the AHTF. Norway equally established its NRF as the Petroleum Fund of Norway, predecessor to the GPF, through the Government Petroleum Fund Act of 1990. This statute is now succeeded by the Government Pension Fund Act 2005. Alaska took a bold step in launching the APF as its NRF in 1976 through a constitutional amendment, mainly because

the constitution hitherto prohibited a dedicated fund such as NRF.²⁴⁸ However, the major provisions regulating most issues in the APF are under Article 01 of the Alaska Statutes,²⁴⁹ although where any uncertainty arises, the constitution is often the last resort.²⁵⁰

Since legal instruments are designed to entrench policy interests, they usually incorporate relevant objectives to ensure clarity and serve as a road map for statutes. Depending on specifics, these could be enclosed in inoperative sections of instruments such as the preamble and the long title, or in the operative sections of the instrument such as the parts and divisions. In any case, given the significance of NRF objectives, they deserve more specific attention.

4.3.1.1. Alberta

The preamble to the Alberta Heritage Savings Trust Fund Act provides for the objective of the AHTF. It states this as the provision of “prudent stewardship of the savings from Alberta’s non-renewable resources by providing the greatest financial returns on those savings for current and future generations of Albertans.”

This objective raises some issues. First, it has been modified from its original form prior to the statute, as seen from its socio-political context. The original policy form had three clear goals as saving excess revenues for future generations, protecting and diversifying the economy, and improving the quality of life of Albertans,²⁵¹ but the new statutory form sets the single goal as prudent stewardship of savings which could be achieved by providing the greatest financial returns. While this modification may not be a problem in itself, it raises the question of what could have accounted for it. Second and more importantly, the objective is

²⁴⁸ Hannesson supra note 16.

²⁴⁹ *Alaska Statutes*, s 37.13.010, 2014..

²⁵⁰ See for example *Zobel v Williams* 37 US, 29–30.

²⁵¹ See Mumey & Osterman supra note 153; McParland supra note 35; Alberta Treasury Board and Finance supra note 214; Giovannetti, Prereira & Wolfe supra note 35; Dahlby & Niloo Hojjati supra note 184.

enshrined in an inoperative part of the statute. This makes it unenforceable. Its enclosure as a preamble also makes it a general guiding principle. As a general principle, a preamble would be subject to specific provisions. Third and equally importantly, the objective solely aims at providing prudent stewardship of the savings from resources revenues, and to do this, prescribes the strategy of providing the greatest financial returns on the savings from non-renewable resources revenues for current and future generations. While a prudent stewardship clause could advance relevant policy objectives,²⁵² it is vague in the AHTF because it does not clarify the beneficiary of the stewardship, and could be construed as not directly giving Albertans any say on how the revenues are managed because there are no substantive or procedural guidelines that allow people to check the stewardship activities of governments. This reality is largely inconsistent with the principle underlying the frontier ethos of Alberta which originally influenced the conception of the AHTF.

Perhaps as a result of these shortcomings which allow too much government power and discretion, the input and growth of the AHTF has been an issue over the years. At the time it was established, its input came from 30 percent of non-renewable resource revenues that the government received from 1 April 1976 and 31 March 1977, and funds transferred from the province's general revenue account.²⁵³ At that time, it grew steadily and ensured a long term saving.²⁵⁴ However, the government reduced the input from these sources and subsequently stopped saving these funds in the AHTF.²⁵⁵ It diverted them into the General Revenue Fund from 1987 and thereafter.²⁵⁶ Even at the moment, the designated Minister could transfer profits made on the investments of the AHTF to the General Revenue Fund pursuant to section 8 of the Alberta Heritage Trust Fund Act 1976. Moreover, there is no certainty about the subsequent

²⁵² Prudent investment would maximize profit and minimize loss. The effect of this is that more funds will be available for addressing intergenerational, intragenerational and economic resilience needs.

²⁵³ Alberta Treasury Board and Finance *supra* note 214; see also Hicks *supra* note 183.

²⁵⁴ Giovannetti, Prereira & Wolfe *supra* note 35.

²⁵⁵ Baena Sévi, & Warrack *supra* note 114.

²⁵⁶ See Alberta Treasury Board and Finance *supra* note 214; Hicks *supra* note 183.

percentage of petroleum revenues that go into the AHTF. The legislature appropriates the amount saved in the AHTF following section 9.2 of the Alberta Heritage Trust Fund Act, and the designated Minister may also transfer funds into it from the General Revenue Fund pursuant to section 9.1 of the same Act.

These facts reveal at least two major substantive problems facing the AHTF. First, there is no prescription that the fund should have a substantial minimum. This means that the government could save whatever it likes at any point in time. Second, the law allows too much discretion on withdrawals from the fund. This situation is undesirable when one considers the fact that the government could withdraw from the entire pool of fund, rather than a designated part of it, say a stabilization pool during economic bursts.

As an overall implication of these problems, the AHTF had a cumulative net income of \$31.3 billion and a government withdrawal amounting to \$29.6 billion between 1977 and 2011.²⁵⁷ Hence, while it could be plausible to argue that the AHTF has endeavoured to improve the quality of life of Albertans through the provision of social services and tax reliefs, it has largely failed to achieve its objective of prudent stewardship of savings.

4.3.1.2. Norway

Turning to Norway, Section 1 of Government Pension Fund Act 2005 provides for the objective. It states that “The Government Pension Fund shall support government saving to finance the National Insurance Scheme’s expenditure on pensions and support long-term considerations in the use of petroleum resources.”

While this objective does not completely translate the original policy underpinnings as set by the Tempo Committee— to serve as backup for future oil price fluctuations and the economic destabilization that could follow, address financial challenges facing the aging

²⁵⁷ Clemens & Milke *supra* at 183.

population, and protect the country from excessive inflow of petroleum revenues that might create inflation²⁵⁸ — it fully captures them. Financing the national insurance scheme captures the considerations on ageing population, and supporting long-term considerations captures the concerns on future price fluctuations and excessive flow of revenues. In any case, financing the national insurance scheme is a sort of an intragenerational goal while supporting long-term considerations aims at advancing intergenerational interests. However, it needs to be stated that the GPF does not really focus on pension-related matters anymore, so the provision on the national insurance scheme now only reflects its history.²⁵⁹ Rather, the GPF now focuses almost exclusively on the intergenerational goal of long-term saving.

But then, the GPF also has a major problem. While its intergenerational goal is meritorious, it appears to be vague in that it does not define what “long term considerations” are. These considerations could be interpreted broadly to include political decisions not necessarily advancing relevant policy objectives. Such decisions would illustrate how governments have too much discretion that could facilitate wrongful handling of the funds.

However, Norway’s administrative law seems to fill the gap that allows vagueness by giving hints on what long term considerations are. For instance, the country has provisions designed to ensure that the funds are saved for future generations, including those that put the governments at arm’s-length to the fund, for instance as found in sections 5 and 6 of the Government Pension Fund Act 2005. The country also has an administrative architecture that has pushed these provisions, seemingly driven by its commendable Scandinavian law regime.

Perhaps owing to its meritorious objective and administrative architecture, the input of the GPF has been more stable and impressive. Unlike the AHTF and APF, the GPF does not derive its inputs from leases, royalties or bonuses, but rather generally from petroleum

²⁵⁸ Clark, Dixon & Monk *supra* note 36.

²⁵⁹ Onifade *supra* note 85.

production activities and returns on capital and transactions. To be specific, the exact source depends on which of the pools of the GPF, the Government Pension Fund Global²⁶⁰ or Government Pension Fund Norway.²⁶¹ Overall, although not stipulating a particular percentage, the input of the GPF, being the net cash flow from petroleum activities, is more generous than the APF and AHTF, hence the enormity of its savings.

As a result, stakeholders and commentators agree that the GPF has mostly achieved its main objective of intergenerational savings as well as other desirable NRF objectives,²⁶² and this is the reason it is often the standard for comparing NRFs. Its success is established through four main indicators. First, its size. The GPF is the second biggest NRF in the world, second only to Abu Dhabi's,²⁶³ is reported to own about 1 percent of global stocks, and has become influential in global financial governance,²⁶⁴ making it a notable player in international investment. Second, the fund has enhanced intergenerational and intragenerational equities in the appropriation of resource revenues, involving substantial provision for current Norwegians and generous savings for future Norwegians.²⁶⁵ It has successfully saved more than it has spent while providing social services of all kinds to its citizens. Third, it has a reputation for transparency.²⁶⁶ It shines above most other NRFs and SWFs generally within transparency indices. This also gives it legitimacy, and presents it as extremely accountable. Fourth, and

²⁶⁰ The Government Pension Fund Global derives its inputs from “the net cash flow from petroleum activities, which is transferred from the central government budget, the net results of financial transactions associated with petroleum activities and the return on the Fund’s capital.” To avoid vagueness, this source clearly includes tax revenues and royalties levied on petroleum activities, tax levied on emissions of carbon di oxide and nitrogen oxide, operating revenues from the country’s direct financial interest in petroleum activities, state revenues from net surplus agreements yielding on production licenses, dividends from joint petroleum operations of Statoil, government revenues derived from removing or alternative use of installations, and the sale of government stakes deriving from the country’s financial interest in petroleum activities less deductible expenses. Norges Bank Investment Management, “Government Pension Fund Act No 123 of 21 December 2005” (2015), section 3 (Government Pension Fund Act). See also Backer *supra* note 150 at 14-15.

²⁶¹ The Government Pension Fund Norway derives its source from “the return on the capital under management.” Government Pension Fund Act, section 4.

²⁶² Gordon L Clark & Ashby Monk, “The Norwegian Government Pension Fund: Ethics over Efficiency” (2010) 3:1 Rothman Intl J Pension Management 14, 14.

²⁶³ Armstrong *supra* note 145

²⁶⁴ Backer *supra* note 150.

²⁶⁵ Mehlum, Moene and Torvik *supra* note 207; Onifade *supra* note 85 at 362.

²⁶⁶ Clark & Monk *supra* note 262.

most complicated, is its ethical investment guidelines. It is picky in its investments, and discriminates based on certain ethical standards. This gives it a sort of moral colouration that attracts many spectators around the world.

4.3.1.3. Alaska

With regards to Alaska, section 15 under Article 9 of the Alaskan constitution that establishes the APF does not contain its policy objectives.²⁶⁷ Instead, section 37.13.020 of the Alaska Statutes provides for them as a means for conserving resources revenues to benefit all generations of Alaskans, maintenance of the principal while maximizing total return, and saving for maximizing the use of disposable income from the fund for purposes designated by law.

Like the AHTF and GPF, the original policy objective of the APF— to save excessive incomes from oil exploration and production for future generations that might not have access to oil resources due to possible depletion— has also been modified in the statute. Nevertheless, this modification, being an expansion, still encapsulates the original objective. As such, the first statutory goal provides for intergenerational and intragenerational interests; the second goal provides for the investment principle for maximising profit; and the third goal captures other exigencies sanctioned by law, one of which could be economic resilience. In all, the Alaskan statutory provision on objectives seems to be the clearest when compared to its counterparts in Alberta and Norway.

More like the AHTF than the GPF, the APF derives its inputs from leases, royalties, revenue sharing and bonus payments. However, the applicable law provides for only 25 percent of these sources. For clarity, the law states that “At least twenty-five per cent of all mineral

²⁶⁷ While the original idea behind the fund was to pay a premium to long time inhabitants of the state, later reversed by the court, the constitution did not provide for how to spend the revenues or the goals that this should achieve. The Alaska Statutes fill this vacuum. See also Hannesson *supra* note 16.

lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund.”²⁶⁸ Unlike its AHTF and GPF counterparts however, the strength of this provision is its constitutional enshrinement which seems to have made the specifics of the APF difficult to “sideline.”

More like the GPF and less like the AHTF, the APF has also largely achieved some of its objectives over the years. In particular, it has done very well on intragenerational justice. It has done this mainly through its permanent fund dividend scheme, the only such mechanism that has survived throughout the world. The highlight of this scheme is the distribution of money to Alaskans.

The scheme attempted giving cheques to Alaskans in 1980,²⁶⁹ but not much was done before it began facing legal hurdles between 1980 and 1982. These hurdles were about the criteria for the allocation of dividends. Following these hurdles, the scheme went into a series of reforms, until 1982 when dividend payment resumed. That year became the official commencement of payment.²⁷⁰

This trajectory of the permanent fund scheme has led to what we now have under the APF.²⁷¹ As of now, the APF addresses less of economic resilience and intergenerational justice, and more of intragenerational justice through payments to Alaskans.²⁷²

4.3.1.4. Comparative Lessons

One and perhaps the most important point to note on the legal framework and objectives of the three NRFs is on constitution versus statutes. Constitutional support as we have in the

²⁶⁸ *Constitution of the State of Alaska, Constitutional Convention, 5 February 1956 (Alaska Constitution)*, Article 9, section 15.

²⁶⁹ Griffin *supra* note 244.

²⁷⁰ cf Widerquist and Howard *supra* note 244.

²⁷¹ See Alaska Department of Revenue Permanent Fund Dividend Division, ‘Historical Timeline’ (2015) <<https://pfd.alaska.gov/Division-Info/Historical-Timeline>> accessed 26 September 2015.

²⁷² See Onifade *supra* note 85.

APF seems to be more reliable because it gives citizens a stronger backing and limits government discretion, but statutory support is less reliable since the government could alter statutory provisions easily. The case of *Zobel v. Williams*²⁷³ illustrates the strength of constitutional support, as opposed to statutory support that could be modified at whim.

In this case, the plaintiffs, Ronald and Patricia Zobel, who had lived in Alaska for only two years, having moved from another state, challenged the permanent fund dividend statute providing that each adult Alaskan resident would receive a dividend for each year of residency after 1 January 1959, the date Alaska became a state, on the basis that the distribution plan would violate their constitutional right to equal protection and migration. The Alaska Supreme Court and the USA Supreme Court had the opportunity to hear this case. While the Alaska Supreme Court upheld the dividend distribution scheme based on a “rational basis” test which attempts to strike a balance between the alleged infringement and the intent of the statute, the USA Supreme Court, on appeal, reversed the decision of the Alaska Supreme Court, upholding the arguments of the plaintiffs.²⁷⁴ This case illustrates how citizens and courts could play the role of a NRF watchdog when backed by constitutional provisions.

Nevertheless, statutory support could also be effective, but this might depend on whether there are other complements or backups. One such complement or backup is administrative action like what we have under the GPF. It appears that Norway’s government has the political will to enforce the statutory provisions on how to deal with the GPF. This will is arguably what makes its NRF effective despite the absence of constitutional support.

Another important point to note with regards to the legal design of the three NRF’s instruments is that the AHTF provides for the objectives in the preamble, together with its vague stewardship clause, while the APF and GPF provide for the same within the operational

²⁷³ Supra note 30

²⁷⁴ Felix R Dowsley III, “Recent Developments: Constitutional Law-Right to Travel-Validity of Alaska’s Income Distribution Plan” (1983) 50 Tennessee L Rev 537.

sections of the statutes, arguably with clearer intent. At the most basic level, this variation might have far-reaching implications because it is trite law that a preamble is not an operative part of a statute, at least within common law jurisdictions. This means that the objective of the AHTF may not give rise to an enforceable cause of action where governments do not conform to it, but rather, at best, only serves as a guiding philosophy.

Conversely, this is not the case for the APF and GPF whose objectives are embedded within the operational sections of the statutes, hence making them enforceable. Where governments act contrary to them, they could be held liable.

4.3.2. OWNERSHIP REGIME

The ownership regime forms part of the institutional support architecture, and could also be backed by law. Where it merely rests on public regimes, this might be only institutional, but where a legal instrument governs it, then it also becomes law.

Alaskans own the APF under a common ownership system while Albertans and Norwegians seem to own the AHTF and GPF respectively under public ownership systems. Also, the ownership system of the APF is enshrined in the constitution but those of the AHTF and GPF could only be inferred from the public land and natural resource regimes of the territories. As such, while the ownership regime of APF is specifically backed by law, the AHTF and GPF rely on general public regimes.

4.3.2.1. Alberta

Given its constitutional monarchy which allows state control, Alberta has public ownership of land and natural resources. However, its frontier ethos has also facilitated a level of private ownership, although publicly owned land and natural resources significantly exceed

those that are privately owned. In essence, Alberta has a mixture of public and private ownership.

Many years after Alberta had become a Canadian province in 1905, the Natural Resources Transfer Agreement of 1930 transferred the ownership of land and natural resources from the dominion government, then equivalent to the national government, to the provincial government.²⁷⁵ The transfer covered about 81 percent of the total mineral rights, with the remaining 19 percent vested in the federal government on behalf of National Parks and First Nations for reserves, and private companies and individuals as originally granted under Canada's western settlement.²⁷⁶

Since the AHTF developed in 1976, many years after the government had acquired an overwhelming majority of mineral rights, it seems that the natural course was for mineral management to become vested in the government like we have for land and natural resources. This course was also in line with the trend at that time as gathered from other polities that had established their NRFs which equally vested ownership in governments or their agencies. Examples include the Saudi Arabian Monetary Agency Foreign Holdings established in 1952, Kuwait Investment Authority established in 1953, the Abu Dhabi Investment Authority of the United Arab Emirates established in 1976, and the APF established that same 1976. Accordingly, section 2 of the Alberta Heritage Trust Fund Act vests legal and beneficial

²⁷⁵ The original provinces of Canada, British Columbia and Prince Edward Island retained natural resource ownership under the confederation prior to the creation of the Prairie Provinces. By the time the prairie provinces were created, Manitoba in 1870 and Alberta and Saskatchewan in 1905, the national government, then known as the dominion government, retained the ownership of natural resources to provide funds for colonization and railway construction. This led to a political struggle between the dominion government and the provinces. This was resolved with the Natural Resources Transfer Agreement of 1930. See *Natural Resources Transfer Agreement SA 1930, c.31, a Schedule of the Constitution Act 1930 (UK)*, 20-21 Geo V c.26. See also Andrew R Thompson, "Resource Rights" (2006) *The Canadian Encyclopedia*, online: *Historica Canada website* <<http://www.thecanadianencyclopedia.ca/en/article/resource-rights/>>; Let's Talk Royalties, "Ownership of Alberta's Mineral Resources" <letstalkroyalties.ca/did-you-know/ownership-of-albertas-mineral-resources/>

²⁷⁶ Let's Talk Royalties *ibid.* See also Alberta Culture and Tourism, "Resource Ownership", online: <history.alberta.ca/energyheritage/sands/underground-developments/energy-wars/resource-ownership.aspx#page-2>; Thompson *supra*.

ownership of the AHTF in the government, and the Minister of Treasury Board and Finance makes management and strategic decisions.

However, this ownership provision seems to conflict with the AHTF mission of providing “prudent stewardship” of the fund, as the preamble states. If the government legally and beneficially owns the fund, then how could it also be a steward for another party, presumably Albertans? In any case, the operational provision of ownership in section 2(1.1) would override the unenforceable stewardship provision in the preamble, flowing from the legal principle that specific provisions would override general provisions.

4.3.2.2. *Norway*

On its part, Norway practices a mixture of public and private land and non-renewable natural resource ownership, although all lands are subject to the overriding public interest and for the beneficial use of its society.²⁷⁷ This overriding interest policy is consistent with what one would expect in such a compact society with an egalitarian culture.

So, while minerals are jointly owned by the government and the private sector,²⁷⁸ petroleum as the major national resource, hence bordering on national survival, is exclusively owned by the government for the citizens.²⁷⁹ The country took ownership by declaring sovereignty over the Norwegian Continental Shelf of the North Sea based on the Geneva Convention of 1958,²⁸⁰ now enshrined in section 1(1) of the Petroleum Activities Act 1996. Fortunately, the country’s commercial oil discovery was within this continental shelf,²⁸¹ and as such, the bulk of its oil revenues has come from this field and the others in the North Sea.

²⁷⁷ *Land Act of Norway No 23*, 12 May 1995, section 1.

²⁷⁸ Harold R Newman, “The Mineral Industry of Norway” (2012) 34 *US Geological Surveys Minerals Yearbook* 1.

²⁷⁹ See also Nigel Banks, “Legal and Institutional Framework: A Comparative Analysis” in Aslaug Mikkelsen & Oluf Langhelle, eds *Arctic Oil and Gas: Sustainability at Risk* (Oxon: Routledge, 2008) 111.

²⁸⁰ Stenstadvold *supra* note 206 at 71.

²⁸¹ Norges Bank Investment Management, “History” <www.nbim.no/en/the-fund/history/>. See also Hartzok *supra* note 32; Mehlum, Moene and Ragnar *supra* note 207; Chris Armstrong *supra* note 145.

Section 1(2) of the Petroleum Activities Act 1996 provides that these resources would be constitutionally managed in the interests of the Norwegian society at large.

Unlike the AHTF and more like the APF, there is no specific provision on the ownership of the GPF. Nonetheless, its ownership system seems to flow from its policy of managing resources for the “society.” Hence, it appears that Norway’s Ministry of Finance formally holds the GPF on behalf of Norwegians.²⁸² The role of the ministry is to ensure that the fund is properly handled in the interest of the public.²⁸³ Also, reinforcing this expectation are sections of relevant laws providing for rules that protect the interest of Norwegians. Such provisions include those restricting the transfer of the GPF global capital to the central government²⁸⁴ and limiting its obligations to private and public authorities.²⁸⁵

Overall, Norway appears to have a public ownership of the GPF. This means that the government manages the funds as trustee for the citizens. This ownership system gives citizens a say on how the funds should be handled.

4.3.2.3. Alaska

Alaska’s ownership approach largely differs from Alberta’s and Norway’s. It has a common ownership system. This means that Alaskans jointly own natural resources found in the state, subject to legal limitations that might exist.

Alaska had become the 49th state of the USA in January 1959,²⁸⁶ a time before it created the APF. Perhaps because of its geographical disadvantages, coupled with the need to attract immigrants at that time, Alaska had ratified its constitution to provide for joint ownership of

²⁸² Government Pension Fund Act, section 2; Norges Bank Investment Management, “About the Fund” (2011) <www.nbim.no/en/the-fund/about-the-fund/>.

²⁸³ It does this through coordination and oversight of activities relating to the Government Pension Fund.

²⁸⁴ Government Pension Fund Act, section 5.

²⁸⁵ Ibid at section 6.

²⁸⁶ Hannesson *supra* note 16; Anderson *supra* note 10 at 58.

unoccupied land in 1956²⁸⁷ and stipulated its natural resources policy as encouraging “the settlement of its land and the development of its resources by making them available for maximum use consistent with public interest.”²⁸⁸ Non-renewable natural resources found on land or in waters are, according to Article 8(11) of the Alaskan constitution, thus subject to “discovery and appropriation.”

Hence, Alaska has common ownership of crude oil in that Alaskans collectively own it in its natural, unexploited state. This also means that once exploited, oil may not necessarily be subject to common ownership, probably because new considerations such as the costs expended for exploitation and development come into play. Consequently, actual access to crude oil is based on discovery and appropriation, although this would still be subject to the overriding public interest. Public stakeholders including government corporations and agencies, or private stakeholders, often companies, native peoples and private citizens, could gain access together with the rights to transfer the same.

Concerning the ownership of the APF, it seems that, like the GPF where no separate provision showing ownership exists, it flows from the constitutional policy on natural resources ownership. Considering that the APF derives most of its input from crude oil revenues, hence amounting to incomes flowing from the exploitation of common property and earned by the government for the people, then the government only manages the fund while Alaskans own it.

Then, since common ownership of natural resources in their natural state has been the norm in Alaska, it appears reasonable to conclude that the state has a common ownership of the SWF as well. After all, the right to natural resources ordinarily extends to the right to use and enjoy such resources, including earning returns from them.

²⁸⁷ Widerquist & Howard *supra* note 244.

²⁸⁸ Alaskan Constitution.

4.3.2.4. Comparative Lessons

In sum, among the three polities, Alaska has the most reliable ownership system, inherent in its common ownership system and backed by constitutional provisions. The implication of this point is that citizens' interests underlying policy objectives could be better protected, and they could lay claims over NRFs more easily. This implication perhaps illustrates why the distribution of resource rent has worked out in the state. Also, citizens and the judiciary can easily serve as public watchdogs. Where the government wants to misbehave, they could challenge it. The case of *Zobel v. Williams*²⁸⁹ further illustrates how so.

Unlike Alaska, the ownership systems of Alberta and Norway have a tendency to create a struggle between citizens and governments. Because, based on the Westphalian model of state and the doctrine of permanent sovereignty over natural resources, it is generally accepted that governments represent and hold natural resources together with the appropriation power on behalf of people, Albertans and Norwegians can hardly lay any direct claim over NRFs. This fact may show why the application of NRFs in these polities largely depends on the idiosyncrasies of the successive government administrations. In this kind of situation, the norm of the society, model of administrative law, and the virtue or political will of the government officials in power might determine how much of policy objectives are advanced. This nuance seems to account for the difference in the performance of the GPF and AHTF.

4.3.3. STRUCTURE AND FUNCTIONALITY

Structure and functionality also form part of the institutional support architecture. Generally, structure refers to NRF configurations while functionality shows how these configurations work.

²⁸⁹ See *Zobel v Williams* supra note 250.

The AHTF, GPF and APF vary in structure and functionality. The AHTF has a single pool with diverse investment divisions; the GPF has two pools of funds managed separately; and the APF has a single pool with two accounting units. The configurations have a direct relationship with how the NRFs function in that where they are haphazard, then their functionality becomes problematic.

4.3.3.1. Alberta

The AHTF has what looks like a single pool with several designated divisions at some times, and like multiple pools at others. This ambivalent nature might be to have a broad range of NRF portfolios that adequately address diversity in the interests of the Albertan society.

When it was created, the AHTF had the Alberta Investment Division, Canada Investment Division, the Capital Projects Division and other investments.²⁹⁰ Changes in 1982 led to the addition of the Commercial Investment Division, the Energy Investment Division, and the Cash and Marketable Securities Portfolio.²⁹¹ Other subsequent designations have included the Alberta Future Fund, the Social Innovation Account and an Agriculture and Food Account. Some of these divisions have changed names and perhaps ceased to exist, while others have been designated as government authorities, commissions and corporations, and mostly report to the Minister of Finance who is the President of the Treasury Board.

Perhaps to address the diverse interests of the Albertan society and in view of the place of Alberta as Canada's foremost resource province, these divisions have focused on various subjects. The Alberta Investment Division was designed to diversify Alberta's economy by investing oil and gas revenues into other sectors; the Canada Investment Divisions helped to extend funds outside Alberta to reduce inflationary tendencies and provide capital for other

²⁹⁰ Collins supra note 34.

²⁹¹ Hoffman supra note 34.

residents of Canada outside the province; the Capital Projects Division provided special amenities that would benefit current and future Albertans; and funds not required under any of the divisions were invested by the Provincial Treasurer pursuant to section 6 of the Alberta Heritage Savings Trust Fund Act.²⁹² The Commercial Investment Division was later designed to make the AHTF a profitable venture; the Energy Investment Division was created to boost the energy sector of the province; and the Cash and Market Portfolio was designed to manage wealth available for external access, say for credit and loans. The Alberta Future Fund was established to support strategic investments that could provide long-term benefits to the economy of the province; the social innovation account was designed to fund projects in the social and cultural sectors of the province; while the Agriculture and Food Innovation Account was created to support agricultural research, innovation and commercialization.²⁹³

The plurality of investment divisions in the AHTF appears to have some benefits. At the least, it reveals concise goals that each division seeks to achieve and clear assignments that each division focuses on. As a result, it ensures clarity and certainty in the supposed activities of the divisions and the pool as a whole.

However, it becomes problematic where it is difficult to track the activities of these divisions in order to ascertain whether they actually drive their supposed goals. The quarterly and annual reports of the AHTF provide for general activities, investment performance and financial report of the entire pool, not the activities of the divisions. This makes it difficult, if not impossible, to ascertain the activities and performance of the individual investment divisions.

4.3.3.2. Norway

²⁹² See Collins *supra* note 34.

²⁹³ Dahlby and Hojjati *supra* note 184.

Unlike the AHTF, the GPF clearly has two pools: the Government Pension Fund Global and the Government Pension Fund Norway.²⁹⁴ The Government Pension Fund Global is designed to manage Norway's oil and gas wealth for long term purposes while the Government Pension Fund Norway, formerly the National Insurance Scheme Fund, is designed to manage the country's public assets. As such, while both pools address certain interests of Norwegians directly or indirectly, the Government Pension Fund Global focuses more on intergenerational justice while the Government Pension Fund Norway focuses more on economic resilience.

What largely distinguishes the GPF from AHTF and APF is its principled business approach which envisages risks of misappropriation and loss as well as value erosion. As such, GPF's principled approach has two broad components, one focusing on business and the other focusing exclusively on values. The first component, described as the "principles of responsible investment and active management," rests on the belief that markets are not always efficient and the conventional market-driven benchmark portfolio investment strategy will not maximize the values of the fund.²⁹⁵ The second and most controversial component, also known as the Ethical Principles for Investment,²⁹⁶ developed by the Ministry of Finance in 2004 based on the recommendation of the Graver Committee,²⁹⁷ provides that financial return over time is conditional upon sustainable economic, environmental and social development, and well-functioning, legitimate and efficient markets.²⁹⁸

As for the business approach, the principle of responsible investment focuses on guiding investments with good corporate ethics and governance, and active management provides an opportunity to identify systematic risks that might not be obvious in market-driven

²⁹⁴ Government Pension Fund Act, section 2.

²⁹⁵ Larry Catá Backer, "The Norwegian Sovereign Wealth Fund: Between Private and Public" (2009) 40 Geo J Intl L 1271, 1276.

²⁹⁶ Kristian Alm, "Challenges to Investment Ethics in the Norwegian Petroleum Fund: A Newspaper Debate" (2007) 80 *Philosophia* 21.

²⁹⁷ Ministry of Finance, "The Report from the Graver Committee: Responsible Investments" online: Government.no < <https://www.regjeringen.no/no/dokumenter/Report-on-ethical-guidelines/id420232/> >

²⁹⁸ See Clark & Monk *supra* note 262.

portfolio investment.²⁹⁹ When combined, the result is the limitation on withdrawals from the GPF, especially the Government Pension Fund Global. So far, the total withdrawals since its establishment has an average of only 4 percent a year as at 2011.³⁰⁰

In addition, the principle of responsible investment and active management also explains the wide range of diversification, especially as seen in the Government Pension Fund Global, as a form of responsible investment and risk mitigation strategy. The country diversifies its investment of the GPF into various businesses, industries, sectors and countries. With regards to the types of investments, it first started with equities in 1998, and extended into securities in 2000 and bonds in 2002.³⁰¹ Its pool had, as at 2014, 60 percent equities, about 5 percent real estate investments, and 35-40 percent fixed-income securities, distributed globally, outside Norway.³⁰² Geographically, the investments cover Europe, North America, Asia, Oceania and emerging markets across countries and among international organizations, making a total coverage of 75 countries and 47 currencies.³⁰³ This global colouration of the pool explains its designation as a global fund.

With regards to the value approach, while the Ethical Guidelines for Investment do not maximize profit or focus on market efficiency, they account for the political legitimacy of GPF, especially the Government Pension Fund Global.³⁰⁴ However, Backer has rightly described them as serving state political interests under the guise of the private investment nature of the fund³⁰⁵ since they entrench the political values of Norway within the international political economy. Pushing corporate social responsibility preferences through voting powers and political influence, sanctioning Israel through repeated efforts to boycott Israeli ventures or

²⁹⁹ Backer *supra* note 295 at 1276.

³⁰⁰ Larry Persily, "Norway's Different Approach to Oil and Gas Development" (7 September 2011), online: Alaska Natural Gas Transportation Projects Office of the Federal Coordinator <www.arcticgas.gov/norway%E2%80%99s-different-approach-to-oil-and-gas-development>.

³⁰¹ Backer *supra* note 150 at 12-13.

³⁰² See Norges Bank Investment Limited, "Holdings" (2015) <www.nbim.no/en/the-fund/holdings/>.

³⁰³ *Ibid.*

³⁰⁴ See Clark & Monk *supra* note 262.

³⁰⁵ See Backer *supra* note 295.

those that do business with them, and fostering investment in Myanmar on ethical grounds are specific illustrations of how Norway entrenches these values.³⁰⁶

Apart from the controversial ethical feature of the Government Pension Fund Global, the separation of pools dedicated to national and foreign investments, diversification of investments, and restriction on withdrawals seem like the outstanding substantive features of the GPF. Separating the pools leads to certainty about what each pool caters to, thus giving stakeholders a clear understanding of the expectations of the pools. The diversification of investments provides security for the funds by ensuring that the risks associated with investment in any one economy, market, sector, industry or portfolio is minimal. Restriction on withdrawals ensures long-term savings and makes the GPF reliable, dependable and budget-driven.

4.3.3.3. Alaska

Unlike the GPF, the APF has a single pool. Given Alaska's low population and fairly balanced socio-political interests representation, there is little need for diversification of pools to serve divergent interests. But then, more like the AHTF, the pool is managed as a diversified portfolio, mainly for investment security.

The APF diversifies into public and private investment destinations. It has also focused on risk-based investments, ranking assets based on risk-return profiles.³⁰⁷ Target investment destinations are within Alaska, outside Alaska but within the USA, and outside the USA. Investments targeted vary from economic to social projects, and range from stocks and bonds

³⁰⁶ Ibid at 1278.

³⁰⁷ Timothy Inklebarger, "Alaska Blazes New Trail in Risk-based Investing" (1 June 2009) 37:11 Pensions & Investments 1, 28.

to real estate and infrastructure, while focusing only on income-yielding ventures.³⁰⁸ It also pays dividends from this single pool.³⁰⁹

For accounting purposes however, more like the AHTF than the GPF, the APF organizes its pool into the principal and the earnings reserve. The principal reserve is fixed and cannot be appropriated. This provides a baseline for the fund and ensures its sustenance. Conversely, the earnings reserve is disposable and could be appropriated by the legislature for public use pursuant to Article 9 of the constitution. Public use includes provision of social services and payment of dividends.³¹⁰

This accounting pattern ensures certainty and transparency in the appropriation of the APF. Without this, it might be difficult to determine which part of the fund goes to what, and might give room for too much government discretion and unaccountable handling of funds, potentially leading to misappropriation.

4.3.3.4. Comparative Lessons

The structural configurations seem to influence whether the NRFs advance their policy objectives. It appears that the GPF and the APF advance these objectives more than the AHTF. In any case, the approach of these NRFs vary.

³⁰⁸ See Ibid.

³⁰⁹ While the dividend has not grown geometrically due to fluctuating oil revenues, it has increased exponentially from the time it official began in 1982 and 2015 which was the last dividend accounting period. Starting with a net yearly dividend distribution of USD1000 in 1982, it has risen to USD2, 072 in 2015. See Alaska Department of Revenue Permanent Fund Dividend Division, “2015 Dividend Calculation Per Dividend Breakout”, online: <https://pfd.alaska.gov/LinkClick.aspx?fileticket=Vot96zQNN2w%3d&tabid=503&portalid=6>; Chris Klint & Sean Doogan, “\$2,072: 2015 Alaska Permanent Fund dividend amount announced” (21 September 2015) online: Alaska Dispatch News < <http://www.adn.com/article/20150921/2072-2015-alaska-permanent-fund-dividend-amount-announced>>; KTUU Staff and Wire Report, “\$2,072 Permanent Fund dividend check announced, largest yet” (21 September 2015) online: KTUU <<http://www.ktuu.com/news/news/live-watch-the-2015-permanent-fund-dividend-announcement-here/35394456>>. See generally Gunnar Knapp, “Resource Revenues and Fiscal Sustainability” (2015) 14:2 Economic Development J 15 (discussing the fluctuation of oil revenues in Alberta)

³¹⁰ The dividend scheme was created primarily to bring the fund closer to the people than the government. Where the fund is not distributed, then there may be more reserves which politicians may be able to misappropriate. Also, since Alaskans are conscious about receiving their dividends regularly, they tend to be vigilant about the management of the fund. This might make them ask more questions in protecting their stake. See Anderson *supra* note 10 at 57.

Because of its distinct separation of pools, the GPF makes it clear which fund is designed for what purpose. The Government Pension Fund Global mainly focuses on the interests of citizens, especially future Norwegians, directly while the Government Pension Fund Norway concentrates on the economy as a whole. The restriction on withdrawal also advances long term savings for future Norwegians. Thus, the GPF fairly balances the relevant policy objectives, and appears to be the most admirable.

Then, the APF's clear accounting pattern ensures a baseline fund for long-term interests, and helps designate which funds are saved for intragenerational interests, appropriated at the macro-economic level and distributed as dividends, and which funds are saved for intergenerational purposes, not meant to be touched anytime soon. As such, the accounting pattern helps balance relevant policy objectives. Without this accounting system, it might be difficult to track the performance of the fund since the government and fund manager might have too much discretion. In this case, stronger transparency and accountability systems would be needed.

The AHTF investment divisions do not clearly take the form of multiple pools like the GPF has or multiple accounting units like the APF has. It seems to have a mix of both with some of its divisions looking like stand-alone pools and others looking like accounting units. As such, to avoid confusion, the divisions could be considered, at best, as forming multiple pools, hence making the accounting units stand-alone pools. These pools are designated for specific functions. In any case, they substantially focus on the interests of Albertans but mostly from a macro-economic point of view.

Then, unlike the GPF and APF, the macro-economic focus of the AHTF seems to keep the fund as close to the government and as far away from the citizens as possible. While macroeconomic focus may have an overall economic advantage, governments have too much discretion in macro-economy, and may not necessarily prioritize citizens' interests. As such, it

might be better to have a mix of macro-economic and micro-economic strategies, with the former catering for the polity and the latter addressing citizens' immediate needs. To make things worse, there is also no clear public accounting method comparable to APF's to track the activities of the government or fund managers with regards to the various fund divisions. Such an accounting method would have helped with ascertaining how the pools and their handlers are performing. So, the government and perhaps their agents such as fund managers end up with too much discretion, and there is no existing measure to check this overwhelming discretion. The overall effect is that the handling of the AHTF has undermined its ability to advance relevant public policy objectives.

4.3.4. GOVERNANCE AND OPERATION

NRF schemes often have regulators and operators, both of whom provide institutional support. Regulators are responsible for governance while operators are involved in the actual commercial management of the NRF.

Through their governance function, regulators provide support to ensure conformity with law and public policy goals, and, through business management strategies, operators provide support to ensure the NRF is profitable or, at least, achieves a break-even, without which its purpose may be defeated. In theory, regulators act in the interest of citizens while operators are experts responsible for investment decisions. When describing a regulatory status, policies may use the term "manager" rather than "regulator," but both generally imply the governance portfolio, although the usage of the former might incorporate governance as well as actual management of funds, hence broader than the latter. When referring to operators, policies may refer to them as "fund managers."

4.3.4.1. Alberta

Consistent with the practice in a constitutional monarchy, section 2(2) of the Alberta Heritage Savings Trust Fund Act provides that the designated Minister, currently the Minister of Treasury Board and Finance, is the primary regulator and operator of the AHTF, generally responsible for holding, managing, investing and disposing of the assets of the AHTF. To create a separation of governance and operation, it serves as the regulator but has delegated the operational aspects of its mandate to the Alberta Investment Management Corporation (AIMCo) which now takes responsibility for investing the AHTF. So, AIMCo serves as the fund manager.

Notably, based on section 6(4) of the Alberta Heritage Savings Trust Fund Act, the Legislative Assembly's Standing Committee is also another regulator. It actively sanctions AHTF decisions, hence performing a governance function.

4.3.4.2. Norway

Also as a constitutional monarchy, section 2 of the Government Pension Fund Act 2005 identifies Norway's Ministry of Finance as the regulator or manager of the GPF,³¹¹ hence responsible for both governance and operation. Like Alberta, it has also separated these functions.

As such, the Ministry of Finance retains its governance duty, but has delegated the operational aspects of its powers to the Norges Investment Management Bank and the *Folketrygdfondet* which now serve as the operators responsible for investment decisions on the Government Pension Fund Global and the Government Pension Fund Norway respectively. It should be noted that the Norges Investment Management Bank has further delegated its operational responsibilities to its investment management unit, established 1 January 1998 as

³¹¹ The Ministry of Finance does more of regulation than management in its strict sense. It is not a "micro-regulator. Its regulatory activities include granting approvals. It does not have the physical custody of the fund. See also Backer *supra* note 150 at 15-16; Backer *supra* note 295 at 1275

“an operational investment management unit,”³¹² represented by the Leader Group.³¹³ As such, the Norges Investment Management Bank moves operations farther from the Ministry of Finance, arguably with the potential to further enhance operational independence. As such, the Leader Group, representing the investment management unit, serves as the fund manager.

Like we have for the AHTF, the Norwegian parliament, the *Storting*, also regulates by debating issues relating to the GPF, including its creation ab initio, although it hardly directly manages the fund, but mainly allocates funds to the GPF from net petroleum revenues.³¹⁴ The point worth noting here is that the *Storting* also serves as a governance body.

4.3.4.3. *Alaska*

Turning to Alaska which operates under the presidential system of the USA, the Department of Revenue Treasury Division seems to have governed the APF in the first four years of its existence.³¹⁵ The government established the Alaska Permanent Fund Corporation as the operator in 1980, and the Department of Revenue Permanent Fund Dividend Division as the regulator and manager in 1988. The implication of this arrangement is that, currently, the Alaska Permanent Fund Corporation is the operator, hence the fund manager, while the Department of Revenue Permanent Fund Dividend Division serves as the regulator, with the responsibility for governance.

Like we have in the AHTF and GPF, the legislature of Alaska also actively decides policy issues on the APF. As such, it makes up another governance body.

4.3.4.4. *Comparative Lessons*

³¹² Backer supra note 295 at 1276.

³¹³ See also See also Backer supra note 150 .

³¹⁴ Backer “Sovereign Investing and Markets-based Transnational Rule of Law Building” supra note at 14.

³¹⁵ See Alberta Treasury Board and Finance supra note 214 (outlining the history of Alaska’s Department of Revenue and Treasury Division).

The three NRFs seem to separate governance and operation. As a control process, governance across the NRFs is restricted to formal administrative decision-making and oversight. As an economic management process, the operation of the NRFs deals exclusively with commercial concerns such as profit maximization and the minimization of business risks.

The separation of governance and operation across the three NRFs has numerous advantages. These advantages include the advancement of expertise of regulators and operators by allowing them to focus on their small areas of concern, the accustomed minimization of the burden of responsibilities on regulators and operators, and the overall stimulation of checks and balances arising from the separation of regulatory and operational functions.

An added advantage might also arise by distancing governance and operation as much as possible. Like we have in the GPF as opposed to APF and AHTF, the more distance operators have from the regulators, the better their independence. This distance might be contributing to why the operation of the GPF has been more effective than that of the APF and AHTF.

4.4. CONCLUSION

The chapter has identified the major regulatory features across the AHTF, GPF, and APF. It first provides the socio-political contexts of these NRFs, and then evaluates the most prominent regulatory features against the respective contexts. These features are the legal framework and objectives, ownership regime, structure and functionality, and governance and operation.

The regulatory features across the three NRFs could be depicted with the table below:

Regulatory Features	Legal Framework/ Objectives	Ownership Regime	Structure and Functionality	Governance and Operation

AHTF	Statutes only/ inoperative	Public ownership	Multiple pools	Separation of powers
GPF	Statutes only/operative	Public ownership	Multiple pools	Separation of powers
APF	Constitution and statutes/operative	Common ownership	Single pool	Separation of powers

Table 1: Table of Regulatory Features across the APF, AHTF and GPF

As for the legal framework and objectives, there are two major conclusions. First, NRFs could be effectively regulated by constitution as well as statutes, or by statutes only. Like the APF has shown, a constitution combined with statutes is more effective in advancing the objectives of NRFs because of the backing it gives citizens and the limitations it imposes on government. Nevertheless, where there is reliable administrative support as the GPF has, statutes alone could be equally effective; however, where this administrative support is lacking as is the case under the AHTF, statutes could be ineffective. Second, the manner of the legal incorporation of NRF objectives matters. As the GPF and APF have shown, the provision of the objectives in the operative parts of the statutes makes them enforceable, but the provision of the objectives in the preamble of the AHTF, together with the vague stewardship provisions, makes them unenforceable.

Turning to the ownership regimes, one could see that NRFs may have common and public ownership systems. As APF has shown, common ownership is more effective in driving the objectives of a NRF because it gives citizens a stronger title. It could be further enshrined in a constitution, making it fundamental. Public ownership as obtained under the GPF and AHTF gives government too much discretion as trustee for citizens. This discretion may allow the government to do as it wishes with the funds.

On structure and functionality, the core is that NRFs could be managed as multiple pools or a single pool. Where the choice is multiple pools, then the goal of these pools should be clear like we have under the GPF. Multiple pools might be advantageous in that they could focus on specific goals, and the clarity of the pools will automatically enhance transparency. However, care should be taken so that these pools are clearly multiple and managed as such. Where there is uncertainty about whether there are multiple pools, for instance where the scheme looks more like having functional divisions like we have under the AHTF, there might be confusion as to how to track it. This is because it would be unclear whether it should be tracked as having distinct pools or a single pool with multiple accounting units. Conversely, where there is a clear single pool like the APF has, the performance of the pool may be easier to track. But then, to ensure accountability and transparency in view of the excessive powers of governments and fund managers, there could be separate accounts that clearly explain dealings with the funds.

Concerning governance and operation, there needs to be a sort of separation of powers. To start with, those responsible for governance should be separate from those responsible for operation. The AHTF, GPF and APF all seem to separate these functions. This separation is likely to create certain advantages, for instance ensuring checks and balances in dealings with the funds, enhancing the professionalism of those handling them, and preventing their being overburdened with too numerous activities. Beyond the basic separation, there might also be implications arising from how far the separation goes. The farther separation under the GPF might be contributing to its better operational performance than the AHTF and APF.

The next chapter seeks to understand the broader relevance of the foregoing regulatory features. Building on these features, it makes recommendations and provides concluding remarks.

CHAPTER 5

5. RECOMMENDATION AND CONCLUSION

This chapter introduces the answer to the research question. It builds on this introduction with recommendations. It then concludes with a recap and significance of the study.

5.1. INTRODUCTION

The thesis has been concerned with how polities could regulate NRFs to be effective. To be effective, NRFs are expected to achieve their stated home state objectives, given that they are established primarily for these. So, of interest is the issue of how polities could drive these stated objectives with regulation.

Polities could drive these stated objectives by adopting strong regulatory options and minimum regulatory essentials which ensure accountability of government and their agents, including fund managers. Based on the result of the comparative case study, these regulatory options and essentials revolve around four regulatory features: legal framework and objectives, ownership regime, structure and functionality, and governance and operation.

5.2. RECOMMENDATION

The only recommendation of the thesis is that, where congruent with their socio-political contexts, polities should aim for the strongest regulatory option available to them and, where otherwise, set minimum regulatory essentials which they should never go below. This means that they should choose the strongest regulatory option where they can, but where this is not possible, then they should not go below certain minimum regulatory essentials. This

would make the regulation of their NRFs strong enough to ensure governments push the underlying objectives.

5.2.1. REGULATORY OPTIONS

Regulatory options could be arranged from the strongest to the weakest. The strongest option represents the most desirable while the weakest option represents the least desirable. The regulatory system of most NRFs would fall between these two extremes.

These regulatory options combine NRF variables across the AHTF, GPF and APF based on the dominant regulatory features, that is the legal framework and objectives, ownership regime, structure and functionality, and governance and operation. However, since governance and operation seem to be comparably similar across the board, they could be considered to be a constant. Also, given that objectives need to be within the operative section of regulatory instruments, the absence of which makes them largely useless, they could also be considered to be constant. These constants are not negotiable.

The table below shows the possible combinations of regulatory variables, based on the regulatory features, to form the regulatory options. The constants and variables are indicated in the table.

Regulatory options	Legal framework (variable)/ objectives (constant)	Ownership regime (variable)	Structure and functionality (variable)	Governance and operation (constant)
Option A	Constitution and statutes/operative section	Common ownership	Multiple pools	Separation of powers

Option B	Constitution and statutes/operative section	Common Ownership	Single pool	Separation of powers
Option C	Constitution and statutes/operative section	Public ownership	Multiple pools	Separation of powers
Option D	Constitution and statutes/operative section	Public ownership	Single pool	Separation of powers
Option E	Statutes only/operative section	Common ownership	Multiple pools	Separation of powers
Option F	Statutes only/operative section	Common Ownership	Single pool	Separation of powers
Option G	Statutes only/operative section	Public ownership	Multiple pool	Separation of powers
Option H	Statutes only/operative section	Public ownership	Single pool	Separation of powers

Table 2: Table of Regulatory Options for Natural Resources Funds

The strength of these options rests on the strength of the variables each has. Hence, to understand the strengths of the options, there is the need to first know the strength of the

variables. Hence, to understand the overall strengths of the options, the variables are interpreted below, followed by the interpretation of the options.

5.2.1.1. Interpretation of variables

The strength of the variables depends on two things. The first is the importance of the regulatory features they represent, and the second is their individual strengths.

As for the importance of the regulatory features, there is an order. In order of importance, the form of legal support seems to be generally more important than the ownership regime, and the ownership regime seems to be generally more important than the structure and functionality. This means the form of legal support is the most important feature; the ownership regime is the more important feature; and the structure and functionality is the moderately important feature. Note that these definitions will guide the interpretation of options that follow in section 5.2.1.2. of the thesis.

To illustrate the order of regulatory features, having a constitution, a form of strong legal support, may make up for the weaknesses that could arise from government ownership on behalf of citizens, characteristic of a public ownership system which is generally weak, by giving citizens a fundamental cause to enforce government trusteeship functions through courts. In the reverse, having citizen ownership, a form of common ownership which is strong, might not solve problems that could arise where the support system is made of statute only, a legal support that is weak, as governments could easily amend statutes where citizens attempt to claim rights under them. As another illustration, holding funds jointly, representing the common ownership regime which is strong, could make up for the potential problems of a single pool which could undermine the rights of citizens, an instance of weak structure and functionality, by giving citizens a say in decision-making concerning the pool, including how to handle it, *ab initio*. In the reverse, where the government and fund managers properly handle

multiple pools on behalf of citizens, hence the best case scenario of structure and functionality, this might not readily address the problems that could arise from the lack of common ownership which is a weak form of ownership regime, for instance inability to directly claim the right to decision-making on ethical considerations of the fund. It should be noted however that these illustrations merely provide general trends, as these orders of importance and how they play out may vary based on circumstances.

Turning to the individual strength, the polarized variables generally have advantages and weaknesses that could make them comparably stronger or weaker. To understand individual strengths better, a brief analysis of the polarized variables is shown below:

- a. Constitutional and statutory support versus statutory support only: Where there is a combination of constitutional and statutory support, there would be a strong legal support. This strong legal support stems from combining the strengths of constitutional support with those of statutory support. It will give citizens very strong titles, backed by the constitution and statutes. The effect is that citizens will have the rights to make and enforce claims, and might find this easier to do. It also leads to backups and resilience. The implication of backups and resilience is that any weakness in one instrument could be supported by the strengths of the other. For instance, where there are uncertainties in statutes, the constitution becomes the final source, and where the constitution does not provide certain details, statutes may provide these.

Where there is statutory support only, citizens could still have titles and the right to make claims, but these would not be comparable to where the constitution backs the claim up, so this is relatively weak. As such, a lot would depend on the sitting government, for instance whether they have the political will to defend citizens' titles and enforce claims.

- b. Common ownership versus public ownership: Common ownership gives citizens' joint or collective rights, so it is a strong ownership regime. This regime provides several advantages to citizens, for instance the right to take part in decision-making and enjoy the dividends of ownership.

Public ownership also ought to enhance citizens' rights and enforce governments' trusteeship, but how it plays out may be subject to the political will of the government since they would have a lot of discretion, hence making it a weak ownership regime. So, the situation with public ownership is similar to what arises under statutory support.

- c. Multiple pool versus single pool: Multiple pools would separate objectives clearly and show how funds are allocated to each pool, making a strong structure with potentially strong functionality. It could also help with tracking, since pools may focus on diverse objectives. It might also create a sort of backup in pressing situations where one pool could provide funds in place of another pool.

Generally, having a single pool does not provide room for addressing objectives separately, hence a weak structure with potentially weak functionality. Nevertheless, there could be a way to make a single pool fairly strong. To illustrate this, the pool could have accounting divisions that clearly allocate funds for specific projects designed to achieve stated objectives.

5.2.1.2. Interpretation of Options

The strength of each option reflects a combination of the strength of each regulatory variable as interpreted and the importance of the regulatory features they represent. This means the more important the regulatory feature and the stronger the regulatory variables of a regulatory option, then the better the overall strength of that option.

- a. Option A: This has the strong variables across the most important, more important and moderately important features, that is constitutional and statutory support, common ownership, and multiple pools respectively. As such, the option occupies the first spot as the overall strongest.
- b. Option B: This has two strong variables representing the most important and more important regulatory features, constitutional and statutory support, and common ownership respectively, and one weak variable representing the moderately important feature, single pool. These components put this option in the second position in terms of overall strength.
- c. Option C: This has two strong variables representing the most important and the moderately important regulatory features, constitutional support and multiple pools respectively, and a weak variable representing the more important feature, public ownership. As a result, the option is in the third spot with regards to overall strength.
- d. Option D: This has one strong variable representing the most important feature, constitutional and statutory support, and two weak variables representing the more important and the moderately important features, public ownership and single pools respectively. This option takes the fourth position in order of overall strength.
- e. Option E: This has one weak variable representing the most important feature, statute only, and two strong variables representing the more important and moderately important features, common ownership and multiple pools respectively. These components put the option in the fifth position as per overall strength.
- f. Option F: This has two weak variables representing the most important and the moderately important features, statute only and single pool respectively, and one strong variable representing the more important feature, common ownership. This option takes the sixth spot in order of overall strength.

- g. Option G: This has two weak variables representing the most important and the more important features, statute only and public ownership respectively, and one strong variable representing the moderately important feature, multiple pools. This option is seventh position in terms of overall strength.
- h. Option H: This has three weak variables representing the most important, more important and moderately important features, that is statute only, public ownership, and single pool respectively. This option takes the eighth and last position in terms of overall strength.

5.2.2. REGULATORY ESSENTIALS

Whatever regulatory choice polities decide to make, they should model their NRFs to have certain minimum essentials across the regulatory features. These essentials are only basic requirements, so polities ought to adopt better alternatives where they can.

While these essentials further reflect the interpretation of variables as already done, it is necessary to discuss them separately because they go beyond the theoretical level by emphasizing how these could play out within territories. Also in an attempt to extend the discussion beyond what has already been said in the interpretation of variables, and to bring out contrasts, there is a discussion of how alternatives to the essentials could benefit polities better.

5.2.2.1. *Legal Framework and Objectives*

With regards to the legal framework and objectives, the minimum standard should be to have a statutory support like we have under the GPF and AHTF. This minimum would provide basic titles over NRFs, and might also provide the avenue for protecting them. But where possible, constitutional support, especially together with statutes like we have under the

APF, would be better. Since constitutions are fundamental, they give solid titles and means of protecting them.

Also, NRF objectives should be enclosed within operative parts of the support instrument, whether statutes like for the GPF or constitution like the APF has. This enclosure will make the objectives enforceable, through courts or other legal means. Where enclosed in the inoperative part like we have under the AHTF, this makes them unenforceable and largely useless. In this instance, they could only serve as a guide for interpretation at best.

5.2.2.2. Ownership Regime

Concerning the ownership regime, the minimum standard should be a clear public ownership system. At the least, this minimum should provide that governments hold NRFs on behalf of citizens. This minimum would affirm citizens' titles and give them a say, and would assign governments with trusteeship functions, like we have seen from the GPF. As already stated, it could give citizens the right to participate in NRF decision-making, for instance participating in the decision on how to spend funds, and could be a basis for making claims, for instance making a case for dividend allocation. However, where the public ownership system is not clear like the situation under the AHTF, then this might lead to vagueness or ambiguity. In this instance, citizens may not be clear about their titles, and might not be able to hold governments accountable for trusteeship duties.

As an alternative to public ownership, common ownership seems to be more powerful. As already mentioned, this is because it emphasizes citizens' titles more, and it also gives them more room for vetting government trusteeship. As an illustration of the strength, common ownership regimes often allow community participation models where citizens can directly provide input and vote on policy matters. So, where they have the wherewithal, polities should adopt common ownership as it could boost NRF schemes better. This adoption could take the

form of a general common natural resource ownership system, for instance as we have in Alaska, or an enhancement of this general system through specific common NRF ownership provisions.

5.2.2.3. Structure and Functionality

Moving to the structure and functionality, NRFs should at least have a single pool as a minimum. This means that all monies go into this pool like we have under the APF. As already mentioned, this arrangement might help with a more intensive monitoring and tracking of what funds are used for, and could also cut down on administrative costs.

However, such single pool might need to have an enhanced accounting model. This model could take various forms, for instance like under the APF where different accounting units exist for how funds are spent in pursuit of specific policy goals. This would help with transparency and accountability.

But then as an alternative, having multiple pools might have more advantages. For one, and as already seen from the GPF, it could ensure that pools pursue clearly separate objectives, and might make monitoring and tracking of these objectives easier. Also, as the GPF has shown, these pools could help guide investments that are suitable for driving distinct policy goals. For instance, long term investments are better for driving intergenerational justice objectives while medium term investments might be better to drive economic resilience objectives. Further to this, one pool could serve as backup for another pool, thus enhancing resiliency. For instance where economic resilience pools are dysfunctional during economic crisis, then intergenerational justice pools might help.

However, where there are multiple pools, polities should avoid the kind of situation under the AHTF, with its fund divisions that look merely like multiple accounting units, and given that it would be difficult to track how funds are achieving their objectives under these

divisions. To avoid this kind of situation, there should be clearly distinct pools or accounting units of a single pool designed for monitoring and tracking. Where there is either of these, there should also be clear reporting on not just what funds are used for but how these are driving the relevant policy goals. For instance, where there are long term savings, reports should show how these are driving intergenerational justice, and where there is the distribution of dividends, then reports should show how this distribution leads to intragenerational justice.

5.2.2.4. Governance and Operation

Now turning to governance and operation, the minimum essential should be a clear separation of powers. This essentially means governance and operational organizations should be separated. The separation will ensure that each organization could work independently of one another, becomes an expert in its small area of duty, and is not overburdened.

Notably, how separation of powers takes place may also vary. To illustrate this point, the GPF has more intense separation than the APF and AHTF. In view of this degree of separation, to maximize opportunities, the more intense the separation, the better.

5.3. CONCLUSION

Regulation could play an important role in making NRFs effective. It could determine what roles relevant stakeholders could play in directing the pooling and appropriation of NRFs. In doing this, it could create an architecture that ensures that NRFs drive their stated objectives, and prevent circumstances that could undermine this. This architecture ought to be positioned within the regulatory options, and not below the minimum regulatory essentials.

To be clear on the NRF models compared, none of them represents the strongest regulatory option, but two of them fall within the regulatory options and have more than the minimum regulatory essentials, while only one seems to be out of place within the regulatory

options and has less than the minimum regulatory essentials. The APF is the closest to the strongest regulatory option. With its combination of constitutional and statutory support with objectives enclosed in the operative parts of the instruments, common ownership that enhances citizens' titles, single pool together with multiple accounting units that allows tracking, and separation of powers, it looks more like option B. The GPF is next line, but stands close to the weakest option. Given its statutory support with objectives enclosed in the operative part of the instrument, public ownership system which works well, multiple pools with an adequate tracking system, and separation of powers, it looks like option G. The AHTF is by far the weakest. While it provides for comparable separation of powers, it has statutory support with objectives not enclosed in the operative part of the instrument, haphazard public ownership, and, at best, multiple pools that are difficult to track, hence totally out of place and not representative of any regulatory option. In light of the evaluation, the regulation of APF and GPF is likely to drive their stated objectives while that of the AHTF is likely to undermine its.

The broader lesson is that where NRFs drive their stated objectives, they could be considered to be effective—this is because they are primarily created to drive these objectives, and would amount to failure where they are unable to do so. There could be several of these objectives, but the most popular are intergenerational justice, intragenerational justice and economic resilience. But experience has shown that how governments and their agents, for instance fund managers, have handled NRFs across many polities have not fully enhanced these objectives. As such, this handling has undermined the effectiveness of their respective NRFs.

So how should polities regulate NRFs to be effective? The thesis has argued that polities should regulate NRFs to be effective by adopting strong regulatory options and setting minimum regulatory essentials. This means that where possible, they should choose the strongest regulatory option available to them, but where circumstances do not allow this, for

instance where their socio-political factors are incongruent, then they should not descend below certain minimum regulatory essentials.

The regulatory options are based on four dominant NRF regulatory features: legal framework and objectives, ownership regime, structure and functionality, and governance and operation. For the legal framework and objectives, the choice is between constitutional and statutory support, and statutory support only, and whether polities should enclose NRF objectives within operative or inoperative sections of statutes, although this should be more of a prerequisite rather than an option as operative objectives are germane for NRF schemes. With regards to the ownership regime, the choice is between common ownership and public ownership, and as for structure and functionality, the choice is between multiple and single pools. Governance and operation boils down to the issue of separation of power, another seemingly prerequisite for every NRF, as reflected across most models around the world.

Across these regulatory options, the strongest that polities should aim at has constitutional and statutory support with objectives outlined in the operative part of the instruments, common ownership regime, multiple pools of funds, and separation of powers. Where it is not possible to adopt this option, then the minimum essentials that jurisdictions must never go below, notwithstanding the option they adopt, are statutory support with objectives outlined in the operative part of the instrument, public ownership regime, single pool fund, and separation of powers. Given these two extremes, polities should aim at getting close to the strongest and getting away from the minimum as much as possible. This could be guided by the table of regulatory options for NRFs under section 5.2.1. of the thesis as it shows a hierarchy based on strengths, and the analysis of the regulatory essentials under section 5.2.2. which shows why a NRF scheme should never descend below a certain minimum.

In conclusion, whether NRFs are regulated to be effective or otherwise might have broader policy significances as experienced across several economies in the recent oil glut.

Where they achieve their stated objectives, this advances the public interest by meeting the expectations of citizens, maximizes resource revenues that the government receives from the industry, and has the tendency to reduce the pressure for increased resource royalties since the government would have reserves to draw from. Where they fail to achieve their stated objectives, they pose a number of problems, not only to the public but also to the resource industry. As for the public, the interests of citizens as owners of resources are undermined, and as for the resource industry, the government and/or citizens might continue to push for increased royalties. So, how politics regulate NRFs has far-reaching implications that necessitate a redefined approach.

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