

INVESTING IN SUSTAINABILITY OR FEEDING ON STRANDED ASSETS? THE NORWEGIAN GOVERNMENT PENSION FUND GLOBAL

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INTRODUCTION

Access to finance is crucial to achieve the fundamental transition necessary to meet the grand challenge of our time: securing a safe and just operating space within planetary boundaries.

The mantra of “sustainability” or “sustainable development” now pervades the international and domestic policy of governments, as most evident in the United Nations’ Sustainable Development Goals (“SDGs”) adopted in 2015.¹ It also increasingly informs business practices, from corporate social responsibility (“CSR”) codes to socially responsible investment (“SRI”).² But all such efforts have still left considerable uncertainty regarding what sustainability means in specific contexts because of difficulties translating its meta-principles, such as the precautionary principle or the polluter-pays principle, into workable legal doctrine or business management strategy.³ Furthermore, it is an open question whether sustainability, in the sense of maintenance of long-term ecological integrity of the planet’s life-support systems, is possible in politico-

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1. See G.A. Res. 70/1, at 13–27 (Sept. 25, 2015).

2. See generally MEGAN BOWMAN, *BANKING ON CLIMATE CHANGE: HOW FINANCE ACTORS AND TRANSNATIONAL REGULATORY REGIMES ARE RESPONDING* (2014).

3. See generally ELOISE SCOTTFORD, *ENVIRONMENTAL PRINCIPLES AND THE EVOLUTION OF ENVIRONMENTAL LAW* (2016).

economic systems geared to indefinite growth via exploitation of natural capital.⁴

Certainly, if sustainability is to be a meaningful concept, it has to mean staying within the nonnegotiable ecological limits of our planet—denoted *planetary boundaries* in the ground-breaking work of Rockström et al.—and, at the same time, finding out how to satisfy the basic social requirements of people everywhere now and in the future.⁵ In spite of the pervasive use of sustainability language, it is also quite evident that “business as usual”—i.e., continuing as we are now—is a very certain path to a very uncertain future.⁶

If we are to break away from the path of business as usual, a fundamental shifting of capital from fossil-fueled and unsustainable business into renewables-based and sustainable business is necessary. Under the Paris Agreement, there is a huge investment gap,⁷ which is even larger in light of the SDGs.⁸ Contributing to development while at the same time steering the world toward sustainability requires enormous investments in renewable infrastructure (and other environmentally and socially sustainable ventures), notably in Africa and Asia. The topicality of the issue is illustrated by a recent Bloomberg report that spoke of the “sweeping transformation of the energy sector” that could result in \$10 trillion

4. See TIM JACKSON, PROSPERITY WITHOUT GROWTH 17 (2d ed. 2017); NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VERSUS THE CLIMATE 19–21 (2014); JOHN MCMURTRY, THE CANCER STAGE OF CAPITALISM 111 (1999).

5. See Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 *ECOLOGY AND SOC'Y* art. 32 (2009), <http://www.ecologyandsociety.org/vol14/iss2/art32/>; Will Steffen et al., *Planetary Boundaries: Guiding Human Development On A Changing Planet*, 347 *SCI. MAG.* 736 (2015) <http://science.sciencemag.org/content/347/6223/1259855>; see also Melissa Leach et al., *Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Pathway for Humanity*, in *WORLD SOCIAL SCIENCE REPORT 2013: CHANGING GLOBAL ENVIRONMENTS* 84, 85 (2013), <http://www.worldsocialscience.org/documents/wss-report-2013-full-text.pdf>.

6. Ivan Turok & Jacqueline Borel-Saladin, *Promises and Pitfalls of the Green Economy*, in *WORLD SOCIAL SCIENCE REPORT 2013: CHANGING GLOBAL ENVIRONMENTS* 289, 291 (2013), <http://www.worldsocialscience.org/documents/wss-report-2013-full-text.pdf>.

7. According to the Norges Bank Investment Management, which manages Norway's Government Pension Fund Global, there is a climate investment gap of \$1 trillion per year. See NORGES BANK INV. MGMT., *RENEWABLE ENERGY INVESTMENTS: DISCUSSION NOTE 3* (2015), https://www.nbim.no/contentassets/d4dc0aaf69ba4f73b9112da6bef259c0/nbim_discussionnotes_4-15.pdf.

8. U.N. Framework Convention on Climate Change, Conference of the Parties' 21st Sess., U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>.

of stranded assets,⁹ a high increase of jobs in renewables, and positive economic development.¹⁰

These issues are particularly applicable to sovereign wealth funds (“SWFs”), which have become an increasingly significant presence in global financial markets since the 1970s and more recently have come under public scrutiny to invest ethically and sustainably.¹¹ This Article undertakes a case study of the world’s largest SWF, the Norwegian Government Pension Fund Global (“Fund”). In the era of global market capitalism and deregulation, SWFs offer one of the few public economic institutions capable of injecting ecological and social values into global markets.

The principal thesis of this Article is that a misleading dichotomy between ethics and economics has held the Fund back from contributing to sustainability, leaving the majority of its investments on an unsustainable path of business as usual. Although there are positive indications, major changes are necessary to realise the Fund’s potential to invest in sustainability.

The Fund is well known for its ethical profile; a Council on Ethics assesses alleged breaches of its Guidelines for Observation and Exclusion from the Fund (“Ethical Guidelines” or “Guidelines”) and proposes excluding companies that violate them.¹² This includes exclusion of companies based on products (e.g., tobacco, certain weapons, and, most recently, coal),¹³ observation and potential exclusion of companies based on conduct (including severe violations of human rights, severe environmental damage, gross corruption, and other particularly severe violations of fundamental ethical norms),¹⁴ and public statements when withdrawing investment from companies based on conduct when the Fund’s attempts to influence the companies have failed.¹⁵

9. Jess Shankleman & Joe Ryan, *Paris Accord Could Make the World \$19 Trillion Richer*, BLOOMBERG (Mar. 20, 2017, 3:23 PM), <https://www.bloomberg.com/news/articles/2017-03-20/paris-climate-accord-could-make-the-world-19-trillion-richer>. This is higher than the \$320 billion under International Energy Agency’s scenario. *Id.* “Stranded assets” are the fossil fuel reserves that become financially unrealizable because of a shift away from fossil fuels. See *How to Deal with Worries About Stranded Assets*, ECONOMIST (Nov. 24, 2016), <http://www.economist.com/news/special-report/21710632-oil-companies-need-heed-investors-concerns-how-deal-worries-about-stranded>.

10. Shankleman & Ryan, *supra* note 9.

11. Christina L. Madden, *Sovereign Wealth Funds under Scrutiny*, CARNEGIE COUNCIL FOR ETHICS INT’L AFF. (May 21, 2008), https://www.carnegiecouncil.org/publications/archive/policy_innovations/briefings/000053.

12. Michael Kourabas, *The Ethical Work of Norway’s Sovereign Wealth Fund*, TRIPLE PUNDIT (Mar. 20, 2014), <http://www.triplepundit.com/2014/03/ethical-work-norways-sovereign-wealth-fund/>.

13. *Id.*

14. *Id.*

15. *Id.*

This Article raises the question of whether the Fund in practice is more reactive than proactive, responding to public opinion and media controversy when considering divestment rather than undertaking due diligence beforehand and continuously monitoring its investments. The controversial Dakota Access Pipeline is a case in point.¹⁶ Further, this Article analyzes the Fund's engagement with and potential withdrawal from companies, querying whether the informational basis for the Fund's decisions is relevant, reliable, and verifiable. This Article also discusses Norges Bank's ordinary fund management in light of the Fund's Management Mandate, questioning whether we are seeing responsible management with moderate financial risk, which, according to the Mandate itself, is meant to be an integrated element in the Fund's long term, sustainability-oriented perspective. Does the Mandate need changing, or is the problem in the operationalization of the Mandate's requirements?

Part I introduces the topic of SRIs and SWFs. Part II briefly presents the Norwegian Government Pension Fund Global and its dual system: risk-based management for long-term high returns combined with that which has given the Fund its reputation as the gold standard, its Ethical Guidelines and its Council on Ethics.¹⁷

In Part III, the Fund's dual system of ordinary fund management and Council on Ethics is analyzed, discussing whether important aspects of the Fund's contribution to sustainability fall between these two approaches. Through this analysis, we respond to the question raised in the Article's title: is the Fund partaking in a shift towards sustainability or still feeding on stranded assets?

The Article concludes with reflections on how and to what extent the Fund could realize its potential to be a driver for sustainability.

I. SOCIALLY RESPONSIBLE INVESTMENT AND SOVEREIGN WEALTH FUNDS

With their public institutional status and growing market presence, SWFs have become of interest to the global movement for SRI. Broadly, SRI means investments and loans that consider social and environmental criteria alongside conventional financial metrics.¹⁸ The movement has sought not merely to dissuade SWFs from investing in environmentally deleterious activities but also to

16. Merrit Kennedy, *Crude Oil Begins to Flow Through Controversial Dakota Access Pipeline*, NPR (June 1, 2017, 5:23 PM), <http://www.npr.org/sections/thetwo-way/2017/06/01/531097758/crude-oil-begins-to-flow-through-controversial-dakota-access-pipeline>.

17. *Norway Wealth Fund Reflects Leadership's Attitudes*, NAT'L (Oct. 11, 2009), <https://www.thenational.ae/business/norway-wealth-fund-reflects-leadership-s-attitudes-1.486377>.

18. See Benjamin J. Richardson, *Sovereign Wealth Funds and Socially Responsible Investing: An Emerging Public Fiduciary*, 1 GLOBAL J. COMP. L. 125, 125 (2012).

embolden them to be role models for best practices.¹⁹ Social investors seek to make SWFs a catalyst for green finance, albeit within a framework of “enlightened” global capitalism rather than any alternate economic system.²⁰

Of the approximately eighty SWFs operating in 2017 (depending on the definition used), the vast majority neither demonstrate any interest in SRI nor possess an explicit legal mandate to consider it. Three funds with explicit legal obligations to consider the social and environmental consequences of their investments are the Norwegian Government Pension Fund Global, the French Pension Reserve Fund, and the New Zealand Superannuation Fund.²¹ Several other SWFs have interpreted their legal mandates as implying some obligation to practice SRI, including the Canada Pension Plan, Australia’s Future Fund, and the (now) Irish Strategic Investment Fund (“ISIF”).²² Yet, like private investors, all SWFs are legally obliged to seek financial returns in order to fulfill their core purpose, such as to build national savings, underwrite future pension income, or invest in public infrastructure.²³ Therefore, in a market where environmental externalities are often unaccounted for, a dangerous tension exists between being a capitalist investor and an agent of environmental change.²⁴

The SRI movement seeks to overcome that tension.²⁵ With its support in both the market and civil society sectors, SRI seemingly occupies a special position from which to leverage change. In practice, its demands on the business sector and its investors have been quite moderate. Unlike the more radical Occupy movement spawned by the recent global financial crisis,²⁶ SRI practitioners generally downplay the need for systemic and structural overhaul of the global financial system.²⁷ Instead, they advocate positive change within

19. *Id.*

20. *Id.* at 162.

21. *Id.* at 130.

22. BENJAMIN J. RICHARDSON, *SOCIALLY RESPONSIBLE INVESTMENT LAW: REGULATING THE UNSEEN POLLUTERS* 372 (2008); Benjamin J. Richardson & Angela Lee, *Social Investing without Legal Imprimatur: The Latent Possibilities for SWFs*, in *RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW* 389, 403–12 (F. Bassan ed., 2015). As for the Irish fund, the predecessor to the ISIF was the Irish National Pensions Reserve Fund, and the assets of the former are being transferred to the latter, a process which started when ISIF was established in 2014. ABOUT ISIF: FLEXIBLE, LONG-TERM, SOVEREIGN INVESTMENT PARTNER, IR. STRATEGIC INV. FUND, <http://isif.ie/about-us/> (last visited Nov. 7, 2017).

23. *Id.*

24. Richardson, *supra* note 18, at 126.

25. *Id.*

26. MICHAEL A. GOULD-WARTOFSKY, *THE OCCUPIERS: THE MAKING OF THE 99 PERCENT MOVEMENT* 37 (2015).

27. See Sophia Greene, *Ethical Standards Make You a Better Capitalist*, *FIN. TIMES* (Feb. 9, 2014), <https://www.ft.com/content/d4476404-8e7b-11e3-b6f1-00144feab7de>.

that system, a stance that reflects the influence of the mainstream financiers who now ostensibly embrace SRI.

Originating in the eighteenth-century campaign of the Quakers to curb transatlantic trade, SRI was a means by which faith-based investors could eschew financial ties to activities contrary to their creed, such as intoxicants and gambling.²⁸ Human rights became an important concern for the SRI movement in the 1970s, as epitomized by the global divestment campaign against South Africa's apartheid regime that ultimately contributed to its demise.²⁹ After a lull until the early 2000s, SRI has enjoyed unprecedented ascendancy as the movement has embraced a diversity of social and environmental issues and has broadened its base to include conventional financial actors such as pension funds, banks, and insurance companies.³⁰ Today, climate change is arguably the most important issue for social investors.³¹

In western Europe and North America, the SRI market has captured a significant minority share on a broad definition of SRI.³² The movement has also become much more geographically diverse, finding support in some emerging economies.³³

Since entering the mainstream, SRI's philosophies and methods have changed. Its older traditions of "ethical" investment have largely ceded to a business case rationale in which environmentally responsible finance is advocated as a means to reap financial advantages.³⁴ Climate change thus matters for its financial risks to investment assets rather than as an ethical concern that demands rethinking basic premises of capitalism, such as economic growth and short-term benefits.³⁵ No doubt, financial rationales can powerfully influence economic actors' environmental behavior, which is why many advocate carbon taxes and other pricing mechanisms to stop global warming.³⁶ But an economic approach is insufficient—it fails

28. RUSSELL SPARKES, *SOCIALLY RESPONSIBLE INVESTMENT: A GLOBAL REVOLUTION* 46–47 (2002).

29. *Id.* at 52–58.

30. *Id.* at 345–49.

31. See Jonathan Shieber, *Climate Change Economics May Trump Politics*, TECHCRUNCH (May 7, 2017), <https://techcrunch.com/2017/05/07/as-environmental-battles-shift-to-states-renewable-energy-adoption-could-come-down-to-good-ole-economics/>.

32. See EUROPEAN SOC. INV. FORUM, *EUROPEAN SRI STUDY 6–7* (2014); FORUM FOR SUSTAINABLE & RESPONSIBLE INV., *REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 5* (2016).

33. See EUROPEAN SOC. INV. FORUM, *supra* note 32, at 7.

34. ASSET MGMT. WORKING GRP., UNITED NATIONS ENV'T PROGRAMME FIN. INITIATIVE, *THE MATERIALITY OF SOCIAL, ENVIRONMENTAL AND CORPORATE GOVERNANCE ISSUES IN EQUITY PRICING 4* (2004); WILLIAM RANSOME & CHARLES SAMPFORD, *ETHICS AND SOCIALLY RESPONSIBLE INVESTMENT: A PHILOSOPHICAL APPROACH 11* (2010).

35. See MERCER LLC, *CLIMATE CHANGE SCENARIOS—IMPLICATIONS FOR STRATEGIC ASSET ALLOCATION 1* (2011).

36. *Id.* at 9.

to provide answers to social equities in the resulting distribution of the costs and benefits and it fails to question the social value of the underlying economic development. One should also question how economic metrics can ever capture the nuanced complexities of anthropogenic ecological impacts spatially and temporally.³⁷

The SRI movement's methods have also changed in recent years. Its former belligerent protest style that relied on divestment, as evident in the anti-apartheid campaign, has given way to more diplomatic and inclusive approaches.³⁸ Corporate engagement is widely used to persuade corporate managers to respond to SRI, and divestment is usually only used as a last resort.³⁹ Another strategy is called "best-in-class" asset selection; it allows funds to retain a stake in dirty industries by choosing their "best" performers doing the most to improve their social and environmental performance.⁴⁰ This might be an oil sands company that seeks to mitigate its emissions through carbon capture technology. Another SRI strategy touts systemic change through voluntary codes of conduct for investors.⁴¹ Popular examples providing performance or process standards for investors and lenders include the Equator Principles⁴² and the UN-supported Principles for Responsible Investment.⁴³ Several codes, such as the Carbon Principles⁴⁴ and the Carbon Disclosure Project,⁴⁵ specifically target climate-change-related issues.

Of course, the SRI movement is not homogeneous. It spans a variety of actors with different goals and agendas.⁴⁶ Its core is now mainstream financial institutions that speak of their commitment to

37. Benjamin J. Richardson & Wes Cragg, *Being Virtuous and Prosperous: SRI's Conflicting Goals*, 92 J. BUS. ETHICS 21, 28 (2010).

38. RANSOME & SAMPFORD, *supra* note 34, at 17.

39. G. Jeffrey MacDonald, *Evaluating Performance: Is Best-in-Class Best for SRI?*, CSRWIRE TALKBACK (Oct. 14, 2013, 9:15 AM), <http://www.csrwire.com/blog/posts/1057-evaluating-performance-is-best-in-class-best-for-sri>.

40. *Id.*

41. Benjamin J. Richardson, *Socially Responsible Investing through Voluntary Codes*, in HARNESING FOREIGN INVESTMENT TO PROMOTE ENVIRONMENTAL PROTECTION: INCENTIVES AND SAFEGUARDS 383, 383 (2013).

42. *About the Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/about-ep/about-ep> (last visited Nov. 7, 2017).

43. *See generally* PRINCIPLES FOR RESPONSIBLE INV., ANNUAL REPORT 2017: DELIVERING AN AMBITIOUS AGENDA (2017), https://annualreport.unpri.org/docs/PRI_AR-2017.pdf.

44. *Leading Wall Street Banks Establish the Carbon Principles*, MORGAN STANLEY (Feb. 4, 2008), https://www.morganstanley.com/press-releases/leading-wall-street-banks-establish-the-carbon-principles_6017.

45. *About Us*, CDP, <https://www.cdp.net/en/info/about-us> (last visited Nov. 7, 2017).

46. *SRI Basics*, F. FOR SUSTAINABLE & RESPONSIBLE INV., <http://www.ussif.org/sribasics> (last visited Nov. 17, 2017).

“responsible investing” without acknowledgement of the “social.”⁴⁷ This cohort includes some SWFs. At the other end of the spectrum, a radical global campaign for fossil fuels divestment is gathering influence under the auspices of 350.org’s Fossil Free project⁴⁸ and the Fossil Fuel Divestment Student Network.⁴⁹ This divestment campaign is beginning to win adherents, such as university endowment funds,⁵⁰ and is even garnering some interest from SWFs, such as the Fund, which divested from 122 coal mining companies in 2015.⁵¹

Finally, before looking specifically at the SRI practices and governance of Norway’s Fund, we must acknowledge that the SRI movement has also sought to influence official regulation of the financial industry. While the movement was once proclaimed as a way to exert influence when governments fail to act, social investors increasingly concede that the law must be changed in order to achieve their aspirations.⁵² In other words, the role of the state itself cannot be bypassed. Over the past fifteen years, legal reforms relating to pension funds (e.g., duties to disclose SRI policies and to consider climate-change-related risks) and corporate governance (e.g., shareholder rights to file SRI-driven proposals), among other issues, are largely the result of pressure from social investors.⁵³

II. THE NORWEGIAN GOVERNMENT PENSION FUND GLOBAL

Mindful to avoid the “Dutch disease,” the Norwegian government in 1990 established the Government Petroleum Fund under the Government Petroleum Fund Act 1990 to invest globally the financial riches that the country was reaping from its North Sea oil industry.⁵⁴ Later renamed as the more respectable Government Pension Fund

47. Michael Kramer, *2014: The Year Sustainable Investment Went Mainstream*, GREENBIZ (Dec. 29, 2014, 12:30 AM), <https://www.greenbiz.com/article/2014-year-sustainable-investment-went-mainstream>.

48. FOSSIL FREE, <http://gofossilfree.org> (last visited Nov. 7, 2017).

49. Dinah DeWald, *Students Rise Up to Fight Climate Change with National Divestment Network: ‘Divest Fossil Fuel Student Network’ Launches to Leverage Power of Growing Youth Climate Movement*, COMMON DREAMS (Oct. 30, 2013), <https://www.commondreams.org/views/2013/10/30/students-rise-fight-climate-change-national-divestment-network#>.

50. *Divestment Commitments*, FOSSIL FREE, <http://gofossilfree.org/commitments/> (last visited Nov. 7, 2017).

51. Damian Carrington, *Norway Confirms \$900bn Sovereign Wealth Fund’s Major Coal Divestment*, GUARDIAN (June 5, 2015, 9:20 AM), <https://www.theguardian.com/environment/2015/jun/05/norways-pension-fund-to-divest-8bn-from-coal-a-new-analysis-shows>; see *infra* Section 4.

52. See RICHARDSON, *supra* note 22.

53. *Id.*

54. Svein Gjedrem, Governor, Norges Bank, *From Oil and Gas to Financial Assets—Norway’s Government Pension Fund-Global*, Speech at the Conference “Commodities, the Economy and Money” (June 20, 2008), <http://www.norgesbank.no/en/Published/Speeches/2008/From-oil-and-gas-to-financial-assets--Norways-Government-Pension-Fund--Global/>.

Global, it began practicing SRI in 2001, coinciding with the beginning of the growing acceptance of SRI in the global financial industry.⁵⁵ The Fund also received advice from the government's Advisory Commission on International Law (later restyled as the Council on Ethics) on human rights and environmental issues arising from its other investments.⁵⁶ In 2009, the Fund established within its portfolio a very small boutique investment fund to support environmental-related activities and companies.⁵⁷ From the outset, the Fund's approach to SRI has been influenced by international legal considerations but has not been to question the ecological sustainability or social justice of global capitalism in which it participates.⁵⁸ In other words, the approach has been to eschew or mitigate only the most problematic economic activities and actors. Following a government committee inquiry,⁵⁹ in 2004 the Norwegian Parliament issued regulations for the Fund that delineated its SRI philosophy and procedure, which were revised in 2010 and 2016.⁶⁰ These regulations, as discussed below, emphasize international human rights and environmental standards as the benchmark for the Fund.

Unlike some SWFs, the Fund's financial investments are overseen by the state through several governmental entities.⁶¹ Until 2014, the Norwegian Ministry of Finance exercised overall responsibility for the strategic policy and management of the Fund, including any decisions to divest from a company for SRI considerations.⁶² That oversight is now effectively exercised by the Norwegian Parliament.⁶³ Norges Bank (Norway's central bank) continues to exert operational control over the Fund, and through share ownership rights in companies it handles corporate

55. Benjamin J. Richardson, *International Environmental Law and Sovereign Wealth Funds*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 356, 361 (2015).

56. Simon Chesterman, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of Norway's Sovereign Wealth Fund*, 23 AM. U. INT'L L. REV. 577, 584 (2007).

57. See *Norway Wealth Fund Reflects Leadership's Attitudes*, *supra* note 17.

58. Richardson, *supra* note 55, at 361–62.

59. *The Report from the Graver Committee: Responsible Investments*, GOVERNMENT.NO: MINISTRY FIN. (Nov. 7, 2003), <https://www.regjeringen.no/en/dokumenter/Report-on-ethical-guidelines/id420232/>.

60. *Guidelines for Observation and Exclusion from the Fund*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/the-fund/governance-model/guidelines-for-observation-and-exclusion-from-the-fund/> (last updated Feb. 15, 2016); *Management Mandate*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/the-fund/governance-model/management-mandate/> (last updated July 5, 2017).

61. See *Governance Model: Government Pension Fund*, GOVERNMENT.NO: MINISTRY FIN., <https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/governance-model-for-the-government-pens/id699573/> (last updated March 31, 2017).

62. See *id.*

63. See *id.*

engagement, including the exercise of shareholders' rights.⁶⁴ The central bank has delegated many of its responsibilities to Norges Bank Investment Management ("NBIM" or the "Bank")⁶⁵ and external fund managers with whom it contracts. The Bank has also chosen to take part in SRI. Consistent with the regulations governing the Fund, NBIM defined its overall mission in its 2016 annual report as follows: "to support the fund's objective by maximising the long-term financial return on our investments and reducing the financial risks associated with environmental, social and governance issues at the companies we invest in."⁶⁶ A third entity, the Council on Ethics, performs an advisory role, conducting due diligence on companies that the Council has decided to scrutinize in depth (albeit only a relatively small number) and making recommendations on divestment or observation of companies in light of those inquiries.⁶⁷ The Norwegian Parliament oversees all of these entities by approving the Fund's investment strategy and receiving annual reports from the Ministry of Finance.⁶⁸ The Fund is governed by the Government Fund Act 2005, which is silent on SRI issues, but regulations passed by the Parliament in 2004 and revised in 2016 and 2017 provide the legal framework for the foregoing activities of the Fund.⁶⁹

The Council on Ethics has a pivotal role in the SRI decisions of the Fund, as the Ministry of Finance, and now the Bank itself, usually accepts its advice.⁷⁰ The five members of the Council, supported by a secretariat of eight staff, make recommendations on a consensual basis to the Ministry of Finance on divestments and have wide discretion in passing judgment on gross corruption, major human rights violations, severe environmental damage, and other severe violations of fundamental ethical norms as recognized in international law.⁷¹ The Council's recommendations to exclude or observe a company are based either on its products (e.g., land mines)

64. *See id.*

65. *About the Fund*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/the-fund/about-the-fund/> (last updated Nov. 10, 2016).

66. NORGES BANK INV. MGMT., GOVERNMENT PENSION FUND GLOBAL: ANNUAL REPORT 2016, at 59 (2016), <https://www.nbim.no/contentassets/41460fa6a42b4bd4a758429b90f80da2/government-pension-fund-global---annual-report-2016.pdf>.

67. Richardson, *supra* note 55, at 362.

68. *Governance Model: Government Pension Fund*, *supra* note 61.

69. *Management Provisions: Government Pension Fund*, GOVERNMENT.NO: MINISTRY FIN., <https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/the-guidelines-for-the-management-of-the/id434605/> (last updated Oct. 13, 2014).

70. Gordon L. Clark & Ashby H.B. Monk, *The Norwegian Government Pension Fund: Ethics Over Efficiency*, 3 ROTMAN INT'L J. PENSION MGMT. 14, 16 (2010), <https://ssrn.com/abstract=1618834>.

71. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60.

or its conduct (e.g., corruption).⁷² In so doing, the Council follows a process of gathering evidence, reviewing findings, and applying the SRI regulations.⁷³ The Council is not a legal tribunal and thus not bound by rules of evidence or other judicial formalities, although its recommendations always include evidence and justification.⁷⁴ The Council also invites companies to respond to allegations against them, but it is not obliged to prove the occurrence of wrongful or unethical conduct in order to recommend the exclusion of a company.⁷⁵ Indeed, much of its work addresses the “unacceptable risk of breaches taking place in the future,” which involves speculative judgments.⁷⁶

The two sets of regulations that presently govern the SRI practices of the Fund are the Ethical Guidelines and the Management Mandate.⁷⁷ The label of “Guidelines” is misleading because the regulations are legally binding.⁷⁸ Overall, they focus on avoiding the Fund’s *complicity* in grossly unethical behavior relating primarily to human rights or the environment.⁷⁹ The parliamentary committee chaired by academic Hans Petter Graver that was tasked with drafting the 2002 version of these regulations looked to international agreements that Norway supports as the source of such ethical precepts.⁸⁰ The Committee reasoned that “companies may aggravate or facilitate human rights and environmental violations committed by states, and the [Fund] might [thereby] contribute to companies’ misdeeds through its stock ownership.”⁸¹

The Guidelines as revised in 2017 require the Fund, on the advice of the Council, to exclude producers of specified harmful products, including tobacco and weapons, deemed to violate fundamental humanitarian principles.⁸² A further ground of exclusion is where “there is an unacceptable risk that the company contributes to or is responsible for” specified concerns including “serious or systematic human rights violations,” “severe environmental damage,” and “acts or omissions that on an aggregate company level lead to unacceptable

72. NYSTUEN ET AL., HUMAN RIGHTS, CORPORATE COMPLICITY AND DISINVESTMENT 1 (2011).

73. Benjamin J. Richardson, *Sovereign Wealth Funds and the Quest for Sustainability: Insights from Norway and New Zealand*, 2 NORDIC J. COM. L. 1, 13 (2011), http://www.njcl.dk/articles/2011-2/benjamin_j_richardson.pdf.

74. Chesterman, *supra* note 56, at 605.

75. *The Report from the Graver Committee: Responsible Investments*, *supra* note 59.

76. COUNCIL ON ETHICS, GOV’T PENSION FUND-GLOB., ANNUAL REPORT 2005, at 47–48 (2006), <http://etikkradet.no/files/2017/02/%C3%85rsmelding-2005-eng-1.pdf>.

77. *Management Mandate*, *supra* note 60.

78. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60; *Management Mandate*, *supra* note 60.

79. Chesterman, *supra* note 56, at 588–89.

80. Richardson, *supra* note 73, at 8–9.

81. *Id.* at 9.

82. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60.

greenhouse gas emissions.”⁸³ In relation to climate change specifically, revisions to the Guidelines in 2016 introduced a new ground for exclusion: “[m]ining companies and power producers which themselves or through entities they control derive 30 per cent or more of their income from thermal coal or base 30 per cent or more of their operations on thermal coal.”⁸⁴ As can be gleaned from these provisions, the Council is set up to target only the “worst case[s].”⁸⁵ Setting the bar so high might be justified given the huge size of the Fund’s portfolio—at about 9,000 companies as of 2016⁸⁶—but it risks leaving untouched businesses whose environmental impacts are piece-meal and only significant cumulatively. The environmental standards in the SRI regulations thus reflect only the gravest issues of concern to international environmental law.

Whereas the Council on Ethics focuses on *divesting* (albeit with dialogue with companies as part of the process), NBIM handles *engagement* with companies whose behavior is deemed less serious and capable of improvement (although NBIM also divests based on risk-assessment, as explained below).⁸⁷ The Management Mandate addresses this second approach to SRI and reflects the assumption widely held in the SRI industry that long-term financial returns depend on an environmentally sustainable economy.⁸⁸ While the Mandate requires NBIM to achieve the “highest possible return” from the Fund,⁸⁹ this objective is “dependent on sustainable development in economic, environmental and social terms [and] well-functioning, legitimate and efficient markets.”⁹⁰ Relatedly, the Mandate obliges NBIM to integrate good corporate governance, environmental, and social issues in its investments⁹¹ and to foster robust international standards in responsible management and active ownership.⁹² Of explicit environmental relevance, the 2016 revisions to the Mandate also requires NBIM, in relation to its real estate investments, to consider “energy efficiency, water consumption and waste management.”⁹³ The Fund investment regulations do not instruct NBIM on how to resolve any trade-offs between ethical and financial considerations, which invariably arise given markets’ failure to

83. *Id.*

84. *Id.*

85. NYSTUEN ET AL., *supra* note 72, at 9.

86. NORGES BANK INV. MGMT., RESPONSIBLE INVESTMENT: GOVERNMENT PENSION FUND GLOBAL 5 (2016), <https://www.nbim.no/contentassets/2c3377d07c5a4c4fbd442b345e7cfd67/government-pension-fund-global---responsible-investment-2016.pdf>.

87. Richardson, *supra* note 73, at 15.

88. *Id.* at 11. The Norwegian Ministry of Finance has explicitly endorsed this thesis. *Id.* at 11 n.64.

89. *Management Mandate*, *supra* note 60.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

internalize all the social and environmental impacts of business activity. It is also doubtful that any Norwegian, foreign individual, or entity could obtain judicial review of decisions made by the NBIM or the Council on Ethics because their decisions involve discretionary judgements about the correct course of action. Only blatant procedural lapses, such as a failure to hold necessary meetings, would be amenable to judicial oversight and remedy.

III. THE DUAL APPROACH: HIGH RETURNS AND ETHICS

The Fund's general investment strategy should, according to its Management Mandate,⁹⁴ also be geared toward sustainable development. While the general direction of the Fund is still one of business as usual, there is an interesting tendency of very tentative integration of sustainability issues through NBIM's risk assessment.⁹⁵ NBIM's management has concentrated on beating the market and achieving high returns, with a wide range of "ethical" issues left to the Council on Ethics.⁹⁶ Tentatively, we now see risk assessment connecting these two roles. Indeed, it turns out that NBIM has divested from more companies based on risk than it has on recommendations from the Council on Ethics.⁹⁷ But is this enough?

After a presentation of NBIM's fund management in Subpart III.A. and an assessment of the implementation of the Ethical Guidelines by the Council on Ethics in Subpart III.B., we discuss in Subpart III.C. whether this dual management system leads to sustainable fund management and whether the Fund deserves its informal ranking as the gold standard of socially responsible investment.

A. *High Returns in a Sustainable Way*

The Fund's Mandate sets out the aim of highest possible return and states that this presupposes, in the long run, sustainable development, economically, environmentally, and socially.⁹⁸ Through the 2014 reform of the Fund's Mandate, the aim of highest possible return was amended to expressly state "within the applicable management framework" as an attempt to further integrate

94. *Id.*

95. *Principles for Responsible Investment Management in Norges Bank*, NORGES BANK INV. MGMT. (Mar. 18, 2015), <https://www.nbim.no/en/the-fund/governance-model/executive-board-documents/principles-for-responsible-investment-management-in-norges-bank1/>.

96. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60; *Management Mandate*, *supra* note 60.

97. *Observation and Exclusion of Companies*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/responsibility/exclusion-of-companies/> (last updated June 29, 2017).

98. *Management Mandate*, *supra* note 60.

responsible investment and the recognition of sustainable development in the Fund's management.⁹⁹

However, the Fund's own 2016 report on responsible investment¹⁰⁰ gives reason to question the order of the Fund's priorities. The report states that it discusses "responsible investment management within the mandate's return objective, as operationalized by [NBIM]."¹⁰¹ If the Mandate's statement that long-term returns are dependent on sustainability is to be taken seriously, the approach should be the other way around: seeking the highest possible returns within the Fund's responsible investment management. It is not surprising that the Fund interprets its Mandate in this way given the approach taken by the Bank's Executive Board in its principles, which clarify that "responsible investment management shall support the objective of the Fund by furthering the long-term economic performance of our investments and reducing financial risks associated with the environmental and social practices of companies in which we have invested."¹⁰²

The Fund's Ethical Guidelines are well known within finance, among politicians and academics, and, to a certain degree, to the general public in Norway.¹⁰³ However, in spite of the questions that may be raised concerning the Bank's approach to responsible investment (as something that it will pursue "within" the quest for highest possible returns),¹⁰⁴ over time it may turn out that the Bank's own risk assessment is more important for the Fund's contribution to sustainability. According to the Bank's own principles for responsible investment, "risk factors associated with environmental, social and corporate governance related issues" will be considered as an integrated part of the overall risk analysis.¹⁰⁵

In 2012, NBIM divested from firms due to environmental-, social-, and governance-related risk factors for the first time.¹⁰⁶ Analyses and decisions related to these risk-based divestments are carried out by NBIM and differ from exclusions under the Ethical Guidelines, which are decided by the Bank's Executive Board following a recommendation from the Council on Ethics.¹⁰⁷ The exception is the coal criterion, where the proposal to divest can be

99. *Id.*

100. NORGES BANK INV. MGMT., *supra* note 86, at 13.

101. *Id.*

102. *Id.*

103. *See Guidelines for Observation and Exclusion from the Fund, supra* note 60.

104. *Principles for Responsible Investment Management in Norges Bank, supra* note 95.

105. *Id.*

106. MARTIN SKANCKE ET AL., FOSSIL-FUEL INVESTMENTS IN THE NORWEGIAN GOVERNMENT PENSION FUND GLOBAL: ADDRESSING CLIMATE ISSUES THROUGH EXCLUSION AND ACTIVE OWNERSHIP 24 (2014).

107. *See Guidelines for Observation and Exclusion from the Fund, supra* note 60.

made either by the Council on Ethics or by NBIM.¹⁰⁸ The fact that coal is also the most obvious potential stranded asset of fossil fuels illustrates how the emphasis on risk has led to issues previously not even perceived as sufficiently serious to be deemed of “ethical” concern now being integrated into the Fund’s management.

In total, 210 firms have been excluded based on risk against the portfolio, whereas 122 firms are excluded due to breach of the Ethical Guidelines (discussed further below).¹⁰⁹ These 210 firms include 68 that were excluded based on greenhouse gases, 54 due to deforestation, 44 because of water issues, and 44 for social and governance issues.¹¹⁰ Unlike the firms which are excluded based on recommendations from the Council on Ethics, NBIM does not make public the list of companies from which it has divested. This reduces the reputational effect of NBIM’s divestments.

The exclusion based on risk is a promising development, but it is tentative. Although NBIM has divested from more companies based on risk than based on recommendations from the Council on Ethics, this is still a minute fraction of the companies in which the Fund is invested.¹¹¹ Even with its 550 employees, in addition to some use of external consultants, NBIM is clearly not capable of conducting proper due diligence into 9,000 companies. This displays the limitations of what is denoted “negative screening”: broadly investing in practically all companies, as is required by the Mandate, and then divesting from those that are regarded as problematic.

The application of the coal criterion in practice also illustrates the sluggishness of the negative screening approach in line with the Guidelines. Firms above the threshold may stay in the portfolio if they have plans, initiatives, or other material factors indicating likelihood that the company will fulfill the criterion in the foreseeable future.¹¹² This forward-looking analysis has been criticized by several nongovernmental organizations, pinpointing a breach with the intentions of the Norwegian Parliament as the criterion becomes too lax.¹¹³ These forward-looking considerations are the basis for setting eleven firms under observation based on the coal criterion.

Also, the coal criterion is, as we see from its name, only linked to coal and not to other products with high emissions of greenhouse

108. NORGES BANK INV. MGMT., *supra* note 86, at 76.

109. *Id.* at 81.

110. *Id.*

111. *Id.* at 76.

112. “In the process of considering recommendations for exclusion or observation of companies that breach the thresholds above, emphasis should also be given to the forward-looking product/fuel mix transition as well as the degree to which the company utilizes renewable energy in its activities.” *Id.* at 84.

113. See, e.g., *Norwegian Parliament Set to Ban Coal Investments: World’s Largest Pension Fund Set to Divest from Coal*, 350.ORG (May 28, 2015), <https://350.org/press-release/norwegian-parliament-set-to-ban-coal-investments/>.

gases. Observation or exclusion due to greenhouse gas contributions from other sectors has to be based on conduct and on the recommendations of the Council on Ethics or on NBIM's risk assessment.¹¹⁴ As the pressure on planetary boundaries continues to increase, with the environmental status worsening in several crucial areas, we see an increased recognition of the significance this has in terms of financial risk.¹¹⁵ Reports such as *Shades of Climate Risk* emphasize this for investors.¹¹⁶ With increasing recognition may come an increase in risk-based investments from the Fund. However, the question remains whether this will continue to be incremental. The Fund has, for example, not joined the Portfolio Decarbonization Coalition, which two other Norwegian funds have joined.¹¹⁷

NBIM also claims to actively engage with all companies by exercising other forms of share ownership rights through voting at shareholder meetings and engaging in dialogue with board members, senior management, and specialists in the firms.¹¹⁸ NBIM reports that it votes at every general meeting of all of the approximately 9,000 companies in which the Fund has shares.¹¹⁹ Obviously, a lot of this voting is conducted by proxy. NBIM's Global Voting Guidelines are meant to streamline the voting, but where the direction of the vote remains unclear, there is an "integrated voting process" through which portfolio managers for the Fund's most significant holdings provide investment knowledge that is incorporated into the final voting decision.¹²⁰ Through this, NBIM considers itself able to assess company factors on a case-by-case basis.¹²¹ NBIM's voting is transparent—details about the votes cast are accessible online.¹²² The Global Voting Guidelines concentrate mainly on mainstream

114. NORGES BANK INV. MGMT., *supra* note 86, at 86–87.

115. See CHRISTA CLAPP ET AL., *CICERO, SHADES OF CLIMATE RISK: CATEGORIZING CLIMATE RISK FOR INVESTORS* 28 (2017), <http://www.cicero.uio.no/en/climateriskreport>.

116. *Id.* at 32.

117. The Norwegian funds KLP and Storebrand have joined this, while the country's other state fund, Government Pension Norway, has not. For information about the Coalition, see PORTFOLIO DECARBONIZATION COALITION, <http://unepfi.org/pdc/> (last visited Nov. 7, 2017). For more information about its start, see Caroline Liinanki, *Pensions In Nordic Region: Time for Action on Carbon*, INV. & PENSIONS EUR. (Nov. 2014), <https://www.ipe.com/pensions/pensions-in/nordic-region/pensions-in-nordic-region-time-for-action-on-carbon/10004145.fullarticle>.

118. See, e.g., *Voting Process*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/responsibility/our-voting-records/voting-process/> (last updated Mar. 22, 2016) (explaining the voting intentions of Norges Bank with respect to various organizations and transactions).

119. NORGES BANK INV. MGMT., *supra* note 86, at 35.

120. *Id.* at 37.

121. *Id.* at 32.

122. *Global Voting—Important but Often Difficult*, NORGES BANK INV. MGMT. (Mar. 5, 2009), <https://www.nbim.no/en/transparency/features/2011-and-older/2009/global-voting-important-but-often-difficult/>.

corporate governance issues, with only the last item mentioning NBIM's expectation that the company address its impact on "society and the environment," and that its business strategy and policies should secure "business practices that are consistent with sustainable development."¹²³ As with the tentative inclusion of CSR issues in corporate governance codes for listed companies in general, this is unlikely to be sufficient to shift business away from business as usual.¹²⁴

However good the intentions of NBIM's fund management may be, sustainability goals are compromised by the same corporate governance limitations that keeps business in general on the unsustainable business-as-usual track. Through all the talk about sustainability, one clear message is delivered to the boards and managers of listed companies: maximize returns.¹²⁵ The social norm of shareholder primacy has led to a short-term and narrow focus on what is falsely perceived to be the duty of the companies: maximizing returns for investors in contradiction with the scope that corporate law across jurisdictions give boards and, by extension, managers to focus on the long-term promotion of the interest of the company.¹²⁶

For socially responsible investors to be able to emphasize sustainability in their investment and divestment decisions and in their engagement with companies, reliable and relevant information is needed from the companies on their environmental and social impact. However, in spite of the increasing number of legislative initiatives to require such reporting from business and the plethora of guidelines and certification schemes to help companies in their reporting, research shows that environmental and social reporting is neither relevant nor reliable.¹²⁷

123. NORGES BANK INV. MGMT., GLOBAL VOTING GUIDELINES 9 (2016), <https://www.nbim.no/contentassets/20aaf52fb17c42e5afa162aad1d5d9f9/global-voting-guidelines-2016.pdf>.

124. See generally Beate Sjøfjell, *When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes* (Univ. of Oslo Faculty of Law, Legal Studies Research Paper Series, Working Paper No. 2016-11, 2016), <https://ssrn.com/abstract=2828579>.

125. Daniel Artana et al., *Designing Fiscal Policy to Achieve Development*, in FROM GROWTH TO PROSPERITY: POLICY PERSPECTIVES FOR TRINIDAD AND TOBAGO 25, 33 (Liliana Rojas-Suarez & Carlos Elias eds., 2006).

126. See generally Beate Sjøfjell et al., *Shareholder Primacy: The Main Barrier to Sustainable Companies*, in COMPANY LAW AND SUSTAINABILITY 79 (Beate Sjøfjell & Benjamin J. Richardson eds., 2015).

127. See generally Charlotte Villiers & Jukka Mähönen, *Accounting, Auditing and Reporting: Supporting or Obstructing the Sustainable Companies Objective?*, in COMPANY LAW AND SUSTAINABILITY, *supra* note 126, at 175. Although the Fund invests in research to develop better databases, relevant generally applicable data is not yet available. In spite of some positive aspects of the Fund's development of databases on climate change, water, and child labor, further work is needed with more emphasis placed on what companies do rather than what they disclose. Further, "investors [should] triangulate data provided by management with data from non-management sources to determine whether

In 2016, NBIM reportedly had 3,790 meetings with 1,589 companies, during half of which it allegedly raised environmental, social, or governance issues.¹²⁸ Such meetings lack transparency, making NBIM's claim impossible to verify, which also fits in with a general mainstream corporate governance penchant for these "dialogue meetings."¹²⁹

It is very difficult to reconcile the Fund's responsible investment profile with its profit-making on lending out shares. The Fund's statements on the lending of shares claims that it achieves a "balancing" of "the need to act as a responsible investor by exercising voting rights, maintenance of relationships and dialogue with the companies invested in" with its "desire to contribute to well-functioning markets" and its "responsibility to generate returns for funds under management."¹³⁰ Balancing seems here to be a euphemism for trade-off—trading the possibility of influencing companies for the possibility of earning money on the shares through lending.

It is difficult to assess the impact of NBIM's engagement with companies. In spite of the information available from NBIM, there is little available on the actual impact of the Fund. The only area in which we can find information regarding its impact is the portfolio on carbon intensity, which decreased by one percent from 2015 to 2016.¹³¹ This is far from enough to contribute to fulfilling the goal of the Paris Agreement.¹³²

Another focus area of NBIM is water management.¹³³ Here we also see the difficulty of assessing an effect of active ownership activities, including divestment. In 2015, NBIM assessed 470 companies' exposure to water risks and concluded that 51 companies showed very good results, whereas, on the other end of the scale, approximately 135 firms had "very weak" results in water

[environmental, social, and governance ("ESG")] information provided by management is reliable." George Serafeim & Jyothika Grewal, *The Value Relevance of Corporate Sustainability Disclosures: An Analysis of a Dataset from One Large Asset Owner 2* (May 11, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2966767.

128. *Nearly 4,000 Company Meetings*, NORGES BANK INV. MGMT. (Mar. 7, 2017), <https://www.nbim.no/en/transparency/news-list/2017/nearly-4000-company-meetings/>.

129. Sjøfjell et al., *supra* note 126, at 133–35.

130. NORGES BANK INV. MGMT., *THE ROLE OF SECURITIES LENDING IN WELL-FUNCTIONING MARKETS, ASSET MANAGER PERSPECTIVE 6* (2016), https://www.nbim.no/contentassets/fa779bdb63724b13a0b25fb976212a13/assetmanagerperspective_2-16_the-role-of-securities-lending.pdf.

131. NORGES BANK INV. MGMT., *supra* note 86, at 72.

132. *See Paris 2015: Tracking Country Climate Pledges*, CARBONBRIEF (Sept. 16, 2015), <https://www.carbonbrief.org/paris-2015-tracking-country-climate-pledges>.

133. *Water Management*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/responsibility/risk-management/water-management/> (last updated Apr. 7, 2016).

management.¹³⁴ The number of divestments in 2015 based on water risk exposure was nine; in 2016 it was zero.¹³⁵ We do not know if practicing the other active ownership instruments has made the worst firms change their practices. There does not seem to be any effort to measure such a development either—or at least not one that is communicated publicly. NBIM made the same kind of assessment of water management in 2016 with 600 firms.¹³⁶ The number in the portfolio with “very weak” increased to approximately 180 firms.¹³⁷ We do not know if the same firms are assessed in consecutive years or if the firms in 2015 and 2016 are different.

The Bank can influence its own Mandate. It has, according to the Mandate, both a right and a duty to suggest changes to its own Mandate when this is deemed necessary, which it can do when asked by the Ministry of Finance or on its own volition.¹³⁸ Whether through a recognition of the increasing risk of business as usual on its portfolio or through a genuine wish to contribute more broadly to sustainability, NBIM has recently put forward several interesting proposals.¹³⁹ With the Panama Papers accentuating the unsustainability of the tax behavior of business, the Fund’s move to put pressure on businesses it invests in to report along the lines of the European Union’s new country-by-country reporting indicates a willingness to gradually integrate issues that previously have been perceived as solely “ethical” (and accordingly left to the Council on Ethics to investigate) into its ordinary fund management.¹⁴⁰

It is also the Bank itself that has suggested that it should be allowed to invest in nonlisted infrastructure. Two reports have been commissioned as a basis for the government’s recommendation to the Parliament on this issue. The first, by McKinsey, concentrated on the risks of investing in nonlisted entities.¹⁴¹ The second, produced by the Institute for Energy Economics and Financial Analysis (“IEEFA”), emphasized such investment’s potential for high returns

134. NORGES BANK INV. MGMT., *supra* note 86, at 81; NORGES BANK INV. MGMT., RESPONSIBLE INVESTMENT: GOVERNMENT PENSION FUND GLOBAL 97 (2015), https://www.nbim.no/contentassets/96608d5f04eb4a138fa88f8fd937b70/nbim_ansvarlig_forvaltning_eng_web.pdf.

135. *Id.* at 96.

136. NORGES BANK INV. MGMT., *supra* note 86, at 29.

137. *Id.*

138. *Management Mandate*, *supra* note 60.

139. *Submissions to Ministry*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/transparency/submissions-to-ministry/> (last visited Nov. 7, 2017).

140. Richard Milne, *Norway’s Oil Fund Takes Tougher Stance on Tax Transparency*, FIN. TIMES (April 7, 2017), <https://www.ft.com/content/c2aeb21c-93ec-3f65-a286-3e6feddbf397>.

141. See generally MCKINSEY & CO., UNLISTED INFRASTRUCTURE INVESTMENTS: EXTERNAL REVIEW OF POLITICAL, REGULATORY AND REPUTATIONAL RISKS (2016), https://www.regjeringen.no/contentassets/312e6001471045cc80be9b86b1fdae4d/risks_in_unlisted_infrastructure.pdf.

while at the same highlighted the need for this investment.¹⁴² The IEEFA report points out that prudently managed unlisted infrastructure investments, which include renewable energy, can produce returns of twelve to fifteen percent annually.¹⁴³

With the aim of securing investment returns from the unlisted infrastructure market while managing the risks associated with that action, the IEEFA report recommends that the Fund be given a mandate to invest five percent of its assets in unlisted infrastructure, including unlisted renewable energy investments.¹⁴⁴ Drawing on a different report from the McKinsey Global Institute, the IEEFA report stresses the need for such a shift due to the enormous funding gap for renewable infrastructure, especially in light of the SDGs.¹⁴⁵ The Bank itself stresses this investment gap with reference to the International Energy Agency's estimates that "53 trillion dollars in cumulative investment in energy supply and energy efficiency is required over the period to 2035 in order to keep global warming below 2 degrees."¹⁴⁶

Unfortunately, the Ministry of Finance recommended that the Fund not be given this opportunity,¹⁴⁷ and in June 2017 the Norwegian Parliament voted against this suggested change in the Fund's Mandate.

142. TOM SANZILLO ET AL., INST. FOR ENERGY ECON. & FIN. ANALYSIS, MAKING THE CASE FOR NORWEGIAN SOVEREIGN WEALTH FUND INVESTMENT IN RENEWABLE ENERGY INFRASTRUCTURE 2-3 (2017), http://ieefa.org/wp-content/uploads/2017/02/Making-the-Case-for-Investment-in-Renewable-Energy-Infrastructure_February-2017.pdf.

143. In the Frequently Answered Questions section, the IEEFA report criticizes the scope of the first report previously commissioned by the Norwegian Parliament: "Because the mandate of that study was to highlight the political, regulatory and reputational risks of unlisted infrastructure investments, the McKinsey Study is a narrow document that suggests such investments are mostly about risk." *Id.* at 37.

144. *Id.* at 35.

145. See JONATHAN WOETZEL ET AL., BRIDGING GLOBAL INFRASTRUCTURE GAPS 1 (2016), https://www.mckinsey.de/files/mgi_bridging-global_infrastructure_gaps_june_2016.pdf (noting the projected global funding gap triples if the UN's Sustainable Development Goals are applied).

146. See RENEWABLE ENERGY INVESTMENTS: DISCUSSION NOTE, *supra* note 7 ("These projections imply annual investments of roughly 2 trillion dollars, or 2 percent of global GDP per year up to 2030. Although the amount invested has increased over the past few years, the actual invested volume of 1 trillion dollars still falls short of what is deemed necessary. Based on this, one could argue that there is a climate investment gap of 1 trillion dollars per year.")

147. Mark Gilbert, *Norway Misses a (Green) Trick*, BLOOMBERG (April 7, 2017, 2:00 AM), <https://www.bloomberg.com/gadfly/articles/2017-04-07/norway-sovereign-wealth-fund-misses-a-green-trick>; *Norway's Risk-Averse Wealth Fund Considers Next Moves*, REUTERS (Aug. 18, 2017), <https://www.reuters.com/article/norway-swfnorway-risk-averse-wealth-fund-considers-next-moves-idUSL8N1L11MV>.

B. Operationalizing Ethics

The Ethical Guidelines have, as outlined above, two main categories: one based on product and the other on conduct.¹⁴⁸ By the end of 2016, a total of 122 companies had been excluded from the investment universe, including 59 companies based on the product-based coal criterion.¹⁴⁹ This is a net number, as some companies have documented a change making them eligible for the Fund's reinvestment. NBIM says they will continue to search for firms under the coal criterion, so the number of exclusions is expected to rise.¹⁵⁰

The Ethical Guidelines are to be rooted in main normative characteristics that are consistent over time. The theoretical foundation is the principle of "overlapping consensus," which is meant to achieve stability within a socially just system.¹⁵¹ The consensus is overlapping in that it allows people to have different reasons, premises, and arguments for supporting a system.¹⁵² This means that it is the common norm of Norwegians, the ultimate beneficiaries of the Fund, that ultimately decides what is ethically acceptable.¹⁵³ How does the Council consider the Norwegian norm when practicing the Guidelines?

For the product-based exclusion criteria, the Council is meant to have an overview of all of the companies in the Fund whose operations may meet any of these.¹⁵⁴ A firm of consultants monitors whether companies have operations that contravene any of the product-based criteria and submits a quarterly report to the Council.¹⁵⁵ The Council investigates any relevant companies in further detail.¹⁵⁶ In other words, the Council does not have to consider if the products are a breach of Norwegian norms—once these products are encompassed in the Guidelines, they are to be acted upon.

Following up on the conduct-based criteria works quite differently and has several questionable aspects. The following case may serve as an example. For several years, the Council had known about corruption accusations involving *Petroleo Brasileira S.A.*,

148. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60.

149. *World's Biggest Wealth Fund Excludes 52 Coal-Related Groups*, *GUARDIAN* (Apr. 15, 2016, 8:54 AM), <https://www.theguardian.com/environment/2016/apr/15/worlds-biggest-wealth-fund-excludes-52-coal-related-groups>.

150. *Additional Exclusions from the Government Pension Fund Global*, *NORGES BANK INV. MGMT.* (Dec. 21, 2016), <https://www.nbim.no/en/transparency/news-list/2016/additional-coal-exclusions-from-the-government-pension-fund-global/>.

151. See John Rawls, *The Idea of an Overlapping Consensus*, 7 *OXFORD J. LEGAL STUD.* 1, 1–2 (1987).

152. *Id.* at 1.

153. See generally Heidi Rapp Nilsen, *Overlapping Consensus Versus Discourse in Climate Change Policy: The Case of Norway's Sovereign Wealth Fund*, 13 *ENVTL. SCI. & POLY* 123 (2010).

154. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60.

155. *Id.*

156. *Id.*

better known as Petrobras.¹⁵⁷ However, it was not until the scope of the accusations became generally known in 2014 that the Council decided to contact the company and investigate the accusations with the aim of recommending exclusion.¹⁵⁸ The Council's view is that the information, which became publicly known in 2014 and 2015, indicates that the company is responsible for gross corruption.¹⁵⁹ The Council is open about the importance of the media in their work, especially in single cases.¹⁶⁰ Massive media reaction indicates that the people react to a certain company's conduct, in other words, that there is an overlapping consensus that such conduct is unethical.¹⁶¹ A thorough check of what Norwegians think about an issue should, to be accurate, be checked through a referendum—or more realistically, a poll. This demonstrates the awkwardness of having overlapping consensus as a basis for practicing the Ethical Guidelines. The origin of overlapping consensus shows that this approach was not constructed for value-based discussions at all, and the concept has been criticized for choosing the least demanding norm, as it is easier to reach agreement on, than more demanding norms.¹⁶² In this view it is not surprising that the Council ends up with media coverage, a creative database for an unfit ethical basis, as the best barometer of Norwegian norms.

Another weakness in the follow up of the conduct-based criteria is demonstrated by no companies being excluded or put under observation due to acts or omissions that on an aggregate company level lead to unacceptable greenhouse gas emissions. This criterion

157. *Decision to Place Company in the Portfolio of the Government Pension Fund Global Under Observation*, NORGES BANK INV. MGMT. (Jan. 28, 2016), <https://www.nbim.no/en/transparency/news-list/2016/decision-to-place-company-in-the-portfolio-of-the-government-pension-fund-global-under-observation/>.

158. Letter from the Council on Ethics, The Government Pension Fund Global, to Norges Bank 1 (Dec. 21, 2015), <http://nettsteder.regjeringen.no/etikkradet/files/2016/01/Recommendation-Petrobras-21-December-2015.pdf> (recommending that Petroleo Brasileiro SA, a company in the fund, be put under observation).

159. *Id.*

160. The Annual Report 2016 states: “[A] firm of consultants searches through many news sources in several different languages for relevant articles on companies in the portfolio. The Council receives quarterly reports from the consultants, and investigates those companies where the risk of future violation of ethical norms seems high.” COUNCIL ON ETHICS FOR THE NORWEGIAN GOV'T PENSION FUND, THE WORK OF THE COUNCIL ON ETHICS 7 (2016), <http://etikkradet.no/files/2017/02/The-work-of-the-Council-on-ethics-1.pdf>.

161. Beate Sjøfjell, *Norway's Oil Fund is a Tarnished Gold Standard for Sustainable Investment*, CONVERSATION (Apr. 27, 2017, 9:36 AM) <https://theconversation.com/norways-oil-fund-is-a-tarnished-gold-standard-for-sustainable-investment-75741>.

162. Overlapping consensus is a tool constructed to achieve stability on so-called “constitutional essentials” in a state and to take debates off of the public agenda. See generally Joshua Cohen, *Moral Pluralism and Political Consensus*, in *THE IDEA OF DEMOCRACY* 270 (D. Copp, J. Hampton & J.E. Roemer eds., 1993); Nilsen, *supra* note 153.

was included in the Guidelines in February 2016, the same time as the product-based coal criterion.¹⁶³ The Council states in its annual report for 2015 that they began in late 2015 to conduct studies of various industries in order to understand where the greenhouse gas emissions are greatest and to identify the companies with unacceptable emissions.¹⁶⁴ In the 2015 report, the Council stated that its ambition was to be able to conduct “specific assessments of individual companies towards the end of the year.”¹⁶⁵

Obviously, the lack of reaction from the Council cannot be explained by the severity of the climate situation. A more likely explanation is that the Council’s process takes time. A company that is being considered for observation or exclusion shall be given an opportunity to present information and opinions to the Council.¹⁶⁶ Then, if the Council decides to recommend observation or exclusion, NBIM is to consider whether engagement with the company is more appropriate.¹⁶⁷ In the next Subpart, we discuss the Fund’s involvement in the Dakota Access Pipeline project, where this slow process and its ineffectiveness became very visible. Only after a possible exclusion is the information made public.¹⁶⁸ The public announcement of exclusion, with a justification, is a part of the Fund’s gold star reputation because it is seen as high-level “naming and shaming.”¹⁶⁹ However, until exclusion is decided, no one outside of the Council and the involved company, and in the last phase, NBIM, knows anything about this unless the Council decides to make public that it is investigating a company.¹⁷⁰

The conduct-based criteria have in total resulted in twenty-nine firms being excluded and two being placed on observation.¹⁷¹ These low figures make it reasonable to conclude that the conduct-based criteria are only applied to the tip of the iceberg. The intent to exclude the worst offenders may be seen in how all of the conduct-based criteria are formulated: *serious* human rights violations, *severe* environmental damage, *gross* corruption, and so forth. The very low number of firms excluded of the approximately 9,000 firms in which

163. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60.

164. Gwladys Fouche, *Exclusive: Norway’s \$960 Billion Fund Wants Banks to Disclose Carbon Footprint of Loans*, REUTERS (June 2, 2017, 10:48 AM) <http://www.reuters.com/article/us-norway-swf-ceo-idUSKBN18T26V>.

165. COUNCIL ON ETHICS FOR THE NORWEGIAN GOV’T PENSION FUND, THE WORK OF THE COUNCIL ON ETHICS 5 (2015), http://etikkradet.no/files/2017/02/Etikkradet_AR_2015_web-1.pdf.

166. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60.

167. *Id.*

168. *Id.*

169. SIMON CHESTERMAN ET AL., ASSESSMENT OF IMPLEMENTATION OF ARTICLES 3 AND 4 OF THE ETHICAL GUIDELINES FOR THE GOVERNMENT PENSION FUND-GLOBAL 30 (2008), https://www.responsible-investor.com/images/uploads/resources/research/21214492869Albright_Group_Ethical_Guidelines.pdf.

170. *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60.

171. *Observation and Exclusion of Companies*, *supra* note 97.

the Fund is invested makes it highly unlikely that anything close to all conduct encompassed by the Guidelines is captured.¹⁷² In spite of the positive response to the Fund because of its Ethical Guidelines, Council on Ethics, and transparency about its exclusions, the very low numbers and the questionable basis for follow up give rise to the question: is this a symbolic show of “ethics” or an actual ethical supervision of the Fund’s investment?

While the name “Ethical Guidelines” signals that there is an ethical standard, the standard is instead Norwegians’ norms. Norway’s ecological footprints, including emissions of greenhouse gases per capita, are above the international average and rising.¹⁷³ In that sense, there is a sad consistency between Norwegian norms and the exclusion of only eighteen firms based on severe environmental damage and none due to greenhouse gas emissions.¹⁷⁴

C. *The Gap between Returns and Ethics*

There are serious limitations to the effectiveness of the dual management of the Fund by NBIM and the observance of the Ethical Guidelines by the Council on Ethics.

In addition to the limitations in the Fund’s setup, Mandate, management as well as the ethical supervision of the Fund, there are also business barriers to sustainable investment governance. These barriers constrain the Fund’s management so that the Fund cannot, or can only with difficulty, correctly assess and engage with the companies in which it invests. These include unverified, unreliable, and irrelevant reporting on environmental, social, and governance issues,¹⁷⁵ although NBIM-supported research in this area may contribute to more reliable measurements over time.

There are also broader societal and economic barriers associated with the larger economic system within which the Fund operates, which arguably would require exceptional qualities of the Fund’s institutional structure and procedures if the Fund were to achieve effective SRI decision making.¹⁷⁶

172. See *id.*; see also *Guidelines for Observation and Exclusion from the Fund*, *supra* note 60.

173. Norway, CLIMATE ACTION TRACKER (Sept. 18, 2017), <http://climateactiontracker.org/countries/norway.html>. But see *Norway’s Greenhouse Gas Emissions Rise, Despite Promised Cuts*, REUTERS (May 20, 2016, 6:40 AM), <http://www.reuters.com/article/us-norway-carbon-idUSKCN0YB12E>.

174. *Observation and Exclusion of Companies*, *supra* note 97.

175. See Heffa Schücking, *Dirty & Dangerous: The Norwegian Government Pension Fund’s Coal Investments 10–12* (2014), http://m.greenpeace.org/international/Global/norway/Klima/dokumente/2014/Dirty_Dangerous_Coal_GPF.pdf.

176. See generally OXFORD BUS. KNOWLEDGE, *RECENT TRENDS AND REGULATORY IMPLICATIONS IN SOCIALLY RESPONSIBLE INVESTMENT FOR PENSION FUNDS* (2016), <https://www.oecd.org/corporate/mne/38550550.pdf>.

While there are positive signs regarding the integration of sustainability issues into the Fund's risk assessment,¹⁷⁷ and while the Ethical Guidelines and Management Mandate continue to expand,¹⁷⁸ increasing the competence and scope of the Council on Ethics, the fundamental issue of whether the Fund contributes to sustainability remains an open question. Indeed, it seems that the well-intended and internationally saluted establishment of the Council on Ethics has facilitated the entrenchment of a detrimental and misleading dichotomy between economics and ethics. The Fund is making progress on identifying, trying to influence, or sanctioning the worst corporate polluters,¹⁷⁹ but this is on such a limited and incremental pace that the market, as a whole, arguably remains unaffected. The long-term investment horizons of the Fund positively orient it toward sustainability goals, but the trade-offs between short-term economic performance and long-term goals remain unresolved when the latter lack equivalent financial salience. Such tensions between short- and long-term temporal horizons are pervasive in many other economic and political domains, such as government electoral politics, and have been identified as a significant barrier to improving the environmental performance of society.¹⁸⁰

Climate risk is the clearest example of how today's portfolio management practice is failing. Continuing with business as usual is financially hazardous as there is a risk of investing in projects which become stranded assets if the fundamental global shift away from fossil fuels and to renewable energy in line with the goals of the Paris Agreement is achieved. There are several signs that this shift has started to happen (although it is happening too slowly). For that reason alone, a continued focus on fossil projects represents an enormous risk. It is not financially viable to bet against the Paris objectives; the economy cannot continue to develop positively in its own little bubble if climate change remains unmitigated.

The criticism of the overlapping-consensus approach of the Council of Ethics is further illustrated by the Fund's involvement with the controversial Dakota Access Pipeline.¹⁸¹ The issue appears to be implicitly perceived as one of ethics as opposed to economic

177. NORGES BANK INV. MGMT., *supra* note 86, at 5.

178. *Amendments to the Mandate for the Government Pension Fund Global*, NORGES BANK INV. MGMT. (Feb. 2, 2016), <https://www.nbim.no/en/transparency/submissions-to-ministry/2016/amendments-to-the-mandate-for-the-government-pension-fund-global/>.

179. *See Climate Change*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/responsibility/risk-management/climate-change2/> (last updated Apr. 7, 2016).

180. *See generally* BENJAMIN J. RICHARDSON, *TIME AND ENVIRONMENTAL LAW: TELLING NATURE'S TIME* (Cambridge Univ. Press 2017).

181. Sam Levin, *Dakota Access Pipeline: The Who, What and Why of the Standing Rock Protests*, *GUARDIAN* (Nov. 3, 2016, 8:00 AM), <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer>.

gain.¹⁸² The Fund is heavily invested in the Dakota Access Pipeline project, as were other large Norwegian financial institutions, but now practically all—except the Fund—have decided to divest.¹⁸³ The other financial institutions' divestment came as a reaction to Norwegian media asking questions about the Dakota Access Pipeline, very much informed by the Saami people's outrage over the project.¹⁸⁴ The Council on Ethics is now also investigating the matter,¹⁸⁵ but currently it is unclear what the Council will recommend. NBIM has made no public statement about the Dakota Access Pipeline project.

NBIM's 2016 report on responsible investment shows it has divested from more companies on its own initiative based on a risk assessment than on advice from the Council on Ethics.¹⁸⁶ The Dakota Access Pipeline case illustrates how NBIM's investment strategy has not picked up on a case which arguably entails a massive climate risk, threatens indigenous peoples' rights, and carries the threat of other human rights violations and a negative local environmental impact, especially concerning drinking water. This does not fit well with two of NBIM's three responsible investment focus areas: climate change¹⁸⁷ and water management.¹⁸⁸ Not even after the international and national media coverage of the controversies concerning the Dakota Access Pipeline has the Fund's investment in the project been publicly discussed in light of the Fund's Management Mandate.

According to the Mandate, the Fund's investment portfolio should be broadly diversified in the various investment markets.¹⁸⁹ NBIM is also supposed to identify systemic risks and adjust its investments accordingly.¹⁹⁰ These two may be in conflict. Neither the Ministry of Finance nor the Fund's own investment strategies seem to acknowledge that investing broadly in all markets will be unwise if the majority of the companies in these markets are on the "business-as-usual" track. From a long-term economic perspective, it is meaningless to hold back on being a part of the necessary shift toward sustainability. If the investment universe as a whole is headed toward the cliff of the convergence of environmental, social, and economic crises seen ahead, the only economically sustainable path for the world's largest SWF is to use its financial muscles to shift

182. Sjøfjell, *supra* note 161.

183. Rachel Fixsen, *Sami People Persuade Norway Pension Fund to Divest from Dakota Access*, GUARDIAN (March 17, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/mar/17/sami-dakota-access-pipeline-norway-pension-fund-divest>.

184. *Id.*

185. *Id.*

186. NORGES BANK INV. MGMT., *supra* note 86, at 76, 84.

187. *Climate Change*, *supra* note 179.

188. *Id.*

189. *Investment Strategy*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/investments/investment-strategy/> (last updated Apr. 20, 2017).

190. *Id.*

the direction of the investment universe. Through divestment, investment, and the example it sets, Norway's SWF could be a real game changer for sustainability.

The small part of the Fund's portfolio that is dedicated to environmental investments may turn out to be a futile exercise if the investment strategy as a whole does not support such an approach. Working toward sustainability, including staying within planetary boundaries, is a prerequisite for long-term return on the Fund's investments.

Mainstream commentators are missing the important question by concentrating on details such as what the Fund financially has missed out on through product exclusion—for example, by not investing in tobacco and certain arms manufacturers.¹⁹¹ The important question is whether the Fund is investing in such a way that future generations will see stable revenue from the Fund. As the Mandate for the Fund itself states, this presupposes sustainable development, environmentally, socially, and economically.¹⁹² The crucial issue is whether the Fund is investing in sustainable development. If the Fund, as we argue, is on an environmentally, socially, and financially unsustainable track, whether it also loses or wins a few billion dollars in investing or not investing in tobacco or certain arms is irrelevant.

CONCLUSION

If the Norwegian Government Pension Fund Global is the best of the SWFs, we may not wish to put high hopes on achieving sustainability through the influence of large investors at this stage. The Mandate of the Fund integrates sustainability in the framework of the management of the Fund.¹⁹³ There are some positive signs that risk assessment can be a key to truly integrating responsible investment into its management. Here, NBIM and the Council on Ethics together could ensure the Fund's contribution to sustainability. However, in practice we see that the Fund is still a case in point for a misleading dichotomy between the economy and ethics. The economy is perceived as the basis for our societies. Ethics are something society wishes to consider but not at the expense of the economy. Ironically, an attempt to give priority to economic considerations actually leads to increased financial risk and serves to keep society on an unsustainable track of business as usual.

191. Richard Milne, *Norway's Oil Fund Returns Crimped by Ethical Stance*, FIN. TIMES (March 21, 2017), <https://www.ft.com/content/e86c9564-0e46-11e7-b030-768954394623>.

192. See *Mandate and Core Responsibilities*, NORGES BANK INV. MGMT., <http://www.norges-bank.no/en/about/mandate-and-core-responsibilities/> (last updated Jan 10., 2017).

193. *Id.*

The positive tendencies are too incremental and illustrate the insufficiency of negative screening—the Fund’s reaction to climate change and, more specifically, the Dakota Access Pipeline, are examples of this. While the Fund itself may only be nudging incremental change within its own investment portfolio, it has the capacity to be a catalyst for wider change as already evident in the growing fossil fuels divestment movement that has benefited from the publicity given to the Fund’s recent efforts to reduce its holdings in coal mining companies.¹⁹⁴ To realize this potential and be a front-runner, changes are necessary to the Fund’s Mandate and management.

The great challenge of our time is indeed how to achieve the social and human rights objectives of the SDGs while staying within planetary boundaries. The climate is only one of nine currently identified planetary boundaries which we need to respect in order to achieve a safe operating space for humanity.¹⁹⁵ For example, reduced biodiversity and excessive use of nitrogen and phosphorous are threatening the planet’s ability to produce food, with potentially devastating ramifications.¹⁹⁶ We risk societal breakdown unless sufficient capital is channeled to environmentally, socially, and economically sustainable projects within planetary boundaries. In a scenario of societal breakdown, it will not be possible to achieve a stable return on any investment.

The unsustainability of global market capitalism is a systemic issue rooted in mainstream paradigms of economic and demographic growth, private property, and open borders.¹⁹⁷ Clearly a fundamental shift is required in the way that international commerce and trade, and indeed business and finance in general, are conducted so that they meet sustainability criteria, economically, socially, and environmentally. The Fund is one of the few actors with the financial position and global profile to leverage some positive change.¹⁹⁸ This requires political courage and will. With the adoption of the SDGs (and the 2015 Paris Agreement), there seems to be a new impetus in the debate. President Trump’s declaration that the United States will withdraw from the Paris Agreement emphasizes the significance of

194. Carrington, *supra* note 51.

195. Rockström et al., *supra* note 5, at 32; Steffen et al., *supra* note 5, at 736.

196. See Will Steffen et al., *How Defining Planetary Boundaries Can Transform Our Approach to Growth*, 2 SOLUTIONS 59, 59–65 (2011), <https://www.thesolutionsjournal.com/article/how-defining-planetary-boundaries-can-transform-our-approach-to-growth/>.

197. See Esther Vivas, *Food Crisis: Causes, Consequences and Alternatives*, CLIMATE & CAPITALISM (Jun. 27, 2010), <http://climateandcapitalism.com/2010/06/27/food-crisis-causes-consequences-and-alternatives/>.

198. Johan Rockström et al., *A Roadmap for Rapid Decarbonization*, 355 SCIENCE 1269, 1269–71 (2017) (highlighting the significance of SWFs geared towards sustainability).

sustainability-oriented business and finance leading the way.¹⁹⁹ The Bank's own proposal that its Mandate should be changed to allow the Fund to invest in renewable infrastructures is a positive sign. However, in spite of the encouraging report on potentially high returns, the strong arguments for such investment to mitigate the enormous investment gap for the shift from fossils to renewables, and the aim of achieving the SDGs, the Ministry of Finance advised against such a change.²⁰⁰ The Minister of Finance's argument, that the Fund is meant to secure the economic basis for future generations and "should not be used as a tool for foreign or climate policy,"²⁰¹ illustrates the depth of the lack of understanding of economics and of sustainability in the Norwegian government. Members of the Norwegian Parliament in favor of this change, unfortunately, turned out to be in the minority.²⁰²

Even if the Mandate is changed to allow for five percent investment in renewable infrastructure, the question remains whether we will continue to be on a path of incremental improvements or whether this will herald the beginning of the necessary fundamental shift. A starting point for the necessary fundamental shift is to stop discussing sustainability as a question of ethics over economics and recognizing that long-term global economic development—like everything else—is dependent on stable living conditions on Earth.

If there were the political will to make the necessary changes to ensure the Fund's contribution to sustainability, and thereby the Fund's potential for continued good returns in the long run, a broader set of reforms would need to be put into place. Sustainable investment requires positive screening or impact investing, which would require a change of the Mandate and the removal or nuancing of the dictate to stay broadly invested in the investment universe. The approach of the Fund would need to be changed from responsible investment within the goal of highest possible returns to good returns within truly responsible investment—within sustainability. That a new approach is needed to achieve high returns in the long run is illustrated by the IEEFA report on renewables infrastructure.²⁰³

If the Mandate and the management of the Fund get it right, positioning its search for good returns within planetary boundaries and supporting social and economic foundation of sustainability, it gives rise to the question of whether we even need a Council on Ethics.

199. The response has been encouraging. See, e.g., Georgina Gustin, 'Over 1,400 U.S. Cities, States and Businesses Vow to Meet Paris Climate Commitments', INSIDE CLIMATE NEWS (June 6, 2017), <https://insideclimatenews.org/news/05062017/paris-climate-agreement-trump-bloomberg-cities-states-businesses>.

200. Gilbert, *supra* note 147.

201. *Id.*

202. *Id.*

203. See generally TOM SANZILLO ET AL., *supra* note 142.

There is a scope for guidelines on ethical issues that fall outside of good returns within a goal of sustainability. A Council on Ethics could have a role in leading discussions about value-based issues that are facing both Norway and other nations or that may face humans, nature, or space in the future. Such issues may include gene technology, animal welfare, including for farmed fish, and pollution in space. The issues should be chosen not because we estimate that they threaten sustainability (to the extent that they do, they would in a revised system belong within the Fund's ordinary management), but because they can define and create understanding about who we are, who and how we want to be, in which direction our society is moving, and alternative pathways. This is not consistent with a basis of overlapping consensus on norms. Such discussions must dare to delve deeply into different ethical theories and ontologies and formulate recommendations for both investments and divestments based on discussions of ethics. Getting rid of the basis of overlapping consensus should not be that controversial as it has never been properly followed up anyway.

Alternatively, if the basis of overlapping consensus is kept, the Council should be known as the Council on Norwegian Norms to make it clear that the overall standard is how the ultimate beneficiaries of the Fund themselves choose to act and live. The Guidelines could then deal with issues on which the Norwegian people might reach consensus, depending on the moral standards of each generation. The overlapping-consensus approach would then be more legitimate. Making our values and especially our priorities between these values more visible and explicit would make it more apparent that we each can contribute toward a more sustainable future. Today, we are instead hiding behind an imaginary sustainable ethical standard.

A significant barrier to responsible investment decisions is the lack of relevant and reliable information from the companies themselves. Corporate law reforms and changes to the current reporting frameworks are arguably necessary as it is extremely difficult for businesses to shift to more adequate reporting by themselves within the current system. However, requirements from an investor of the Fund's size may also be an important driver for change. For this to work, NBIM must show a willingness to use already available information to substantiate the effect of engagement and not only disclose the number of shareholder meetings at which it votes and number the meetings held with companies.²⁰⁴ Also, NBIM should follow the Council on Ethic's lead and make public its risk-based divestments. Doing that with a justification based on risk because of environmental, social, and governance issues could contribute to the Fund's position as a market

204. See Serafeim & Grewal, *supra* note 127 (providing recommendations related to the value relevance of ESG data and how investors could improve the data being collected).

leader for investing in sustainability. With its financial muscles, the Fund has the potential to shift the direction of global investments—highly significant in itself—and to be a potential facilitator for the other reforms. Although the Fund is limited to owning a maximum of ten percent of the shares in any company,²⁰⁵ it is in the highly dispersed shareholding structures of many companies a relatively large investor.²⁰⁶ And it is certainly an influential one, with its reputation as the gold standard of responsible investment. It is time to put this to good use before the gold standard fades completely.

205. NORGES BANK INV. MGMT., GOVERNMENT PENSION FUND GLOBAL: QUARTERLY REPORT 14 (3Q 2015), https://www.nbim.no/contentassets/c241d687f06c4dc498a50407f80f04ca/3q_15_eng_web.pdf.

206. Lars Løvold, *Norway Takes Pathway to Ethical Investment with Human Rights Policy*, GUARDIAN (Mar. 18, 2016, 10:02 AM), <https://www.theguardian.com/global-development/2016/mar/18/responsible-investing-financial-winner-human-rights-strategy>.
