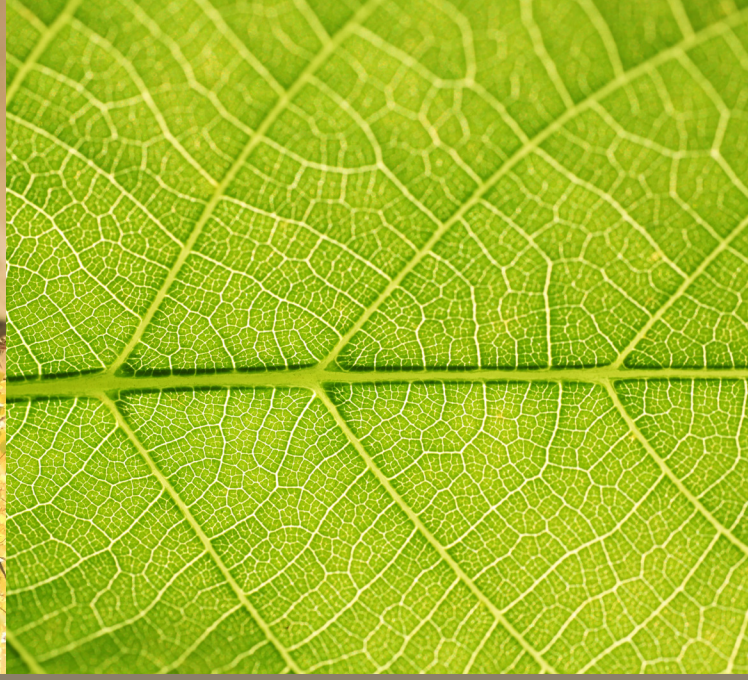

Annual report 2011

Council on Ethics for the Government Pension Fund Global

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Content

Introduction

The Council on Ethics for the Government Pension Fund Global (GPFG) is an independent council that makes recommendations to the Ministry of Finance on the observation or exclusion of companies from the Fund. The Council issues its recommendations following an assessment of whether a company's actions or omissions are in contravention of the criteria in the guidelines laid down by the Ministry.[1] The Ministry makes decisions on the observation or exclusion of companies based on the Council's recommendations. The Council on Ethics has five members and a secretariat with a staff of eight.

Published recommendations

Since the last annual report, four new recommendations have been made public. In these recommendations, the Council on Ethics recommended the exclusion of five companies from the Fund. The Ministry of Finance has excluded three companies and put one company under observation, while a further company was neither excluded nor put under observation.

Company	Date of recommendation	Made public	Decision	Criterion
PetroChina Co. Ltd.	26 May 2010	6 December 2011	Not excluded	Serious human rights violations
FMC Corp. and Potash Corp. of Saskatchewan	15 November 2010	6 December 2011	Excluded	Other particularly serious violations of ethical norms
Alstom SA	1 December 2010	6 December 2011	Observation	Gross corruption
Grupo Carso SAB CV	15 February 2011	25 August 2011	Excluded	Tobacco production

In the first of these recommendations, the Council recommended the exclusion of the Chinese company PetroChina Co. Ltd. because of the risk of human rights violations in connection with the construction of two oil and gas pipelines in Burma. The Ministry of Finance did not follow the recommendation.

PetroChina's parent company, the state-owned China National Petroleum Corporation (CNPC), is responsible for the construction of the two pipelines, while the Burmese authorities shall ensure the security of the project. The Council considered that there was an unacceptable risk that the project would lead to human rights violations. The Council held that the significant and remarkable overlap of people in key positions, not only on the board and in the management of the companies, but also in the administration of the companies, meant that the two companies are under common management. On the question of complicity in human rights violations, the Council therefore concluded that the management of PetroChina and CNPC is so uniform, and the operations of PetroChina so significant within the company group, that CNPC's activities in Burma could not be separated from the subsidiary's. The Ministry of Finance did not find that PetroChina's links with CNPC were such that the two companies should be regarded as a single entity.

The second recommendation concerns the U.S. company FMC Corp. and the Canadian company Potash Corp. of Saskatchewan, which were excluded on the

background of their purchase of phosphate from Western Sahara. Western Sahara is a non-self-governing territory without a recognised administering power. In practice Morocco controls most of the area, and a state-owned Moroccan mining company extracts phosphate in Western Sahara.

The Council found that mineral exploitation in Western Sahara is only acceptable if done in accordance with the interests of the local population and for their benefit, which is not the case in connection with phosphate extraction in Western Sahara. Both of the excluded companies confirmed to the Council on Ethics that they purchased phosphate from Western Sahara under long-term contracts and would continue to purchase phosphate from there. Against this backdrop, the Council on Ethics concluded that the companies contributed to the continuation of phosphate extraction. This matter is elaborated on in a letter to the Ministry of Finance, which is also included in this annual report. When the recommendation was published, FMC Corp. stated to the media that it no longer purchased phosphate from Western Sahara. The Council on Ethics immediately contacted FMC Corp. in order to clarify the facts but has not, as of 1 March 2012, received a reply.

The third recommendation concerns the French company Alstom SA, which the Ministry of Finance put on the observation list on 6 December 2011. In its recommendation one year earlier, the Council had recommended excluding the company due to the risk of gross corruption. When this recommendation was made, the company was under investigation for extensive corruption in a number of countries including Brazil, Switzerland and the United Kingdom.

The Ministry of Finance was of the opinion that observation might be better suited to reduce the risk of corruption than exclusion. The Council on Ethics was asked to monitor Alstom's anti-corruption efforts and the development of its corruption-prevention system over a period of four years. The Council shall also monitor how the company deals with the further investigation of older corruption cases, as well as monitor whether allegations are made of new instances of corruption. The Council shall provide an annual briefing to the Ministry on the status of the observation process and make a new recommendation at the end of the observation period.

The final recommendation concerns to the Mexican company Grupo Carso SAB de CV which was excluded because it produces tobacco.

This annual report also contains a letter from the Council on Ethics to the Ministry of Finance about the company Siemens AG, which the Ministry put on the observation list in 2009 for a period of up to four years. Both the Council on Ethics and Norges Bank are required to report on developments in the company's anti-corruption efforts as long as the company is on this list.

Sector studies and media monitoring

The Council on Ethics identifies cases for further assessment on the basis of media monitoring for news items about companies in the portfolio, special sector studies, systematic product studies, and information about individual matters that the Council obtains in

various ways. Media monitoring is important for the Council to learn about companies that require further assessment, but there are still many issues about which little is written and which are therefore not captured in this way. For this reason, the Council on Ethics undertakes its own assessments of issues or sectors where the Council believes it is highly likely that companies are engaged in activities that are in violation of the guidelines.

A sector study usually starts with the Council contracting one or more experts in the area to identify all the companies in the portfolio involved in a particular type of business and to gather information about companies that may be engaged in activities in violation of the guidelines. On the basis of the consultants' reports, the Council assesses which companies should be studied in more detail in light of, for example, the extent and severity of the violations, the companies' involvement in the violations and the likelihood of future violations taking place. At this stage, the Council will normally write to the companies to request information that is important for the assessment. Sector studies offer several advantages: they provide better overview of issues, sectors and regions; they help increase the efficiency of the Council on Ethics; and they provide a better basis for comparative assessments of companies.

Last year's annual report listed nine issues under the environmental criterion which the Council was going to study in more detail.[2] Several of these assessments are underway and are described on page 17 of this annual report. One of the issues, the disposal of waste from mining operations, is described in more detail on page 20.

On the matter of human rights, the likelihood of companies contributing to violations is significantly influenced by the situation in the countries where the companies operate. Distinctive features of a particular industry may also play a role, but it will rarely be the case that the Council will be able to identify a large number of companies with a high probability of violations through a general study of a particular type of business. In the area of human rights, the Council on Ethics has been closely monitoring infrastructure projects in Myanmar for several years. In addition, the Council continuously monitors the extraction of natural resources in conflict areas in the Democratic Republic of Congo. In 2011, the Council has also focused on work-related accidents in coal mines and working conditions in the construction industry in Saudi Arabia and the United Arab Emirates. There is a brief presentation of the assessment of work-related accidents in coal mines on page 25.

The Council on Ethics uses an external consultant to carry out daily Internet searches for news items about the companies in the portfolio. These searches are done in several languages, and the Council receives monthly reports about companies that may be linked to human rights violations, corruption, severe environmental damage or other factors encompassed by the ethical guidelines. Among these cases, the Council probes more deeply into the cases that appear to be the most serious. In 2011, the Council discontinued a separate agreement on media monitoring focusing on Asian companies. There was a large degree of overlap between this specific monitoring and the general media monitoring, and few additional cases were detected. The Council still uses an external consultant to monitor companies that may have operations in violation of the criteria for weapons and tobacco. Furthermore, the Council participates in an informal partnership with other investors to identify companies that manufacture cluster munitions. The Council will continue its work on sector studies and the monitoring of individual companies in 2012.

Overview of activities in 2011

Table 1 below summarises the Council on Ethics' assessments of companies in 2011 and compares them with the figures for 2010 and 2009. Over 700 news items were reported through the Council's monitoring systems in 2011, concerning just under 160 companies. In other words, the same companies and the same matters are often reported several times. Of these cases, only around 30 have been assessed in more depth. However, the total number of cases the Council has studied in more detail has increased significantly from 2010 to 2011. The sector approach seems to lead to a greater number of companies being assessed initially, a greater number of cases being concluded relatively quickly, and a greater number of cases than previously being studied more thoroughly.

Sector studies also contribute to more contact with companies than previously. This year, the table presents two new elements: contact with companies and meetings with companies. The first contact from the Council is usually a letter in which the Council requests information. Roughly two-thirds of the companies the Council on Ethics writes to provide answers to the questions. The Council on Ethics always sends the draft recommendation to the companies for comment before a possible recommendation is issued. It can be difficult for the Council on Ethics to provide sufficient evidence to justify a recommendation for the exclusion of companies that do not respond to the Council's correspondence, especially in societies where little information is publicly available. The guidelines nevertheless allow the Council to make a recommendation in cases where, for various reasons, it is difficult to obtain information. In Report no. 20 (2008–2009) to the Parliament, the Ministry of Finance states: "*If in reality it is impossible to obtain sufficient information to assess the risk of a violation of norms, this will per se be viewed as taking an unacceptable risk, given the circumstances. For this reason, the requirement of documenting the violation of norms should be nuanced in markets where such information in general is difficult to obtain. The lack of an ability and willingness on the part of companies to disclose information can provide a basis for an assessment that the risk of complicity is unacceptably high, should there be other information in the case that supports meeting the criteria.*" Of the five companies covered by the recommendations in this annual report, two did not respond to the Council's letter and the draft recommendation.

Table 1. Overview of the activities of the Council on Ethics

Year	2009	2010	2011
Total excluded companies at year-end	48	51	55
Number of companies on the official observation list at year-end	1	1	2
Number of companies excluded during the year	19	5	2
Number of companies reinstated during the year	3	1	0
Number of recommendations published	6	5	4

Year	2009	2010	2011
Number of limited companies in GPFG at year-end	8,300	8,400	8,000
Number of cases flagged in monthly reports by consultants	450	830	720
Number of cases where initial assessments were carried out	170	70	160
Number of companies under further assessment	55	65	130
Number of companies the Council has contacted	–	25	30
Number of companies the Council has had meetings with	3	6	9
Number of Council meetings	9	11	10
Number of people in the secretariat	7	8	8
Budget	NOK 11.3 mill.	NOK 11.3 mill.	NOK 11.6 mill.

Norges Bank Investment Management (NBIM) and the Council on Ethics meet on a quarterly basis to exchange information conceerning, for example, which companies the institutions are planning to contact. Differences in the mandates of the two institutions mean that the Council on Ethics and NBIM normally concentrate their efforts on different companies and different issues.

The Council on Ethics considers yearly whether there continue to be reasons to exclude those companies which are already excluded from the Fund. The routines for this process are made public on the Council's website.[3] The Council has also established routines for the updating of important information in recommendations pending the Ministry's decision. The aim of this routine is to reduce the risk of omitting new information.

In 2011, in addition to the sector studies mentioned above, the Council has assessed issues related to mining operations in Africa, Asia and Latin America, working conditions in Brazil and Thailand, and the building of settlements in the West Bank or East Jerusalem. Some of these studies are in the initial phase, while others have come a long way. The Council issued four recommendations in 2011.

In 2011, a book was published on companies' complicity in human rights violations based on, among others, the GPFG ethical guidelines. The book, called *Human Rights, Corporate Complicity and Disinvestment*, was written and edited by three of the Council's current and former members. It is presented in more detail on page 27. Although more than seven years have passed since the Council was established, the Council still discusses fundamental issues and principles that are pivotal to the assessment of cases. The recommendation concerning the purchase of phosphate from Western Sahara is a prime example of this. The contentious issue for the Council was whether companies should be excluded on the basis of their role as purchasers of raw materials from a disputed territory, even though they are not directly involved in the production process. In the recommendation on PetroChina, the contentious issue concerned whether a subsidiary in a very remarkable constellation could be identified with the parent company, among other

things on the basis of an unusually high degree of personnel and organisational overlap between the board, the management and the administration of the two companies. The Council's experience so far is that it is difficult to decide such questions on principle. Each case is different and must be assessed specifically on the basis of the facts of the case. Nevertheless, the cases build on each other, and practice from previously decided matters sets a precedent for future cases.

After seven years of activities, the Council assumes that it can continue to look forward to challenging discussions within the Council and with other parties who are interested in the Council's work, both because the Council's assessments dive deeper into issues and because corporate conduct and market integration are constantly changing. We welcome all feedback, both about individual cases and about the Council's work in general.

Ola Mestad	Dag Olav Hessen	Ylva Lindberg	Gro Nystuen	Bente Rathe
Chair			Deputy Chair	
(sign.)	(sign.)	(sign.)	(sign.)	(sign.)

Endnotes

1 www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.
2 www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.
3 www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/councils-activities/procedures-for-the-reinclusion-of-compan.html?id=631472.

Members of the Council and of the Secretariat

The Council on Ethics

Ola Mestad (Chair), Dr. juris and Professor at the Centre for European Law, University of Oslo
Gro Nystuen (Deputy Chair), Dr. juris Associate Professor at the Norwegian Defence University College and Senior Partner at the International Law and Policy Institute.
Ylva Lindberg, BA, Managing director of SIGLA.
Dag Olav Hessen, Dr. philos, Professor at the Institute of Biology, University of Oslo.
Bente Rathe, MBA, self-employed.

The Secretariat

The Council has a Secretariat that researches and prepares cases for the Council. The Secretariat has the following employees:

Eli Lund, Executive Head of Secretariat, (Economist)
Pia Rudolfsson Goyer (Cand. jur., LL.M)
Svein Erik Hårklau (Cand. agric.)
Hilde Jervan (Cand. agric.)
Charlotte Hafstad Næsheim (Master of Law)
Aslak Skancke (Graduate Engineer)
Pablo Valverde (Master in War Studies)
Marte Johannesson, Secretary, (BA)

Overview of recommendations issued by the Council on Ethics in 2011

Published by March 2012

26.05.2010 **Recommendation to exclude PetroChina Co. Ltd.**

The Chinese company PetroChina Co. Ltd. was recommended for exclusion due to the risk of the company contributing to human rights violation in connection with the construction of two oil and gas pipelines in Burma. PetroChina's parent company CNPC is responsible for the construction of the two pipelines. The Council nevertheless found that the two companies in this case should be regarded as a single entity, due to the significant and remarkable overlap of people on the board, management and administration of the companies, and because the operations of PetroChina are so significant within the company group.

The Ministry of Finance considered that PetroChina's links with CNPC were not such that the two companies should be regarded as a single entity and decided not to exclude the company.
(Published 6 December 2011)

15.11.2010 **Recommendation to exclude Potash Corp. of Saskatchewan and FMC Corp.**

The Canadian company Potash Corp. of Saskatchewan and the US company FMC Corp. were recommended for exclusion because of their purchase of phosphate minerals extracted in Western Sahara by the Moroccan company OCP. Western Sahara is a Non-Self-Governing Territory without a recognized administering Power.

The Council's premise is that mineral exploitation in Western Sahara could be acceptable if done in accordance with the interests of local population and for their benefit. The Council's assessment was that the interests of the local population were not safeguarded by OCP's activities.

Within this context, the Council assessed whether it should be regarded as grossly unethical for companies to purchase phosphate from OCP under long-term contracts.
(Published 6 December 2011)

01.12.2010 **Recommendation to exclude Alstom SA**

The French company Alstom SA was recommended for exclusion because of the risk of gross corruption in its operations.

The Ministry of Finance did not exclude the company but rather put it on the observation list.
(Published 6 December 2011)

15.02.2011 **Recommendation to exclude Grupo Carso SAB de CV**

The Mexican company Grupo Carso SAB de CV was recommended for exclusion because of its involvement in the production of tobacco.
(Published 25 August 2011)

Companies the Ministry of Finance has decided to exclude from the Government Pension Fund Global

Cluster Weapons

- Alliant Techsystems Inc.
- General Dynamics Corp.
- Hanwha Corp.
- Lockheed Martin Corp.
- Poongsan Corp.
- Raytheon Co.
- Textron Inc.

Nuclear Weapons

- BAE Systems Plc.
- Boeing Co.
- EADS Co., including its subsidiary
  - EADS Finance BV
- Finmeccanica Sp. A.
- GenCorp Inc.
- Honeywell International Corp.
- Northrop Grumman Corp.
- Safran SA.
- Serco Group Plc.

Anti -Personnel Landmines

- Singapore Technologies Engineering Ltd.

Companies supplying arms or military equipment to Burma

- Dongfeng Motor Group Co. Ltd.

Tobacco

- Alliance One International Inc.
- Altria Group Inc.
- British American Tobacco BHD
- British American Tobacco Plc.
- Gudang Garam tbk pt
- Imperial Tobacco Group Plc.
- ITC Ltd.
- Japan Tobacco Inc.
- KT&G Corp.
- Lorillard Inc.

- Philip Morris Int. Inc., including its subsidiary
  - Philip Morris Cr AS
- Reynolds American Inc.
- Souza Cruz SA
- Swedish Match AB
- Universal Corp VA
- Vector Group Ltd.
- Shanghai Industrial Holdings Ltd.
- Grupo Carso SAB de CV

Human Rights

- Wal-Mart Stores Inc., including its subsidiary
  - Wal-Mart de Mexico SA de CV

Violations of the rights of individuals in situations of war or conflict

- Africa Israel Investments Ltd., including its subsidiary
  - Danya Cebud Ltd.

Environmental Damage

- Barrick Gold Corp.
- Freeport McMoRan Copper & Gold Inc.
- Vedanta Resources Plc., including its subsidiaries
  - Sterlite Industries Ltd.
  - Madras Aluminium Company Ltd.
- Rio Tinto Plc.
- Rio Tinto Ltd.
- MMC Norilsk Nickel
- Samling Global Ltd., incuding its subsidiary
  - Lingui Development Ltd.

Other particularly serious violations of fundamental ethical norms

- Elbit Systems Ltd.
- FMC Corp.
- Potash Corp. of Saskatchewan

Companies the Ministry of Finance has decided to put under observation

Gross corruption

- Siemens AG
- Alstom SA

Environmental studies

In the 2010 Annual Report, the Council announced that it would assess certain sectors and types of activities where the risk of severe environmental damage is considered particularly high. The Council will assess the following areas in the coming years:[1]

- some forms of oil production that cause major local pollution problems
- certain types of mining activities where waste disposal entails particular risks
- illegal logging and other particularly damaging forms of logging
- illegal fishing and other particularly damaging fishing activities
- some forms of particularly polluting coal-fired power production
- particularly polluting operations for smelting and processing minerals and metals
- certain types of chemical industries with emissions of pollutants that are particularly harmful to the environment and to public health
- particularly damaging dam projects
- activities with severe impacts on particularly valuable conservation areas (such as World Heritage Sites)

The purpose of such assessments is both to identify issues that constitute a particular environmental risk, and to identify companies in the Government Pension Fund Global (GPFG) with activities in these sectors. It is not yet known how many of these assessments, if any, will result in recommendations for exclusions or observation. The threshold for exclusion is high; only a small proportion of the Council's work results in recommendations and is made public. Studies initiated in 2011 covered, *inter alia*, the following areas: oil production that causes major local pollution problems; mining activities where waste disposal involves particular risks; illegal logging and other particularly damaging forms of logging; illegal fishing and other particularly damaging fishing activities; particularly damaging dam projects; and activities with severe impacts on particularly valuable conservation areas. These assessments will be continued in 2012 and are briefly presented below.

Oil production and pollution

In 2011, the Council continued existing assessments and initiated new ones in areas where oil production may result in particularly large risks of pollution. Assessments of oil pollution in Nigeria's Niger Delta[2] continued throughout 2011, and the Council assesses a limited number of companies involved in onshore oil production. For a number of years, onshore oil production has resulted in frequent oil spills and major impacts on the environment and local communities in many areas.

Towards the end of 2011, the Council started the initial assessment of companies involved in oil production based on oil sands. The Fund is invested in more than 30 companies that have ownership interests in oil sands operations. The Council's assessments will, among other things, cover land take, water use, pollution of air, soil and water,

impacts on particularly valuable biodiversity, and impacts on aboriginal peoples and other local communities.

Mining activities where waste disposal involves particular risks

The handling of mining waste is a very important environmental challenge for mining activities. In 2011, the Council considered issues associated with sub-marine and riverine tailings disposal, various issues associated with uranium mining and various other mining-related issues. Part of this work is described further on pages 20–24 in this Annual Report.

The Council is currently not aware of any mining companies in the Fund that are involved in large-scale riverine tailings disposal. The Fund is invested in just over a handful of mining companies practicing large-scale sub-marine disposal of waste rock or tailings. The Council's further considerations will cover a range of impacts on marine ecosystems (for example coral reefs, fish, benthic organisms) and local communities dependent upon them.

The Council has carried out an initial assessment of several uranium mines. The Fund is invested in a few mining companies with ownership interests in uranium mines. Many environmental issues are common for uranium mines and other types of mines. However, in one important area uranium mines distinguish themselves from other mines. While virtually all types of mining pollution can be managed with appropriate processes and clean technologies that remove or neutralize pollution, there are no equivalent methods to remove radioactive radiation from mine waste because the decay of radioactive isotopes cannot be halted. This requires extra efforts to avoid that substantial quantities of radioactive material come into contact with the environment and local communities, an aspect the Council will emphasize in its assessments.

Illegal logging and other particularly damaging forms of logging

The Council has carried out studies which have identified companies in the Fund that are involved in logging or the conversion of tropical forests to plantations in Southeast Asia and Africa. The Council has so far not focused on Latin America, as companies in the Fund to a lesser degree appear to be directly involved in the logging and clearing of tropical forests in these parts of the world. In total some 40 companies in the Fund seem to be involved in logging operations or plantation development in Southeast Asia and Africa. There is a clear impression that timber harvesting is becoming less important in Southeast Asia. On the other hand, there is a significant growth in the development of plantations – particularly for the production of palm oil and timber – where Indonesia and Malaysia are the most important countries. The development of plantations at the cost of forest land is also an important issue in a number of African countries, including DRC, Congo and Liberia. The Council is in the process of researching individual companies further.

Illegal fishing and other particularly damaging fishery activities

The Council has carried out at a study to determine what may constitute particularly damaging fishery activities. The Council has also mapped companies in the Fund that are involved in fishery activities. In this context fishery activities are defined as encompassing the whole

value chain, from fishing, to the transportation, purchasing, selling and processing of fish. More concretely it includes companies that own fishing vessels or vessels for the transshipment and transport of fish from fishing grounds to ports, port companies and buyers of fish such as fish processing companies. In total the Fund is invested in about 100 companies that are involved in fishery activities, of which less than 10 are involved in actual fishing. Whether fishing leads to severe environmental damage is a complex issue which depends on a whole range of factors: which species and stocks are being caught, the catch volume, the fishing gear that is being used, where fishing is carried out and how fishing stocks are managed. The Council will carry out further research aimed at assessing whether companies in the Fund are involved in illegal, unreported and unregulated fishing (IUU-fishing), but also other forms of environmentally damaging fishing activities will be considered.

Particularly damaging dam projects

The Council began looking at several dam projects towards the end of 2011 in order to identify a limited number of potentially highly-damaging large dam projects for further assessment. A substantial number of companies in the Fund's portfolio have ownership interests in large dam projects. The Council will focus on environmental impacts on upstream and downstream ecosystems, including forests, freshwater and fish stocks, wetlands, protected areas and threatened species. Impacts on people living in these areas will also be considered, for instance how involuntary resettlement is implemented and to what extent people's livelihoods are maintained.

Impacts on particularly valuable conservation areas

In 2011, the Council carried out an initial assessment to indentify companies' activities where there is a risk of causing severe impacts on protected areas. Initially the Council has focused on World Natural Heritage Sites and the countries that have ratified the UN World Heritage Convention.[3] The Council will later also consider other types of particularly valuable protected areas. About ten companies have so far been identified for further consideration and potentially more detailed assessments. The Council considers impacts from activities both within and in the vicinity of protected areas. The considerations emphasize the relationship with the protected areas' conservation objectives and existing frameworks (such as management plans) for the management of the protected areas.

Endnotes

1 For more information, see the Council on Ethics' 2010 Annual Report, pages 21–22.

2 See the Council on Ethics' 2009 Annual Report, page 6.

3 Almost 190 countries have ratified UNESCO's World Heritage Convention. Globally, there are about 210 natural and mixed natural and cultural heritage sites.

Mining and tailings

Mining and environmental issues

Minerals and metals are essential in modern societies, and mining ensures access to these. Meanwhile, the mining industry has long lacked trust among some groups in society due to environmental damages and negative impacts on local communities and public health. During the last decades, however, an increase in environmental awareness and competence has taken place in major parts of the mining industry. New standards and goals are being introduced nationally and internationally, while companies have implemented measures to achieve these as well as their own goals. Progress in technologies for production and treatment, as well as tailings management, has made it possible to improve environmental conditions at many mining operations. Parts of the mining industry have also gone further than other industries, for instance by designating UN World Heritage Sites[1] as "no-go" areas for exploration and mining. Also other groups of protected areas may be considered in such a context. On some issues, however, there is a long way to go.

For the Council on Ethics, it is important to identify operations with an unacceptable risk of severe environmental damage.[2] The threshold for recommending the exclusion of companies from the Government Pension Fund Global (GPFG) is high. The Council has previously assessed a number of mining operations and several are still under consideration. In a small number of instances this has resulted in a recommendation to exclude companies from the Fund.[3] Some experiences from the Council's work on mining issues are summarised below.[4]

Some important issues

The management of mining waste, particularly tailings disposal and at times the management of waste rock and process water, is often the most challenging environmental issue associated with mining. The inadequate handling of tailings may result in severe and long-term impacts on ecosystems and local communities, conflicts, legal processes and compensation claims.

Tailings, which remain after the valuable parts of the ore have been extracted, are often placed in land-based deposits. Deposits may cause acute or chronic environmental damages due to pollution from heavy metals, process chemicals or other substances, both during and after the mining activities. The Council considers to what extent the deposits result in severe pollution for the environment or public health. The Council typically collects information from companies and other parties regarding the treatment or neutralisation of various toxics, the water balance of mining operations, companies' own monitoring of tailings facilities and other infrastructure, water quality in river systems, etc. In addition to issues associated with normal operations, there may be severe impacts in case of failure in a tailings storage facility that results in the release of tailings and harmful substances. Historically, tailings dams have had a higher frequency of failures than for instance hydropower dams. Studies of dam failures show that many could have been avoided through better construction and management.

Some methods of tailings disposal, such as riverine tailings disposal and sub-marine tailings disposal, have had particularly severe impacts and are therefore controversial. Certain types of mining also entail unique challenges associated with tailings, such as uranium mining and management of radioactivity. Some issues associated with riverine and sub-marine tailings disposal and uranium mining are described briefly below.

Riverine tailings disposal

The disposal of tailings in river systems is currently a rarely used method and is usually justified by the risk of landslides, heavy rainfall or seismic risks associated with tailings storage facilities. Riverine tailings disposal is a technically simple and cheap way to dispose of tailings, particularly if costs associated with negative environmental and socio-economic impacts and future risks are not included. Damages from previous cases of riverine tailings disposal are well documented, for instance massive environmental impacts caused in the King River, Tasmania, Australia and the Kawerong–Jaba river system, Bougainville, Papua New Guinea. Very few countries currently allow riverine tailings disposals. International guidelines advice against the method, which some companies have declared they will abstain from using. In the event that no appropriate option for land based tailings storage is found, the ore body may not be possible to mine and process in a responsible manner with current technologies.

Experiences show that environmental damages arise partly as a result of the large volumes of tailings disposed and partly due to the chemical properties of the tailings. Disposal of millions of tons of tailings can fill up rivers and completely alter natural river systems. Tailings are often deposited outside the original river course and may destroy large areas of primary forest, agricultural lands or other areas. The tailings may also be transported to lakes or the sea. This can cause damages to coral reefs and reduce the production of fish and crustaceans. It may also cause sedimentation, substantially reduced water quality and biological production, as well as elevated levels of toxics that impact ecosystems and people who use the ecosystems.

It is sometimes claimed that tailings are just sand like the sediments already found in rivers. The fact is that recently crushed and milled ore has different chemical and physical properties than natural sediments in rivers. Crushing and milling of ore release heavy metals (for example arsenic, cadmium, copper, lead, mercury). The metals may be toxic, they may accumulate in organisms and sediments and the tailings may contain process chemicals (for example cyanide, acids). This may result in damages to ecosystems and people's livelihoods and health, also for a long period after mining ended. Small particles from recent milling will usually also have physically distinct properties, such as much sharper edges which may cause damage to gills on fish and benthic organisms. It is well documented that riverine tailings disposal may result in severe and long-term impacts on people and the environment.

At present, the Council is aware of three mines practicing large-scale riverine tailings disposal (Grasberg, Indonesia, and Ok Tedi and Porgera, Papua New Guinea). The GPFG is currently not invested in mining companies that own these mines. Should the Council be made aware of other companies practicing large-scale riverine tailings disposal, the

relevant operations will be considered in relation to the ethical guidelines. The Council follows the developments in this area.

Sub-marine tailings disposal

Sub-marine tailings disposal is also a controversial practice. As with riverine tailings disposal, this is a cheap and technically relatively simple way to dispose of large volumes of tailings. The justifications for using sub-marine tailings disposal are mainly as for riverine tailings disposal. There is not much independent research on – or documentation of – the impacts of sub-marine tailings disposals. In some instances, severe damages to coral reefs and fish and the spreading of toxics are nevertheless documented, for instance at the former Marcopper and Atlas mines in the Philippines where tailings were disposed in relatively shallow waters.

Experience shows that the disposal of millions of tons of tailings destroys the natural seabed in substantial areas during operation and for periods following the closing down of operations. Most of the tailings will settle in thick layers relatively shortly after disposal. Fine particles, chemicals, heavy metals and other pollution may spread with currents and impact larger areas, causing reduced biological production and toxic effects. It is difficult to limit the extent of impacted areas. Often, impacted areas are larger than originally predicted and the environmental impacts have often been underestimated. This is one of the reasons why several international guidelines recommend not using sub-marine tailings disposal. Many countries do not accept the practice.

Sub-marine tailings disposal is used by a limited number of mining operations, for instance in the Asia / Pacific Region. Active operations in countries such as Indonesia and Papua New Guinea release tailings at greater depth than the operations in the Philippines mentioned above. When pipelines release tailings at depths greater than 100 m, the risks of severe damages in shallow waters are reduced. Nevertheless, experience shows that this is no guarantee. It is important that the location of the pipeline outlet is permanently deeper than the layer called the pycnocline, which due to differences in temperature and salinity acts like a barrier against the mixing of water above and below the pycnocline. Adequate depth of the pipeline outlet can prevent tailings from reaching the shallow and most productive waters. Instead, tailings are spread across a large area at greater depths. Experience nevertheless shows that in addition to extensive damages in deeper waters, the tailings disposal may also impact more shallow areas, for instance due to pipeline breakage or if the pipeline outlet is inappropriately located in relation to the depth of the pycnocline, which varies through the year.

The Council has identified mining companies in the Fund that practice sub-marine tailings disposal. The Council will review the relevant mining operations.

Uranium mining

Uranium ore is found in economically viable quantities in a limited number of countries, and there are relatively few listed companies producing uranium. Most environmental issues associated with uranium mining are the same as for other types of mining (for examples pollution by heavy metals and process chemicals). These issues may be serious

enough for the Council to carry out assessments. In one important area, however, uranium mining is a special case, namely the problem of radioactivity. Radioactive radiation associated with uranium mines requires additional measures to avoid potentially severe and long-term impacts on the environment and local communities.[5] The Council has noted that, despite these issues, there is often very limited reporting by uranium mining companies on these issues to the public.

Radioactive radiation from uranium mining is not acutely harmful and is rarely noticeable without specialised instruments. It may take decades before severe health and environmental impacts, such as cancer that may result in death, are proven. A very long half life[6] for several radioactive substances means that radiation will continue for centuries, in some instances more. This is longer than tailings storage facilities are built to last. Follow-up and monitoring of storage facilities is a long-term task. Currently there are very few uranium mines that have been completely cleaned-up, remediated and reverted to "normal conditions", which shows the complexities of the challenges.

The processes that cause radioactive radiation cannot be stopped once the ore is brought to the surface and is processed to uranium and finely ground tailings. It is important to be aware that the three naturally occurring forms (isotopes) of uranium themselves are not particularly radioactive due to long half lives.[7] The majority of the uranium is removed during processing. The majority of radioactivity remains in the tailings in the form of radioactive progeny from past uranium decay, for instance radium or radon.

Some radioactive substances can be dissolved in water and pollute ground water, rivers and lakes unless adequate measures are put in place to manage tailings and water. Radon gas, produced during the radioactive decay of radium, can be spread through air and water in substantial areas around tailings storage facilities. The same may be the case with radioactive dust from tailings deposits. The failure or collapse of tailings storage facilities can result in the release of radioactivity and other pollution. Issues like these should be considered in a specific manner for uranium mining operations as they may be severe and long-term.

In some countries (for example Australia, Kazakhstan, USA) a method called "in-situ leaching" (ISL) is used to produce uranium. The ore remains underground. An acidic or alkaline solution with process chemicals is pumped into the ore body through injection wells. A solution with dissolved uranium is pumped to the surface through production wells and then processed. Tailings storage facilities are avoided, but other important problems and risks associated with, for instance, the severe pollution of large ground water reservoirs and their subsequent restoration, are main issues. These issues should also be considered specifically for each mining operation in question. Frameworks and practices for ISL vary from country to country.

The Council has identified mining companies in the Fund that are involved in uranium mining and will review the relevant operations.

Some lessons

One important lesson from the Council's work is that companies that consider riverine or sub-marine tailings disposal to a larger extent should carry out thorough and objective

analyses of alternative methods of disposal. The analyses should be made available in a manner that ensures transparency and confidence in recommendations and decisions. The lack of such analysis contributes to doubts as to whether the selected solutions for tailings disposal take into account environmental and local community issues in an adequate and responsible manner. In order to be credible, analyses should, among other things, include adequate technical, geophysical, environmental, social and economic assessments.

Another important lesson is that large-scale riverine and sub-marine tailings disposals result in the spreading of potentially harmful tailings over large areas. It has been the norm, rather than the exception, that the impacts of such disposals have been more extensive than predicted – at times much more so. In reality, the tailings cannot be controlled, treated or collected if serious or unexpected impacts are identified after the disposal. In some instances, disposal represents large-scale experiments without adequate options to reverse the situation. This means there should be strict requirements to the knowledge base, comprehensive studies prior to the disposal, adequate monitoring during and after operation, and effective mitigation measures.

A third lesson, also important for uranium mining, is the importance of monitoring during and after disposal on the basis of adequate pre-project (baseline) studies. Large potential damages and high risks mean that the monitoring of all important issues should be based on scientifically accepted methods and independent verification. Experience shows that in several instances monitoring has omitted important issues, been methodologically weak so that actual impacts have not always been documented, or baseline studies have been so incomplete that it is hard to track changes caused by disposal. Limited transparency in terms of monitoring methods and data also reduce the public's confidence in the responsibility of companies' behaviour.

Endnotes

1 The International Council on Mining and Metals (ICMM) has committed to not explore or mine in UN World Heritage Sites. More than 20 of the world's largest mining and metals companies are ICMM members (see www.icmm.com).

2 The Council also considers health and safety issues, human rights, etc. associated with mining operations. However, this article only covers environmental issues and tailings.

3 See www.etikkradet.no for an updated list of excluded companies and companies under observation.

4 Many oil sands operations are mining operations. Such operations are not included here even though the disposal of tailings is a main issue for such operations.

5 Radioactive radiation also requires extra measures in terms of health and safety, but these issues are not covered here.

6 The half life is the period of time it takes for the amount of a radioactive substance undergoing decay to decrease by half. The half life varies from fractions of a second to billions of years. Radioactive radiation is emitted during the decay.

7 Half lives of the three uranium isotopes: uranium-234 (^{234}U) 4.5 billion years, uranium-235 (^{235}U) 700 million years and uranium-238 (^{238}U) 250 000 years. Longer half life means smaller frequency of decay and less radioactive radiation.

Survey of accidents in the coal industry in China and Russia

Coal production has increased substantially around the world in recent years. This increase has been greatest in China, which now accounts for nearly half of the world's coal production, followed by the United States and India. Operations in underground coal mines are particularly susceptible to accidents, as the combination of methane gas and coal dust entails a significant risk of explosion and fire.

The extent of the Fund's investments in the coal industry has also increased. For example, the number of Chinese coal companies in the GPFG portfolio has risen from six companies at the end of 2008, to 27 at year-end 2011.

In 2010, the Council on Ethics decided to investigate the extent of fatal accidents in companies in the coal industry in China and Russia. The reason for this was a number of reports of accidents in this industry in general and in these countries in particular. In China, 260 people were killed in a single mining accident in 2008. In Russia, 90 people lost their lives in an accident in 2010.

The challenge for the Council on Ethics is determining which companies have a higher probability of these kinds of accidents taking place. Past accidents may provide an indication of future risk, but it can also be the case that companies that have experienced accidents in the past will take steps to improve their control of operations. The Council on Ethics has therefore looked at accident statistics over several years to assess whether there is a pattern indicating that some companies are particularly susceptible to accidents.

China:

The Council on Ethics has charted the number of deaths due to accidents and the production of coal for all the Chinese coal companies in the GPFG portfolio during the years 2008, 2009 and 2010. Using this data, the Council then calculated the number of casualties per million tonnes of coal produced.

The Council on Ethics has obtained information about the number of casualties and the companies' production volumes for the years 2008, 2009 and 2010 from a broad range of public sources, including companies' annual reports and various government agencies and industry organisations. This information was then compared with similar data for the coal industry in China. The purpose of this survey was to see whether any of the companies stood out as particularly problematic over several years. If so, this would give rise to further surveys of these companies.

In 2008, one company stood out as particularly problematic, both compared with the other companies in the survey and with the industry at large. This was due to a single accident with many fatalities. In 2009, significantly fewer deaths caused by accidents were reported in the company, and in 2010 no fatalities were reported for the company.

In 2009, the companies in the GPFG portfolio did significantly better than the average for the industry. Nevertheless, two companies scored relatively poorly compared with the

other companies in the portfolio. However, these companies scored significantly better than the other companies in 2008, and had no reported deaths in 2010.

The companies that did relatively poorly in 2010 had been among those with the fewest accidents in the previous two years.

Several companies reported no fatal accidents in one or more of the last three years. There is probably some under-reporting of accidents, especially as concerns accidents with few injuries and fatalities. There is also the possibility that accidents have been reported, but are not reflected in the publicly available material.

In general, the Chinese coal companies in the Government Pension Fund Global are above the average for the rest of the industry in China, which comprises several hundred companies. One reason for this may be that the Fund has invested in the largest companies in the industry. It is generally assumed that large companies have more resources to invest in technologies and systems to reduce the risk of accidents.

Russia:

Five Russian companies were studied in the period 2008 to 2011. The survey did not identify any clear pattern indicating that one or more of the companies had a systematically higher number of fatalities in accidents or particularly hazardous working conditions. The study showed that the number of fatal accidents in Russia was well below the level in China, although still significantly higher than in the United States and India. The accident in May 2010 set accidents in coal mines on the agenda in Russia. It seems that Russian authorities are tackling the problem both through legislative amendments and by improving their supervision of the coal industry.

It is likely that serious accidents will occur in coal companies in the GPFG portfolio in the future too, but it is difficult to predict which companies are the most susceptible. It is also difficult to determine whether a risk of this kind can in itself be said to constitute a violation of the Fund's ethical guidelines.

Book about human rights, corporate complicity and disinvestment

In the fall of 2011, Cambridge University Press published a book based on the work of the Council on Ethics. The book, titled Human Rights, Corporate Complicity and Disinvestment, is edited by former and current members of the Council on Ethics Gro Nystuen, Andreas Føllesdal and Ola Mestad.

The background for this book was the Council's wish to discuss and bore deeper into the issues concerning the relationship between violations of human rights in which listed companies may be involved, and the role of institutional investors. The first step was an international conference in Oslo in 2006 where philosophers and legal experts discussed different approaches to the topic. This resulted in the idea of writing a book, for which some of the speakers were asked to author chapters. The book has ten contributors: two philosophers; seven legal experts, including one who is also educated as a philosopher; and a political scientist. Several of the contributions are also interdisciplinary. The authors work in Singapore, the United States, Switzerland, Belgium and Norway. A permeating theme is the question of investors' ethical or legal complicity for violations of human rights.

Gro Nystuen, Associate Professor at the Norwegian Defence University College, former diplomat and Head of the Council from 2004 to 2011, writes about the Ethical Guidelines for the Government Pension Fund Global and how the concept of complicity has been understood *de facto* by the Council in light of concrete decisions. Based on the understanding that states are directly responsible for violations of human rights, she treats how companies can contribute to said violations. Professor Simon Chesterman, New York University in Singapore, provides a critical analysis of the reasoning behind complicity in the decisions of the Council on Ethics. He discusses whether this practice will lead to the development of legal norms, or whether it instead will function as a substitute for these.

Professor Christopher Kutz, University of California-Berkely, treats the ethical problems arising from the separation of ownership and management in modern corporate capitalism. This raises questions around what he calls agent-problems – the responsibility of being complicit in this kind of situations. This is particularly relevant when the owners are funds, and even more so when the funds are state-owned. Ola Mestad, professor and current Head of the Council, takes a closer look at the problem of complicity in relation to complex companies with extensive, trans-boundary corporate relationships, as well as other corporate organizational forms such as the problem of supply-chains and joint-venture structures.

A recurrent problem is the long distance between the corporate entity accused of contributing to the violation of human rights, and the corporate group in which the fund owns shares. Professor Urs Gassers, Harvard University, analyses the complicity of companies within what is referred to as their "sphere of influence" by the UN's Global Compact, among others. This is done theoretically as well as in regards to how the concept is used in practice in companies' codes of conduct.

Andreas Føllesdal, Council member (2004–2010) and professor at the University of Oslo, discusses the question of whether investors should refrain from investing in certain companies for ethical reasons. The theory of social contract he develops gives a positive answer to this question. A follow-up to these questions and to Christopher Kutz' discussion is provided by Helene Ingierd, Head of Secretariat for The National Committee for Research Ethics in Science and Technology, and Henrik Syse, Senior Researcher at the Peace Research Institute Oslo and Head of Corporate Governance at Norges Bank Investment Management (2005–2007). They map out the practical implications for institutional investors of ethical responsibilities regarding violations of human rights. Among other things, they point to the responsibility of institutional investors to carry out their ownership in such a way as to influence companies, rather than excluding them from the investment portfolio.

Bruno Demeyere, PhD candidate at the Leuven Centre for Global Governance Studies in Belgium, analyses sovereign wealth funds and the question of complicity in violations of human rights from the perspective of international law, both generally, wherever no such liability exists, and specifically where responsibility may be said to result from a treaty. Andrew Clapham, professor at the Graduate Institute of International and Development Studies in Geneva, discusses the concept of complicity for companies from the perspective of recent developments in international penal law and how this will affect discussions of the ethical and legal responsibility of companies for human rights violations.

Collectively, the book provides both an overview over the main ethical and legal questions concerning the complicity of stockholders in the role of corporations in human rights violations, and several in-depth analyses which advance the discussion. In particular, the use of examples from the recommendations of the Council on Ethics provides a concrete basis for discussion which is often lacking in other contributions to the subject.

Further information on the book is available on Cambridge University Press' homepage.[1]

Endnotes

1 See www.cambridge.org/9781107012851.

The recommendations and letters on exclusion and observation

To the Ministry of Finance
Recommendation – 26 May 2010
(Published 6 December 2011)
(Unofficial English translation)

Recommendation on the exclusion of PetroChina Co. Ltd.

Innhold

1 Introduction

This recommendation concerns the risk of contributing to human rights violations in connection with the construction of two oil and gas pipes in Burma by the Chinese company China National Petroleum Corporation (CNPC). The Government Pension Fund Global (GPFG) invests in PetroChina Co. Ltd., a subsidiary of CNPC. As of 31.12.2009, GPFG owned shares in PetroChina worth some USD 92 million, corresponding to an ownership of 0.03 percent. CNPC owns 86.71 per cent of PetroChina's shares. The Council on Ethics has evaluated whether PetroChina contributes to ongoing and future violations of human rights in connection with the construction of the pipelines in Burma through its close ties to CNPC.

Ever since the Council submitted its recommendation in November 2005 concerning the activities of the French company Total in Burma, the Council has closely observed companies with operations in the country.[1] Total was the operator of an international consortium which was responsible for the construction of the so-called Yadana-pipeline in 1995–98. Associated with the preparation of the pipeline corridor and the construction of the pipeline, the Burmese military committed extensive and severe abuses against local people, including the forced relocation of villages, forced labour, torture and killings. In the Council's view there are a number of similarities between the Yadana project and the project referred to in the present recommendation, both with regard to the type of project, the use of military forces, and the risk of human rights violations.

In October 2007 the Ministry of Finance requested that the Council on Ethics account for the Council's research on companies with operations in Burma. In its response to the Ministry, the Council states: "*If companies in the Fund's portfolio were to enter into contract agreements regarding the construction of such pipelines, the Council may recommend the exclusion of these companies already from the time of entering into the agreements. Because such undertakings would most likely involve an unacceptable risk of contributing to human rights violations, it is not considered necessary to wait until the violations actually take place.*" [2]

In this specific case, the point of departure is that the governments of China and Burma signed an agreement on 27 March 2009 to build two onshore pipelines: A gas pipeline which will carry gas from the Shwe field and a parallel crude oil pipeline for the transportation of oil. The Burmese part of the pipeline route is close to 800 km long and will traverse central Burma, from the town of Sittwe to Yunnan-province in China. It was also made clear that CNPC and MOGE, a Burmese state-owned company, will have 50.9 and 49.1 per cent share respectively in the project. On 20 December 2009, representatives of CNPC and the Burmese Ministry of Energy signed an agreement on the rights and obligations concerning the pipeline. According to the agreement, CNPC shall build, own and operate the pipeline, while the Burmese government shall ensure its security.

The pipeline will pass through areas populated by ethnic minorities where extensive use of forced labour and severe human rights violations have been reported. There have also been reports of increased militarization along CNPC's pipeline corridor. The Council assumes that the construction of a nearly 800 km-long pipeline through areas inhabited by a number of different ethnic groups will entail serious or systematic human rights violations. As the Burmese government will be responsible for the security of the project, it is highly

probable that CNPC, through its involvement in the project, will contribute to human rights violations. Although it is the Burmese government and not the company which in principle commits the violations, there is a link between the violations and the company's operations insofar as the violations take place to facilitate the company's operations.

Seeing that the Fund owns shares in PetroChina but not in CNPC, it is necessary to consider whether also PetroChina contributes to the human rights abuses through it relationship with CNPC . The Council, therefore, has evaluated the corporate structures of PetroChina and CNPC and the relationship between the companies. The Council has found PetroChina's position in relation to CNPC to be so particular that PetroChina can be said to contribute to human rights violations in Burma.

In accordance with the Fund's guidelines for the observation and exclusion of companies, the Council's draft recommendation was sent to PetroChina for comments on 26 March 2010. As of 26 May 2010, PetroChina has not responded to the Council.

In its assessment of whether PetroChina may contribute to the human rights violations through its relationship with CNPC, the Council has stressed the following aspects pertaining to the company group: It is a fundamental starting point that the main part of the operations of the CNPC company group are carried out by PetroChina. PetroChina is responsible for more than 80 per cent of the income of the CNPC company group and the equivalent of 70–80 per cent of the company group's total oil and gas production.

CNPC's entire management are members and constitute the majority of PetroChina's board. Four members of PetroChina's top management concurrently have senior management positions in CNPC. Furthermore, most of PetroChina's departments are headed by individuals with identical positions in the parent company. This is extraordinary in all kinds of corporations. The leading persons of PetroChina are at the same time the leading people of CNPC, which means that the companies are under common management.

Executives in both companies are appointed by structures outside the corporate structure – including the so-called Leading Party Members' Group of the company group. The entire CNPC senior management, the same individuals who make up the majority of PetroChina's board, are also members of the Leading Party Group of the company group. The concurrence of identities between members of the management and administration suggests that the Leading Party Member Group views the company group as a whole, and that leaders are selected on the basis of an overall assessment of the needs of both CNPC and PetroChina

Finally, there appears to be a considerable coordination of operations within PetroChina and CNPC, including the transfer of assets from CNPC to PetroChina. The Council finds it noteworthy that only CNPC may enter into production-sharing agreements with other states. CNPC can, however, transfer these agreements to PetroChina after some time. It is well-known that CNPC has negotiated state-to-state deals, like those with Sudan and Burma. It is also known that CNPC after some time has transferred such deals to PetroChina, for example in Kazakhstan and Turkmenistan.

Based on an overall assessment of the governance issues outlined above, the Council concludes that the management of PetroChina and CNPC is so uniform, and the operations of PetroChina so significant within the company group, that CNPC's activities

in Burma should be perceived as directed by PetroChina's management in that which pertains to §2 of the ethical guidelines. Concerning the question of the risk of contributing to human rights violations, the companies should be perceived as one single unit insofar as CNPC's activities in Burma cannot be separated from PetroChina's operations.

Based on this, the Council has reached the conclusion that the Fund's investment in PetroChina entails an unacceptable risk of contributing to ongoing and future, serious or systematic violations of human rights in connection with the construction of the pipelines in Burma.

The Council therefore recommends the exclusion of PetroChina from the Norwegian Government Pension Fund Global's investment universe.

2 Sources

The Council has commissioned its own research to clarify the factual relationship between PetroChina and its parent company, CNPC. The recommendation is mainly based on this research. Regarding human rights violations, the Council has communicated with a number of civil-society organisations which carry out fact-finding activities in Burma. The Council has also made use of publicly available sources.

Sources are referred to in endnotes throughout this recommendation.

3 The Council's considerations

In accordance with section § 2, section three letter a of the Fund's guidelines for the observation and exclusion of companies, the Council has assessed whether an unacceptable risk exists of PetroChina being complicit in serious or systematic human rights violations through the activities of its parent company in Burma. The assessment is based on whether there is a direct link between the company's activities and the violations of human rights in question.

The Council is familiar with allegations voiced against CNPC of contributing to human rights violations in Sudan. The Council has not assessed this.

As advanced in the Council's letter to the Ministry of Finance dated 12 December 2007,[3] the Council has recommended the exclusion of PetroChina based on the understanding that the construction of an onshore pipeline in Burma carries an unacceptable risk of the company contributing to serious violations of human rights in the future. CNCP has entered into an agreement with the Burmese government to construct the pipeline, and in this case the Council does not consider it necessary to wait until the violations actually take place before issuing a recommendation.

In the present recommendation, the Council has in particular assessed whether a subsidiary can be complicit in the unethical activities of its parent company. Normally a subsidiary cannot be held accountable for the actions of the parent company. The Council on Ethics works under the premise that the exclusion of companies for activities that are contrary to the ethical guidelines can only take place when the company in which the

Fund owns equity is itself – or through its ownership or other controlling positions – involved in the unethical activity. One consequence of this interpretation of the guidelines is that whenever the Fund owns equity in a company which is itself a subsidiary of the leading group company, only the actions or omissions which can be attributed to the company in which the Fund owns equity will provide grounds for exclusion.

In this case however, the Council has found the connection between the parent company and its subsidiary to be so close that the two companies can be regarded as a unit, making the subsidiary complicit in the parent company's actions. The preparatory work for the ethical guidelines emphasises that the company's legal structure cannot be decisive in the ethical assessment of complicity, including cases where " *the links between a company in the Petroleum Fund's portfolio and a company where there is an ethical risk are so close that the two can be identified with each other.*" And furthermore: " *Factors that could be decisive for such identification are the size of the ownership interests, whether the companies act as one externally, and whether shareholdings in one of the companies have implications for the other. Even if there is no identification, it may still be reasonable to argue that complicity exists.*" [4]

The Council considers the views of the Graver committee as guidance, but also considers other factors to be pertinent to its assessment of whether ownership in a subsidiary can be regarded as equivalent to ownership in the parent company. This would be the case if it could be proven likely that the real power over the parent company lays in the leadership of the subsidiary, or that the businesses of the two companies and their respective subsidiaries are so intertwined as to make them inseparable from each other in reality.

4 The construction of the pipelines and violations of human rights

4.1 THE CONSTRUCTION OF THE PIPELINES

On 27 March 2009, the Chinese government signed an agreement with the Burmese government for the construction of two pipelines: a pipeline for the transport of gas from the Shwe-field on the west coast of Burma to China, and a parallel oil pipeline.[5] The oil pipeline will carry crude oil that is currently transported by ship from the Middle East and Africa.

Both pipelines will start from the port of Kyauk Phyu in the Rakhine (Arakan) State, on the west coast of Burma, and will cross the Chinese border at Ruili in China's Yunnan province.[6] An estimated 800 km of the pipelines will traverse Burmese soil. [7] The oil pipeline will end in Kunming, the capital of Yunnan Province, and have an annual capacity of 22 million tons of crude oil. It is expected that the gas pipeline will go through Kunming and end up in Nanning, the capital of the Guangxi Zhuang Region.[8] The pipelines are expected to be completed by 2013.

PetroChina has gained the distribution rights of the gas in China's Yunnan province[9] and is currently planning the construction of an oil refinery in Kunming to receive the oil from the pipeline.[10]

On June 16 2009, CNPC informed that the company's Vice President Liao Yongyuan and Burma's Ambassador to China had signed a memorandum of understanding making

CNPC responsible for the construction, operation and management of the pipeline from Burma to China. In addition to the pipeline, CNCP will also build a large-scale crude oil unloading wharf and a terminal at Kyaukryu port, with oil storage and transportation facilities. [11] The construction costs are expected to amount to USD 1.5 billion for the gas pipeline and USD 1 billion for the oil pipeline. CNPC and MOGE's shares in the projects are 50.9 and 49.1 per cent respectively, but CNPC will carry all the costs of the project.[12]

On 20 December 2009, representatives of CNPC and the Burmese Ministry of Energy signed an agreement on the rights and obligations relating to the oil pipeline, granting CNPC exclusive rights to build and operate it. CNPC's press release confirms that: *"The agreement explicitly defines the obligations of the CNPC-holding Southeast Asia Crude Pipeline Company Ltd. and the rights authorized by the Myanmar government to the company. According to the agreement, the Southeast Asia Crude Pipeline Company Ltd. is endowed with franchise rights of the Myanmar-China Crude Pipeline, and will be responsible for the construction and operation of the pipeline. The company also has related rights of tax remission, crude transit, import and export customs clearance and right-of-way operation".* This shows that CNPC's subsidiary Southeast Asia Crude Pipeline Company is responsible for building and operating the pipeline. Furthermore the press release states that: "*The agreement also stipulates that Myanmar government shall ensure the company's ownership and exclusionary right to the pipeline and guarantee the safety of the pipeline."* [13] Thus CNPC confirms that the Burmese authorities shall ensure the company's ownership to the pipeline and guarantee security. The Council assumes that this applies to the construction period as well as to the operation of the pipeline.

The Council therefore assumes that, as with similar pipeline projects previously, the Burmese government will be responsible for the preparation of the pipeline corridor and the security for the pipeline, thereby facilitating the company's operations.

4.2 HUMAN RIGHTS VIOLATIONS

The Council anticipates that human rights violations associated with the construction of the pipelines can be expected to resemble those which took place before and during the construction of the Yadana-pipeline in 1995–1998, where Total was the operator. [14] In parallel with the increased militarisation of the area, there were numerous reports on extensive violations committed against the local population, including accusations of forced labour, the forced relocation of villages, torture, killings and rape. The violations were perpetrated by the Burmese military in connection with the clearing of the pipeline's corridor and the construction of the pipeline. Similar abuses have been reported in association with the construction of other pipelines and infrastructure projects.[15]

The onshore part of the Yadana-pipeline is 64 km long, while CNPC's pipelines will run for nearly 800 km in Burma. The pipeline will pass through 22 townships across central Burma, including the Arakan and Shan states, where there is an ongoing conflict between the regime and local ethnic groups. The ILO and NGOs have long reported that the Burmese military, present in these states, systematically uses forced labour. The extent of the abuses led the ILO to include both the Arakan and Shan states in its priority program for field observations in 2003.[16] The situation, however, has not improved. A detailed

report submitted by the International Trade Union Confederation (ITUC) to the ILO in 2007 documented the extensive use of forced labour in a number of states, including the Arakan and Shan states. The report states that the military forces local people to porter, construct and maintain military camps, provide services to the soldiers such as cooking and cleaning, as well as generate an income for the troops in agricultural or industrial projects owned by the military. Also the organisation Minority Rights International describes a similar picture: "*Military and other government authorities are persistently reported as still engaged in 2006 and 2007 in patterns of gross violation of human rights, including forced labour, conscription, arbitrary detention, torture, rape, sexual slavery and extra-judicial killings, especially in central and southern Shan State as the SPDC's armed forces engage the Shan State Army-South.*"[17] Also the US State Department's 2009 report on the human rights situation in Burma[18] and not least the report of the UN Special Rapporteur,[19] confirm that the military's unacceptable practice continues.

Considering that CNPC's pipeline is 15 times longer than the Yadana-pipeline, the Council finds it reasonable to believe that the human rights violations associated with the construction of CNPC's pipelines will be more extensive than those which occurred during the construction of the Yadana-pipeline.[20]

In September 2009, reports described an increased military presence along the CNPC-pipeline corridor. Apparently, close to 44 battalions (some 13,000 soldiers) are stationed along the pipeline's route, including areas inhabited by ethnic groups where the military previously has had no presence. [21] There are also reports that villages have been forcibly relocated and land has been confiscated on Maday Island in the Kyaukhpyu Township among others. [22]

In comparison, 16 battalions were deployed along the Yadana corridor between 1991 and 1996. The increased military presence was intended to secure the area and ensure full control over the local population, which was assumed to be essential for the development of the project.[23] Many villages were forced to relocate for the clearing of the pipeline corridor and for security reasons. According to the organisation *La Federation des droits de l'Homme* (FIDH), a total of 30,000 people living in the pipeline area were forcibly relocated.[24] The heavy presence of soldiers led to the extensive and systematic use of forced labour. Local people were required to build military camps and the necessary infrastructure for the construction work, including heliports, roads and other buildings, as well as clear land for the corridor itself. [25] Other accusations of atrocities on the part of the security forces against the civilian population include violence, torture and summary executions of what the military regarded as ethnic rebels, as well as punishment and violence in connection with the forced labour – not least against women and children.[26]

In the Council's opinion, nothing indicates that the present situation in Burma is any different from 20 years ago, when preparations for the Yadana-pipeline started. The reports of the UN Special Rapporteur and other sources confirm that the Burmese military's systematic abuses against the civilian population are extensive and follow the same pattern as before. The Council therefore assumes that the construction of CNPC's pipelines will entail severe and systematic human rights violations.

5 CNPC and PetroChina

5.1 CNPC AND PETROCHINA'S OPERATIONS

According to its website, CNPC is a state-owned, integrated energy company with businesses covering oil and gas operations, technical services, engineering and construction, equipment, manufacturing, financial services and renewable energy development. The company is China's largest oil and gas producer and supplier, and has oil and gas assets in 29 countries including Azerbaijan, Burma, Chad, Canada, Ecuador, Equatorial Guinea, Indonesia, Iraq, Libya, Peru, and Sudan.[27]

Since the restructuring of the CNPC company group in 1999 (see below), CNPC has engaged in crude oil and natural gas exploration and production outside China, as well as the limited production of chemicals and the retail sale of refined products.[28]

CNPC is entirely owned by the Chinese government. It is one of 132 companies that are managed by the State-owned Assets Supervision and Administration Commission (SASAC).[29] SASAC invests on behalf of the state and among other things is responsible for the appointment of top management in these companies: *"SASAC appoints and removes top executives of the enterprises under the supervision of the Central Government, evaluates their performances, and grants them rewards or inflicts punishments."*[30] SASAC is subject to the Chinese government (the State Council).

PetroChina is a public limited company established in November 1999 as part of the restructuring of CNPC. Virtually all of CNPC's core business and assets relating to the exploration, production, refining and marketing of chemicals and natural gas were transferred to PetroChina. CNPC retained assets relating to international exploration, production, refining and pipeline operations, as well as non-core assets such as hospitals and schools.[31]

Among the original 1.54 million employees of CNPC, about 1 million were retained by the remaining enterprise while the other 0.5 million were employed by PetroChina. PetroChina was listed on the Hong Kong and New York stock exchanges in April 2000, and on the Shanghai Stock Exchange in November 2007.

PetroChina states that it is *"the largest oil and gas producer and distributor, playing a dominant role in the oil and gas industry in China."* [32] PetroChina is involved in all key sectors in the petroleum and petrochemical industry *"from exploration and production of crude oil and natural gas in the upper stream to the refining, chemicals, pipelining and marketing in the middle and down stream"* [33] The company is also engaged in the construction and operation of oil and gas pipelines. PetroChina's main operations are in China, but the company also operates in 11 other countries.

PetroChina constitutes the dominant part of CNPC's operations. According to PetroChina, the company produced 117.8 million tons crude oil and 52.8 m^3 natural gas in 2008. [34] Corresponding figures for CNPC are 138.5 million tons crude oil and 66.5 m^3 natural gas.[35] Consequently, PetroChina's part of the total production of oil and gas within the CNPC company group amounts to 85 and 80 per cent respectively. In 2009 PetroChina's part of oil production was reduced to 66 per cent, while the production of gas was maintained at the same level as in 2008.[36]

PetroChina's income represents a corresponding part of the CNPC company group's operations. In 2008, PetroChina's operating revenue amounted to RMB 1,072,604 million, while the operating revenue of the CNPC company group was RMB 1,273,002 million. Thus, PetroChina's part of the income of the consolidated group was 84 per cent in 2008. This share was maintained in 2009. [37]

There can therefore be no doubt that the main operations of the CNPC company group occur within PetroChina. To a large extent, CNPC's operations seem to serve as a support for PetroChina. This is also evident from PetroChina's annual report to the SEC, where the company informs: "*CNPC's primary business activities relate to the provision of various services and products to PetroChina*." [38]

5.2 MORE ABOUT THE RELATIONSHIP BETWEEN CNPC AND PETROCHINA

As of 12 May 2009, CNCP owned 86.71 per cent of PetroChina's shares, making it the company's controlling owner. According to PetroChina: "*China National Petroleum Corporation (CNPC) is the sole sponsor and controlling shareholder of PetroChina. This ownership percentage enables CNPC to elect our entire board of directors without the concurrence of any of our other shareholders.*" PetroChina adds that CNPC is accordingly in a position to "*control our policies, management and affairs*."[39]

Based on the fact that CNPC is the formal controlling owner of PetroChina, and that PetroChina represents the decidedly main part of the CNPC company group's operations, the Council has in its assessment of the relationship between PetroChina and CNPC given particular consideration to the following governance aspects:

- The concurrence of identities between the members of the Board, the management and the administration at PetroChina and CNPC.
- The concurrence of identities and executive power through the Leading Party Members' Group at the CNPC company group.
- Common and coordinated activities through internal agreements within the CNPC company group.

The Council stresses that it is not uncommon for the management of a parent company to be represented in the board of its subsidiary. The existence of internal agreements within the business group regulating transactions between the parent company and its subsidiaries is not uncommon either. On the basis of a holistic approach, the Council nevertheless considers it relevant to include these aspects in its evaluation. This because the different elements together show that the two companies are unusually closely intertwined.

5.2.1 CONCURRENCE OF IDENTITIES BETWEEN MEMBERS OF THE BOARD AT PETROCHINA AND CNPC

There are 14 members on the board of PetroChina, which consists of a chairman, a vice-chairman, PetroChina's CEO, six non-executive directors and five independent non-executive directors, see table 1.

Table 1: PetroChina's Board and Supervisory Board as of February 2010.[40] Board members affiliated to CNPC are marked *[41]

Directors		
Chairman	Jiang Jiemin*[42]	
Vice Chairman	Zhou Jiping*[43]	
Executive Director	Liao Yongyuan*[44]	
Non-executive Directors	Wang Yilin*[45]	Zeng Yukang*[46]
	Wang Fucheng*[47]	Li Xinhua*[48]
	Wang Guoliang*[49]	Jiang Fan*[50]
Independent Non-executive Directors	Chee-Chen Tung	Liu Hongru
	Franco Bernabé	Li Yongwu
	Cui Junhui	
Secretary to the Board of Directors	Li Hualin	
Supervisors		
Chairman	Chen Ming*[51]	
Supervisors	Wen Qingshan*[52]	Sun Xianfeng*[53]
	Yu Yibo*[54]	Wang Yawei
	Qin Gang	Wang Shali*[55]
Independent Supervisors	Li Yuan	Wang Daocheng

The Board was reorganised in 2007. Among other things the number of independent board members was increased from three to six, expanding the Board from 11 to 14 members. [56]

The Council has examined the period from 1999 to 2010 (with the exception of 2003 and 2004). A review of the positions in both of these companies reveals a considerable concurrence between the top management at CNPC and the members of the Board at PetroChina during this time. The President of CNPC is normally the Chairman of the Board at PetroChina. CNPC's management also holds the vice-Chairmanship of the Board at PetroChina. Until 2007, all of the Vice Presidents at CNPC had positions in PetroChina's Board or management. After 2008, six of CNPC's eight Vice Presidents have been represented on PetroChina's Board, in addition to CNPC's Chief Financial Officer.[57]

Chinese corporate law requires joint-stock companies to create a so-called "Supervisory Board". This committee is composed of nine members, four of which represent the shareholders and two are independent representatives chosen by the General Assembly, while three represent the company's staff. The Supervisory Board monitors financial matters and controls that the company's board and management do not abuse their power. PetroChina states that four of the representatives are related to CNPC, but this does not take into account that one of the representatives of the employees is also linked to CNPC (see below). [58] The Council's findings indicate that CNPC's "Chief of Discipline and Inspection Group" is usually also the leader of the Supervisory Board. Three of PetroChina's remaining Supervisors are also heads of their respective departments at CNPC, namely the Finance and Property Department, the Capital Operation Department and the Audit Department respect. The leader of the Finance and Property Department seems to always be a member of the Supervisory Board.

Ms Wang Shali is one of Petro China's three employee-representatives on the Supervisory Board.[59] At the same time and according to PetroChina's SEC filings, she is the "Senior Executive, Senior Deputy General Manager and the General Legal Counsel of CNPC Exploration and Development Company Limited." [60] It is unusual that employees will choose an employee at another company in a company group to represent their interests. This helps to reinforce the impression that there is no distinct difference between the companies.

The Council's study indicates that PetroChina's Board has been dominated by leaders at CNPC since its establishment. As mentioned previously, this is not uncommon in corporate relations, but it does show a strong degree of integration between the companies. In this case, however, the concurrence of identities on the board means that these persons who in principle shall protect the interests of all of PetroChina's shareholders, simultaneously are top-managers at CNPC. In other word, the same persons will make strategically important decisions both for PetroChina and CNPC's operations. The Council finds it noteworthy that also the Supervisory Board is dominated by persons holding leading positions at CNPC. The Supervisory Board is responsible for controlling PetroChina's board and management. The Council assumes that this duty may be influenced by the fact that these persons in practice shall control their own colleagues and superiors among CNPC's management.

5.2.2 THE CONCURRENCE OF IDENTITIES BETWEEN TOP-MANAGEMENT AT PETROCHINA AND CNPC

Table 2 below shows the composition of PetroChina's top-management in 2010. The Council's review goes back to 1999 and shows that the CEO of PetroChina normally also is a Vice President of CNPC. Zhou Jiping holds these positions in 2010. An exception to this norm can be found in 2006 and 2007, when Jiang Jiemin was president of both CNPC and Petro China. Two other directors in PetroChina also have leading positions at CNPC or CNPC's subsidiaries. A further two directors have had leadership positions at the CNPC company group before taking over their present positions at PetroChina. There seems to be a consistent tendency for two or three directors at CNPC, besides the President of the group, to hold leading positions at PetroChina in the years investigated by the Council on Ethics.

The concurrence between the leadership of the two companies is striking, meaning that PetroChina's board (which mainly consist of the top-managers at CNPC) appoints the same persons to manage PetroChina who also manage CNPC. Also at this organisational level, the same persons will manage and make decisions in both companies.

Table 2: Management of PetroChina in 2010.[61] Individuals with executive positions in CNPC are marked*

President	Zhou Jiping*[62]	
Executive Director	Liao Yongyuan*[63]	
Vice Presidents	Sun Longde	Shen Diancheng
	Liu Hongbin [64]	Li Hualin
	Zhao Zhengzhang [65]	Sun Bo* [66]
	Bo Qiliang*[67]	
Chief Financial Officer	Zhou Mingchun	
Other Senior Management Members	Lin Aiguo	Wang Daofu
	Huang Weihe	

Within this overlap of individuals it is worth highlighting that two of the vice presidents in PetroChina are concurrently senior managers in other subsidiaries of CNPC. Both are managers of companies with important international relations. Sun Bo is the General Manager of Trans-Asia Gas Pipeline Company, and Bo Qiliang is the General Manager of China National Oil and Gas Exploration Corporation, which is the subsidiary of CNPC that is responsible for CNPC's overseas investments. This even appears to bring the control of CNPC's international investments under PetroChina's leadership.

5.2.3 CONCURRENCE OF IDENTITIES BETWEEN MANAGEMENT OF DEPARTMENTS AT PETROCHINA AND CNPC

The interwoven relationship between the companies is even clearer further down the administrative ladder. Both companies' administrations and number of departments have increased over time, from PetroChina's 10 departments and CNPC's 14 in 1999, to the current level of 19 and 21 respectively (see table 3). It looks as though there was an administrative separation between the companies until 2005. It was then that five of the same sections in both companies first were placed under concurring leaderships, a number that was to rise to 15 two years later. The weaving together of the two companies has in other words been reinforced over time, particularly the last two-three years.

Table 3: Overlap in the administration of CNPC and PetroChina, 1999–2008

Overlapping administration	1999	2000	2001	2004	2005	2006	2007	2008
Number of PetroChina departments	10	12	13	14	17	17	19	19
Number of CNPC departments	14	16	15	14	17	20	21	21
Number of PetroChina departments with overlapping management with CNPC	0	0	0	0	5	5	15	15

The organisation in the two companies and the concurrence of the administrative leadership can be found in table 4.

The departments which overlap have important functions within the companies. PetroChina's Planning Department, for example, is to the Council's knowledge responsible for developing the company's investment plans. The Council assumes that this includes plans for acquisitions and other new investments, in other words what the company's capital is to be used for. The Human Resource department is, among other things, responsible for the company's recruitment and staffing. The Legal Department takes part in the negotiation of contracts for important projects and is responsible for the legal implications of important economic activities such as joint ventures, fusions and the transfer of assets in which the company may embark both nationally and abroad.[68] All of these functions are strategically important. That the leadership of these departments and functions is shared between the companies implies that the operational running of both companies is integrated with each other, and that decisions can be executed as if the company was one unit. In the Council's view, the concurrence of identities at the administrative level is strongly indicative that CNPC and PetroChina in practice have a shared management.

Table 4: Heads of Departments in PetroChina and CNPC (2008). Departments with concurrence in leadership are in brown.[69]

PetroChina: 19 departments		CNPC: 21 departments	
President's Office	Li Huamin	General Office Administration	Li Runsheng
		Policy Research Department	CaoZhengyan
Planning Department	Wu Mei	Planning Department	Wu Mei
Finance Department	Zhou Mingcun	Finance & Property Department	Wen Qingshan
Human Resources Department	WangYongchun	Human Resources Department	WangYongchun
Budget Management Department	Jia Yimin	Budget Management Department	Jia Yimin
Capital Operation Department	Yu Yibo	Capital Operation Department	Yu Yibo
Legal Affairs Department	Guo Jingping	Legal Affairs Department	Guo Jingping
Safety & Environmental Protection Department	He Rongfang	Safety & Environmental Protection Department	He Rongfang
Quality Control & Energy Efficiency Department	Yu Hongjin	Quality Control & Energy Efficiency Department	Yu Hongjin
Science Technology Management Department	Yuan Shiyi	Science Technology Management Department	Yuan Shiyi
		Engineer Technology & Market Department	Yang Qingli
Information Management Department	Liu Xijian	Information Management Department	Liu Xijian
Purchase Management Department	Li Bin	Purchase Management Department	Li Bin
Foreign Affairs Department	Zhang Xin	International (Foreign) Affairs Department	Zhang Xin
Supervision Department	Liu Xiaoli	Department of Supervision, Discipline & Inspection of CCP Group	Liu Xiaoli
Audit Department	Sun Xianfeng	Audit Department	Sun Xianfeng
Internal Control Department	Xie Geguo	Internal Control Department	Xie Geguo
Enterprise Culture Department	Guan Xiaohong	Enterprise Culture Department	Guan Xiaohong
Secretary Bureau of Board of Directors	Li Huiqi	Department of CCP Committee	Liu Minxing
Board of Supervisors' Office	Zhang Jinzhu	Retired Staffs Bureau	Fan Shengli

5.2.4 CONCURRENCE OF IDENTITIES AND OF EXECUTIVE POWER THROUGH THE LEADING PARTY MEMBERS' GROUP AT THE CNPC COMPANY GROUP

The so-called Leading Party Members' group plays an important role in the appointment of leaders at the CNPC company group.

According to Article 46 of the Chinese Communist Party Constitution, a leading Party members' group can be established at the management level of organisations that are not associated with the Party, such as companies: "*The leading Party members' group may be formed in the leading body of a central or local state organ, people's organization, economic or cultural institution or other non-Party unit. The group plays the role of the core of leadership.*"

The main tasks of the Leading Party Members' Group is to guarantee the implementation of the Party's principles and policies, to discuss and decide on matters of major importance in its unit, to manage affairs concerning *cadres,* and "*to unite with the*

non-Party cadres and the masses in fulfilling the tasks assigned by the Party and the state and to guide the work of the Party organization of the unit and those directly under it." [70]

The composition of the Leading Party Members' Group is decided by the Party organisation that endorses the formation of the group, and the group must also accept the leadership of the Party organisation that endorses the formation of the group.[71]

To the Council's knowledge, the composition of the Leading Party Members' Group in state-owned companies, such as CNPC, is decided by the so-called Organisation Department of the Communist Party in cooperation with CNPC's owner, the State-Owned Assets Supervision & Administration Commission (SASAC).[72] These two bodies decide on the appointment of the president and vice presidents of CNPC. The Council has been informed that individuals that are selected for the Leading Party Members' Group are first granted a position in the party before receiving a management position in a state-owned enterprise.

The Leading Party Members' Group is responsible for deciding appointments of executives below vice president level within the company. According to the Council's findings, all the vice presidents of CNPC – and therefore also the majority of PetroChina's board – are members of the Leading Party Members' Group. Furthermore the CNPC president is always the Chair of the Leading Party Members' group. The Leading Party Members' Group, under the leadership of Jiang Jemin, is responsible for the appointment of leaders both at CNPC and PetroChina. The fact that 15 of PetroChina and CNPC's departments have common management, suggests that CNPC and the Leading Party Members' Group select managers based on an overall assessment of the needs in both companies.

5.2.5 COMMON AND COORDINATED ACTIVITIES THROUGH INTERNAL AGREEMENTS WITHIN THE CNPC COMPANY GROUP

According to PetroChina's yearly filings to the US Security and Exchange Commission, transactions and transfers of assets between CNPC and PetroChina are common. PetroChina states that the company enters into extensive transactions with CNPC and other members of the CNPC company group, and that CNPC is the company's primary provider of a wide range of services and products.[73] In 2009 Petro China states that it spent around RMB 32 billion (about USD 5 billion) on acquiring assets from CNPC, including the Turkmenistan natural gas project (RMB 8.1 billion/ USD 1.3 billion) and the acquisition of ten refineries within China (RMB 11 billion/ USD 1.7 billion). [74]

At the time of PetroChina's initial public offering (IPO), CNPC and PetroChina signed a non-competition agreement. It is reported that the acquisitions from CNPC are carried out under this agreement.[75] In 2000, shortly after the IPO, the two companies also agreed to a "Comprehensive Products and Services Agreement, a Land Use Rights Leasing Contract, a Building Leasing Contract", and several other agreements involving the cross-provision of goods and services. [76]

In this regard it is also relevant to mention that only CNPC has the right to enter into production-sharing contracts directly with foreign oil and gas companies for onshore crude oil and natural gas exploration and production.[77] PetroChina does not have this capacity but reports that: "*Accordingly, CNPC will continue to enter into production sharing contracts.*

After signing a production sharing contract, CNPC will, subject to approval of the Ministry of Commerce, assign to PetroChina most of its commercial and operational rights and obligations under the production sharing contract as required by the Non-competition Agreement between CNPC and PetroChina." [78] CNPC has previously transferred such contracts to PetroChina, for instance in Kasakhstan and Turkmenistan. [79] According to a statement in 2005 by the then CFO of PetroChina Wang Guoliang (who has been CFO of CNPC since 2007), PetroChina will also have the pre-emptive right to acquire CNPC's assets in Sudan.[80]

In its Annual Report for 2009, however, PetroChina informs: "*As the laws of the country where ADS[81] are listed prohibit its citizens from directly or indirectly financing or investing in the oil and gas projects in certain countries, CNPC did not inject the overseas oil and gas projects in certain countries to the company*".[82] American authorities have implemented sanctions against a number of countries, including Burma and Sudan. With regard to Sudan, American citizens are not allowed to be involved in transactions or activities related to the petroleum industry in the country without special permission from the Office of Foreign Assets Control.[83] Concerning Burma, U.S. citizens are prohibited from purchasing shares in a third-country company if the company's profits are predominantly derived from its economic development of resources located in Burma.[84] Apparently, these requirements may have prevented CNPC from transferring the operations in Sudan and Burma to PetroChina.

6 PetroChina's position

In accordance with the ethical guidelines, the Council sent a letter to PetroChina through Norges Bank on 20 November 2007 requesting information about the company's role in the planned gas pipeline from the Shwe field on the west coast of Burma. It had been reported in the press that PetroChina had signed a Memorandum of Understanding (MoU) with MOGE on the sale of gas from the Shwe field. The Council requested information on whether the agreement included the construction of the pipeline, as well as PetroChina's role and responsibilities in the pipeline project.

In its response to the Council, dated 12 December 2007, PetroChina states that the company "*does not have any direct business contacts with, ties to, or associations with Burma; it has no exploration, production or operations in Burma; nor does it maintain any joint ventures, offices or employees, sell any products or provide any services in Burma*." Furthermore the company informs that the agreement with MOGE was entered into by CNPC, "*the controlling shareholder of PetroChina. PetroChina and CNPC are two separate entities and PetroChina has no control over CNPC's business activities.*"[85]

On 26 March 2010, the Council sent a draft recommendation to PetroChina in order to give the company the possibility of providing comments to the Council's findings and assessments. The company was asked to provide a response by 15 April. The company has since been contacted on two occasions, responding in a message dated 27 April that it wished to respond to the Council's letter. The company was requested to respond by 10 May. As of 26 May 2010, PetroChina has yet to respond to the Council's request.

PetroChina treats its relation to CNPC on its website, where it reports that CNPC exercises its rights and interests as the controlling owner in accordance with the law. The website states further that "*CNPC is independent from the Company in all aspects, including personnel deployment, assets, finance, organisation and business operations. At the time of listing of the Company, the Company and CNPC had entered into a Non-competition Agreement which ensures that CNPC will not engage either directly or indirectly in any business that is or may be in competition with any core business of the Company. The Board of Directors, the Supervisory Committee and the management team headed by the President of the Company also work independently.*"[86]

7 The Council's assessment

The Council assumes that the construction of onshore oil and gas pipelines in Burma will entail severe and systematic human rights violations, including forced labour and extensive abuses against the civilian population. Even though it is the Burmese authorities and not the company who in principle will commit the violations, there is a link between the violations and the company's operations in the sense that the violations take place to facilitate the company's future operations. In its letter to the Ministry of Finance dated 11 October 2007, the Council states that "*If companies in the Fund's portfolio were to enter into contract agreements regarding the construction of such pipelines, the Council may recommend the exclusion of these companies already from the time of entering into the agreements. Because such undertakings would most likely involve an unacceptable risk of contributing to human rights violations, it is not considered necessary to wait until the violations actually take place*" [87]

The Chinese state-owned company CNPC has entered into an agreement with the Burmese government to build two pipelines to transport oil and gas from the west coast of Burma to China. CNPC has made clear that the agreement on the oil pipeline gives CNPC exclusive rights to, and ownership of, the pipeline, while the Burmese government shall guarantee the safety of the pipeline. It is this safety guarantee which makes serious human rights violations probable. The Council therefore concludes that there is an unacceptable risk that CNPC will be involved in serious or systematic human rights violations associated with the construction of the pipeline.

The particular problem which must be assessed in this case is the fact that the Fund is not invested in CNPC, but in CNPC's subsidiary PetroChina. The Council has so far worked under the premise that the exclusion of companies for activities that are contrary to the ethical guidelines can only take place when the company in which the Fund owns equity, itself or through its ownership or through controlling positions, is involved in the unethical activity. Consequently, a parent company may be excluded as a result of a subsidiary's involvement in unethical actions, but normally a subsidiary cannot be excluded because of its parent company's actions.

On the other hand, the preparatory work for the ethical guidelines emphasises that the company's legal structure cannot be decisive in the assessment of complicity, for example in cases where the links between the company in the Fund's portfolio and a company

which is involved in the unethical actions in question are so close that the two can be identified with each other.[88]

The Council has assessed whether the relationship between the CNPC group company and its subsidiary PetroChina is so interwoven that the companies *de facto* cannot be separated from each other, and accordingly that the companies must be perceived as one unit when it comes to questions of human rights violations. If so the subsidiary will also be complicit in the company group's actions.

The starting point for this specific analysis is the fact that CNCP owns 86.71 per cent of PetroChina's share capital, while at the same time, the group company's main operations are carried out by PetroChina, and the parent company's primary function is to support the operations of its subsidiary. This is evident from the companies' accounting figures, the transactions between the companies and PetroChina's filings to the SEC.

Furthermore, the Council has emphasised the following circumstances: Formally, the companies are separated and both companies have large operations and many employees. In relation to the management of the companies, however, there are three special features. First, CNPC's entire senior management is composed of individuals who constitute the majority of PetroChina's Board. Second, four members of PetroChina's top management concurrently have senior management positions in CNPC. Third, 15 out of a total of 19 departments in PetroChina's administration are headed by individuals with identical positions in the parent company. In other words, these persons head the same departments in both companies. The overlapping departments are responsible for important functions within the company, which means that investments, acquisitions, contract negotiations and staffing decisions *inter alia* can be decided and implemented as if the companies were a single unit. In the Council's view, this demonstrates a very particular construction in the governance of the companies. Especially extraordinary is the fact that the mid-level management performs simultaneous roles for both companies. This means that the same people lead and make decisions in both PetroChina and CNPC.

This joint governance is further reinforced by the fact that executives in both companies are appointed by structures outside the corporate structure – through the Communist Party's organisation and through the mutual, so-called Leading Party Members' Group of the CNPC company group. The entire CNPC top-management, and consequently also the majority of PetroChina's Board, are members of the leading Party members' group. This clearly demonstrates not only the Chinese communist Party's influence on important strategic decisions in PetroChina, but also that executives at all levels may be selected on the basis of an overall assessment of the needs in both companies. In the Council's view, this supports the impression that the companies are managed jointly.

Based on the Council's research, there appears to be a considerable coordination of operations within PetroChina and CNPC, including the transfer of assets from CNPC to PetroChina. The Council finds it noteworthy that only CNPC may enter into production-sharing agreements with foreign states. CNPC can, however, transfer these agreements to PetroChina after some time. This may be particular advantageous to PetroChina, which as a listed company is required to be more transparent and is more exposed to investor pressure than its parent company. Consequently, CNPC can negotiate state-to-state deals, like

those with Sudan and Burma, and after some time transfer these deals to PetroChina, as has been the case in Kazakhstan and Turkmenistan. In the Council's opinion PetroChina and CNPC appear as two parts of the same organisation, which can perform different roles depending on what is appropriate for the company.

On the basis of an overall assessment of the aforementioned conditions, the Council finds that the administration of PetroChina and CNPC is so unified, and the activities of PetroChina are of such importance to the company group as a whole, that, insofar as § 2, section three of the ethical guidelines is concerned, CNPC's activities in Burma should be considered directed by PetroChina's management. As concerns the question of risk of complicity in human rights violation, the companies must be perceived as one single unit and, in this context, that CNPC's activities in Burma cannot be separated from its subsidiary's operations.

The Council finds that there is an unacceptable risk of PetroChina being involved in severe or systematic human rights violations associated with the construction of gas and oil pipelines in Burma.

8 Recommendation

The Council on Ethics recommends the exclusion of PetroChina from the investment universe of the Norwegian Government Pension Fund Global due to an unacceptable risk of the company being complicit in severe or systematic human rights violations associated with the construction of oil and gas pipelines in Burma by its parent company, CNPC.

Gro Nystuen Chair	Andreas Føllesdal	Anne Lill Gade	Ola Mestad	Ylva Lindberg
(sign.)	(sign.)	(sign.)	(sign.)	(sign.)

Endnotes

1 The Council on Ethics' recommendation on Total is available at www.etikkradet.no.
2 The Council's letter to the Ministry of Finance 11 October 2007 regarding the Council on Ethics' assessment of companies with operations in Burma. The letter is also attached to this draft recommendation.
3 PetroChina has been notified of this letter in a letter from the Council on Ethics to PetroChina dated 20 November 2007.
4 The report from the Graver Committee, available at www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/graverutvalget/Report-on-ethical-guidelines.html?id=420232.
5 www.atimes.com/atimes/South_Asia/KD03Df03.html.
6 www.reuters.com/article/rbssEnergyNews/idUSPEK1796020090616.
7 According to CNPC "*the Myanmar-China Crude Pipeline starts from Madeira* [Island of Maday] *at the west coast of Myanmar, running 771 kilometers through Rakhine (Arakan), Magway, Mandalay and Shan State, and enters into China from Ruili of Yunnan Province.*" www.cnpc.com.cn/en/press/newsreleases/2009/210a7949-5718-4248-a913-697f672b67a1.htm.
8 www.news.xinhuanet.com/english/2009-06/16/content_11552020.htm.
9 Through its subsidiary PetroChina Kunlun Gas Ltd, PetroChina Annual report 2009 page 46, and www.chinastakes.com/2008/11/myanmar-china-pipeline-to-start-construction-in-2009.html.
10 See for example www.en.kunming.cn/index/content/2010-02/04/content_2086838.htm.
11 www.cnpc.com.cn/en/press/newsreleases/MOU_signed_of_Myanmar%EF%BC%8DChina_Oil_Pipeline.htm.
12 www.burmalibrary.org/docs08/SGB03-09.pdf.
13 www.cnpc.com.cn/en/press/newsreleases/RightsandobligationagreementsignedofMyanmar_ChinaCrudePipeline.htm.

14 See the Council's recommendation regarding Total, available at www.etikkradet.no.
15 Human Rights Foundation of Monland 2009: Laid Waste: Human Rights along the Kanbauk to Myaing Kalay gas pipeline, available at www.rehmonnya.org/archives/793 .
16 International Labour Conference, 91st Session, Geneva, June 2003, Committee on the Application of Standards: Special sitting to examine developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), s 19 Part III/30, available at www.burmalibrary.org/docs/ILC2003special_sitting.htm.
17 Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples – Myanmar/Burma : Shan*, 2008, available at: www.unhcr.org/refworld/docid/49749cdb28.html.
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20 See Council on Ethics recommendation regarding Total.
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23 Earth Rights International 2000: Total Denial Continues, pages 39, 43, available at www.earthrights.org/publication/total-denial-continues.
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27 www.cnpc.com.
28 PetroChina 20 F filings 2009 to the Security and Exchange Commission (SEC), page 87, available at www.sec.gov/Archives/edgar/data/1108329/000114554909000914/h03279e20vf.htm.
29 www.petrochina.com.cn/Ptr/About_PetroChina/Company_Profile.
30 www.sasac.gov.cn/n2963340/n2964712/3049579.html.
31 See endnote 28, page 17.
32 www.petrochina.com.cn/Ptr/About_PetroChina/Company_Profile/.
33 See endnote 32.
34 PetroChina Company Ltd: *Results Announcement for the year ended December 21,2009. (Summary of the 2009 Annual Report)*, page 16, available at www.petrochina.com. The calculation is based on that 1 ton of oil corresponds to 7 289 barrels and that 1 m^3 equals 33 314 feet,^{3} as PetroChina states in its Annual Report.
35 CNPC *Annual Report 2008*, pages 8–9, available at www.cnpc.com.
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37 See endnote 34 and *CNPC Annual Report 2009* page 71.
38 PetroChina *20 F SEC Filings 2009*, page 87.
39 See endnote 38, page 13.
40 www.petrochina.com.
41 Information about the CNPC affiliation is obtained from the *CNPC Annual Report 2008* and *2009*, available at www.cnpc.com, PetroChina *20 F SEC Filings 2009*, and PetroChina's homepage www.petrochina.com.
42 President of CNPC who also holds prominent positions in the Chinese Communist Party.
43 Vice President of CNPC.
44 Vice President of CNPC.
45 Vice President of CNPC.
46 Vice President of CNPC.
47 Vice President of CNPC.
48 Vice President of CNPC.
49 Chief Financial Officer of CNPC.
50 General Manager of Dalian Petrochemical Company, which is a CNPC subsidiary.
51 Chief of Discipline and Inspection Group at CNPC.
52 Deputy Chief Financial Officer and Director of the Finance and Assets Department at CNPC.

53 Director of the Audit Department and the Audit Services Centre at CNPC.
54 Director of Capital Operation Department at CNPC.
55 Senior Deputy General Manager and the General Legal Counsel at CNPC Exploration and Development Company Limited, which is a CNPC subsidiary.
56 www.petrochina.com.
57 Based on CNPC's and PetroChina's Annual Reports, *Zhongguo Shiyou Tianranqi Jituan Gongsi Nianjian* (Annual Book of China National Petroleum Corporation) and the companies' home page.
58 PetroChina's *20 F SEC Filings 2009*, page 76.
59 PetroChina *Form 6K Filings* to the US Security and Exchange Commission (SEC), May 2008: *"The Board of Directors further announces that Mr Wang Yawei, Mr Qin Gang and Ms Wang Shali were elected by employees of the Company on 15 May 2008 as the employee representative Supervisors at the Fourth Session of the Supervisory Committee."*
60 PetroChina *20 F SEC Filings* 2009, page 83.
61 www.Petrochina.com.
62 President of PetroChina and Vice President i CNPC.
63 Executive Director of PetroChina og the Deputy General Manager and Safety Director of CNPC.
64 Director for CNPC Planning Department 2005–2007, Vice President of PetroChina 2007.
65 Different management positions at CNPC 1996–2008. Senior Executive and Deputy General Manager of CNPC Exploration and Production Company 2006–2008.
66 Vice President of PetroChina and the General Manager of Trans-Asia Gas Pipeline Company Limited, which is a CNPC subsidiary, see also www.google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHTML1?ID=5620618&SessionID=jV_wHC33MvPqol7.
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69 As of 2008. The Department structure does not appeared to have been changed, and corresponds to information in CNPC's Annual Report 2009. Based on C*NPC Annual Report 2008 PetroChina Annual Report 2008*, *Zhongguo Shiyou Tianranqi Jituan Gongsi Nianjian* (Annual Book of China National Petroleum Corporation) 2008, CNPC's home page http://www.cnpc.com.cn and PetroChina's home page www.petrochina.com.cn.
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71 Constitution of the Communist Party of China, Article 47 and 48, www.news.xinhuanet.com/english/2007-10/25/content_6944738.htm.
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75 www.investorsagainstgenocide.net/2009-0803%20Robert%20Hormats%20letter.pdf.
76 See 20F *SEC filings 2009,* page 89 and PetroChina *Annual Report 2009*, page 157. According to PetroChina b *The Comprehensive Products and Services Agreement* was amended in August 2008, but it is not clear what this involves.
77 As authorised by the Regulations of the PRC on "Exploration of Onshore Petroleum Resources in Cooperation with Foreign Enterprises".
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79 PetroChina *Form 6 K SEC Filings to the SEC* 31 August 2009*: Announcement dated August 28, 2009 relating to the connected transaction about the acquisition of rights under Product Sharing Contract*, www.sec.gov/Archives/edgar/data/1108329/000095012309039565/h03613e6vk.htm.
80 http://www.sudantribune.com/spip.php?article10071.
81 ADS means American Depositary Shares, which is "*a U.S. dollar-denominated equity share of a foreign-based company available for purchase on an American stock exchange. ADSs are issued by depository banks in the U.S. under agreement with the issuing foreign company; the entire issuance is called an American Depositary Receipt (ADR) and the individual shares are referred to as ADS,*" www.investopedia.com/terms/a/ads.asp.
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87 The Council on Ethics letter to the Ministry of Finance regarding the Council's assessment of companies with operations in Burma, 11 October 2007.
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To the Ministry of Finance

Recommendation – 15 November 2010

(Published 6 December 2011)

(Unofficial English translation)

Recommendation on the exclusion of Potash Corp. of Saskatchewan and FMC Corp.

Innhold

1 Introduction

The Council on Ethics for the Government Pension Fund Global (GPFG) has assessed whether the Fund's investments in the companies Potash Corp. of Saskatchewan[1] and FMC Corp.[2] may be in breach of the Fund's Ethical Guidelines[3] § 2, section three letter e, which concerns companies' contributions to particularly serious violations of fundamental ethical norms.[4]

GPFG's investments in equities issued by the companies were, as of year-end 2009, NOK 1 057 million and NOK 151 million respectively.

The background for the Council's assessment is the companies' purchase of phosphate from Western Sahara. Western Sahara is a Non-Self-Governing Territory without a recognized administering Power. In practice Morocco controls most of the area. The state-owned Moroccan mining company OCP extracts phosphate in Western Sahara. The companies discussed in this recommendation purchase phosphate minerals that OCP has mined in Western Sahara, using this to manufacture fertilizers and chemicals.

As a point of departure, the Council assumes that mineral exploitation in Western Sahara may be acceptable if this is done in accordance with the interests of the local population and for their benefit.

The Council's assessment is that the interests of the local population are not safeguarded by OCP's activities, and that OCP's activities in Western Sahara partly because of this must be regarded as grossly unethical.

Within this context, the Council has assessed whether it must be regarded as grossly unethical for companies to purchase phosphate from OCP under long-term contracts. The Council has particularly emphasized that the companies in their purchasing agreements have specified the origin of the phosphate as Western Sahara, even if there is no reason to believe that this is the only phosphate the companies could have utilized in order to fabricate their products. In addition, the relationship between the companies and OCP's activities has also been considered. The Council finds that the connection between the companies' purchase of phosphate from Western Sahara and the extraction by OCP of this is of such a nature that the companies must be said to contribute to serious violations of ethical norms.

The Council on Ethics concludes that there is reason to recommend the exclusion of the companies FMC Corp. and Potash Corp. of Saskatchewan from the GPFG due to an unacceptable risk of contributing to particularly serious violations of fundamental ethical norms.

2 Background

2.1 WHAT THE COUNCIL ON ETHICS HAS CONSIDERED

The Council has considered whether GPFG's investments in companies that purchase phosphate that is extracted in Western Sahara may constitute a breach of the Fund's ethical guidelines. Several issues pertaining to this have been considered. The Council has considered whether the phosphate extraction *per se* should be considered grossly

unethical. Furthermore, the Council has considered the form of contribution to violations of norms by companies which purchase phosphate from Western Sahara, and whether there is an unacceptable risk of contribution to future violations of norms.

2.2 THE STATUS OF WESTERN SAHARA

Western Sahara, which was a Spanish protectorate from 1884, was established as a Non-Self-Governing Territory in 1963 according to the provisions of the UN Charter.[5] At the same time, Spain was appointed as Administering Power over what was then called Spanish Sahara.

According to the UN, Western Sahara today still has the status of Non-Self-Governing Territory.[6] Unlike other Non-Self-Governing Territories in the world, Western Sahara does not have any recognized Administering Power.[7]

Morocco controls most of the territory, but no UN organ has recognized Morocco's sovereignty or its status as the rightful Administering Power of Western Sahara. Morocco refers to Western Sahara as the *Moroccan Saharan Provinces*, claiming sovereignty over the greater part of the territory.

The liberation movement Polisario (*Frente Popular de Liberación de Saguía el Hamra y Río de Oro*) was established in 1973 with the purpose of making Western Sahara an independent State. Polisario started an armed insurgence against the Spanish administration. In October 1975 the International Court of Justice (ICJ) in The Hague rejected the territorial claims by Morocco and Mauritania regarding sovereignty over their respective areas of Western Sahara.[8] Subsequently Morocco invaded parts of Western Sahara, which led to strong condemnation from the UN Security Council.[9] In 1975 Spain entered into an agreement (the Madrid Accords) with Mauritania and Morocco concerning the transfer of administrative power over Western Sahara. The Madrid Accords confirmed Spain's intentions of contributing to the decolonization of Western Sahara and to transferring its administrative duties to Morocco and Mauritania. Consequently, the said agreement did not transfer sovereignty over Western Sahara to Morocco and Mauritania, as Spain did not have such power and thus could not cede or transfer territorial sovereignty. Neither did the agreement alter Western Sahara's status as a Non-Self-Governing Territory under the UN Charter. Spanish authorities presumed that a referendum would be held in Western Sahara regarding the territory's future status. In 1976 Morocco and Mauritania came to a mutual agreement about dividing Western Sahara between the two of them. In 1979, however, Mauritania withdrew, and Moroccan military have been present in Western Sahara since.[10]

Morocco has exercised *de facto* sovereignty over most of the territory since 1979 without assuming the role of Administering Power under the provisions of the UN Charter. As the rightful Administering Power of the territory, Morocco would, in accordance with article 73 of the UN Charter, have an obligation to "*ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement ...*" and to "*develop self-government, to take due account of the political aspirations of the peoples ...*".

Following armed conflicts between Polisario and Morocco a ceasefire was signed in 1991. The UN's peace-keeping force MINURSO[11] oversees the ceasefire and was originally also expected to monitor the referendum on the future of the territory.

Since the 1990s several initiatives have been taken under the auspices of the UN in order to hold a referendum on the future of the territory. Most recently, negotiations were initiated between the Moroccan government and Polisario in April 2007, but foundered in April 2008. In August 2009 attempts were made at resuming the negotiations. Morocco has presented a proposition for the territory calling for limited self-rule under Moroccan sovereignty. Polisario maintains the demand for a referendum with independence as one of the options.[12] There is little indication of any immediate solution on the basis of these negotiations.

2.3 THE SITUATION OF WESTERN SAHARA'S POPULATION

Western Sahara is to a great extent populated by people of Moroccan origin who moved there after Morocco's *de facto* annexation of the territory. The population of Western Sahara amounts to some 400,000 people.[13]

Approximately 165,000 *Saharawis*, the territory's indigenous population, have been driven away to refugee camps in Algeria, where they live in dire conditions. [14]

The Moroccan government has built a 2,500 km long separation barrier through Western Sahara,[15] consisting of a militarily guarded wall and mine fields with large quantities of antipersonnel landmines.[16] The purpose of the barrier is to prevent Polisario forces from infiltrating Moroccan-controlled territory. The barrier also makes it impossible for the Saharawis to move into the areas of Western Sahara that Morocco controls.

2.4 MORE ABOUT PHOSPHATE EXTRACTION

Phosphates are a group of minerals that contain the element phosphorus. There are some 15 different minerals called phosphates. Depending on their composition the phosphates are mainly used for manufacture of different types of phosphorous fertilizers[17] but also for the production of phosphoric acid and for other purposes. Approximately 90 per cent of extracted phosphate is used in fertilizer production.[18]

Worldwide annual phosphate extraction amounts to some 156 Mt (156 million tonnes). The extraction rate has shown a 5 Mt annual increase during the past 10 years.

Phosphate extraction – largest producing countries:[19]

Country	Annual phosphate production (2007) Mt (million tonnes)
China	45
USA	30
Morocco (incl. Western Sahara)	27
Russia	11
Tunisia	8
Brazil	6
Jordan	6
Syria	4
South Africa	3
Worldwide	156

Morocco differs from other large phosphate producing countries (primarily China and the USA) in that it has limited agricultural activity and thus a small domestic market for phosphate. China and the USA on the other hand are both net importers of phosphate, and particularly the USA will in the future have to increase its imports significantly because the country's own deposits are running out. Morocco's importance as a phosphate exporter will probably grow, precisely because the country has a combination of large deposits and limited domestic demand.

Since Morocco regards Western Sahara as Moroccan, the country does not provide specific data for phosphate production in Western Sahara. Interest groups estimate the annual extraction of phosphate in Western Sahara at 3 Mt.[20] If this is correct, it represents around 10 per cent of Morocco's total phosphate output.

2.5 COMPANIES' PURCHASE OF PHOSPHATE FROM WESTERN SAHARA

In the processing industry it is generally common to sign long-term contracts for the supply of raw materials. The reason for this is a desire for reliable deliveries and homogenous quality. 5–10 year contracts including possible price adjustments are not uncommon.

As regards the purchase of phosphate, the buyers, which are mainly fertilizer and chemicals manufacturers, normally specify the desired quality of the phosphate, including chemical composition and other properties. As a result of this the phosphate's origin (source/mine) will normally be specified in the supply contract and thus be known to the buyer.

In Western Sahara, it is the Moroccan state-owned company OCP (Office Cherifien des Phosphates) that mines the phosphate rock.[21]

3 Basis for the Council on Ethics' assessments

Below is an account of the Council on Ethics' contact with the companies, as well as statements that have guided its assessment.

3.1 SURVEY OF COMPANIES WHICH PURCHASE PHOSPHATE FROM WESTERN SAHARA

The Council has surveyed a number of companies in the GPFG's portfolio with the aim of identifying those who have ongoing contracts for regular supply of phosphate from Western Sahara. Potash Corporation of Saskatchewan (Potash Corp.) and FMC Corporation (FMC Corp.) were identified as companies that possibly purchase phosphate from Western Sahara on a regular basis.

3.2 THE COUNCIL ON ETHICS' CONTACT WITH THE COMPANIES

In February 2010, the Council on Ethics contacted the companies Potash Corp. and FMC Corp. through Norges Bank.

The companies were asked whether they buy phosphate from Morocco that may stem from Western Sahara, and if so:

- What type of contract (e.g. long-term or spot) is the purchase based on?
- Is there any agreement regarding cooperation with the Moroccan seller?
- Does the company itself have any form of operation related to the extraction of phosphate in Western Sahara?

The companies replied to the initial enquiries from the Council on Ethics. Both companies explain the following:

- They purchase phosphate from Western Sahara under long-term contracts with the state-owned Moroccan company OCP.
- They have specified that they want phosphate extracted in Western Sahara.
- The contract with OCP only covers purchase of phosphate on a commercial basis.
- They do not have any operations themselves in Western Sahara.
- In the future they will continue to buy phosphate extracted from Western Sahara.

Further information provided by Potash Corp.

Potash Corp. informs that one of their wholly-owned subsidiaries in the USA uses phosphate from Western Sahara for the production of phosphoric acid. The company points out that the production process is sensitive to alterations in the rock source and that the company has reached the conclusion that phosphate from places other than Western Sahara is not viable.[22]

The company explains that its imports of phosphate rock from Bou Craa[23] take place in accordance with applicable trade and import legislation, and that neither the UN nor others have stated that such trade is illegal.

The company makes further reference to the 2006 Fisheries Partnership Agreement between the EU and Morocco, interpreting this to mean that the European Parliament has effectively recognized Morocco's sovereignty over Western Sahara. Potash Corp. also considers the Fisheries Partnership Agreement to be in line with the legal opinion on Western Sahara issued by the UN Legal Counsel in 2002.[24]

Moreover, the company's view is that Morocco's presence in Western Sahara may have a stabilizing effect on the territory and that the interests of the local population are best met "*in a stable environment*". In this regard the company makes reference to statements issued by the US government in connection with the signing of the Free Trade Agreement between the USA and Morocco in 2004.[25]

The company also points out that OCP employs many local inhabitants at Bou Craa and makes a positive contribution to the region through various initiatives aimed at supporting the development of local business, education, health care, and infrastructure.

Further information from FMC Corp.

FMC Corp. informs that its wholly-owned Spanish subsidiary FMC Foret buys phosphate from OCP which has been mined at Bou Craa, Western Sahara.

The company points out that FMC Foret has bought phosphate from Bou Craa for more than 40 years and has always complied with existing legislation and trade rules.

Furthermore, FMC Corp. makes reference to a report[26] received from the American law firm Covington & Burling LLP. This report states that "*the Kingdom of Morocco has complied with all the international legal obligations it could have as an administrating power, through the manner in which, both directly and through OCP, it has managed the phosphate resources in the Sahara region.*"

In conclusion, FMC Corp. makes it clear that FMC Foret will continue to buy phosphate from Bou Craa, and that the company's plant in Huelva, Spain, to a great extent is dependent on access to phosphate of the quality found at Bou Craa.

3.3 RESPONSE TO THE DRAFT RECOMMENDATION

The Council submitted a draft version of this recommendation to both companies in July, 2010. The companies were invited to provide any further information or views relevant to the Council's assessments.

Potash Corp. responded that the company understands the questions raised by this case, but gives no indications that the company will reduce the extent of its sourcing of phosphate from Western Sahara.[27] FMC Corp. did not respond to the draft recommendation.

3.4 MEETING WITH REPRESENTATIVES OF OCP

Representatives of OCP and the American law firm Covington & Burling LLP met with the Council on Ethics in Oslo on 24 August 2010. During the course of the meeting, OCP and Covington & Burling discussed OCP's activities in Western Sahara.

3.5 SUBSEQUENT LETTER ON BEHALF OF OCP

In a subsequent letter to the Council on Ethics, Covington & Burling LLP emphasizes some of the points that were discussed at the meeting.[28] The importance of OCP's activities for the local economy at Bou Craa is outlined in the letter, including the fact that the company provides jobs to support over 2,000 households in the region. The significance of OCP's investments for the future economic development of the area is also highlighted. OCPs investments, it is furthermore stated, have in no way been designed to impede the process towards self-government. In conclusion, the letter expresses the hope and expectation that the Council's assessment of OCP in Bou Craa is carried out on the basis of OCP's own activities and issues within its influence.

3.6 OPINION SUBMITTED BY THE UN LEGAL COUNSEL

A legal opinion submitted in 2002 by the UN Under-Secretary-General for Legal Affairs, Ambassador Hans Corell, addresses the legality of mineral resource exploitation in Non-Self-Governing Territories in general and provides an assessment of this with regard to the situation in Western Sahara in particular.

The legal opinion is based on article 73 of the UN Charter, which obliges States that have assumed responsibilities for the administration of Non-Self-Governing Territories to manage the resources of these in accordance with the interests of the local population. This principle is established in a number of UN resolutions.

According to the legal opinion, not all forms of economic activity in Non-Self-Governing Territories should be regarded as problematic. Reference is made to several UN resolutions that establish a distinction between economic activities in Non-Self-Governing Territories which harm their peoples and those which benefit them:

"*In recognizing the inalienable rights of the peoples of Non-Self-Governing Territories to the natural resources of their territories, the General Assembly has consistently condemned the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of those Territories and deprive them of their legitimate rights over their natural resources. The Assembly recognized, however, the value of economic activities which are undertaken in accordance with the wishes of the peoples of those Territories, and their contribution to the development of such Territories.*"[29]

Thus, the 2002 legal opinion finds that mineral resource exploitation in Non-Self-Governed Territories is only acceptable if proper consideration is given to the interests of the local population.

In an address at a conference in 2008, Ambassador Corell[30] made it clear that the most obvious point of departure for the legal opinion would be an analogy based on article 73 of the UN Charter, since Morocco is not recognized as Western Sahara's rightful administering Power. For States that are not legitimate but *de facto* administering Powers of Non-Self-Governing Territories, this demand that the local population should benefit from the exploration of the resources must be considered a minimum:

"*I came to the conclusion that the best way to form a basis for the legal opinion was to make an analysis by analogy taking as a point of departure the competence of an administering Power. Any limitation of the powers of such entity acting in good faith would certainly apply* a fortiori *to an entity that did not qualify as an administering Power but* de facto *administered the Territory.*"[31]

3.7 THE UN'S ASSESSMENT OF THE CONFLICT PERTAINING TO MINERAL RESOURCE EXPLOITATION IN NAMIBIA

UN Resolution 36/51 (1981) addressed, among other issues, mineral resource exploitation in Namibia, considering that South African and Western companies were extracting uranium ore and other mineral resources in areas over which South Africa did not have rightful sovereignty:

"The General Assembly [...] Reaffirms that, by their depletive exploitation of natural resources, the continued accumulation and repatriation of huge profits and the use of those profits for the enrichment of foreign settlers and the entrenchment of colonial domination over the Territories, the activities of foreign economic, financial and other interests operating at present in the colonial Territories, particularly in southern Africa, constitute a major obstacle to political independence and to the enjoyment of the natural resources of those Territories by the indigenous inhabitants [...]"[32]

But this must be seen in light of the UN Security Council Resolution 276 (1970), which states that "*[...] the continued presence of South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid.*"

There are no similar, clear resolutions concerning Morocco's presence in Western Sahara issued by the UN Security Council. However, there may be an overlap in these cases in so far as they pertain to the relationship between mineral resource exploitation and considerations of the interests of the local population.

3.8 THE FISHERIES PARTNERSHIP AGREEMENT (FPA) BETWEEN THE EU AND MOROCCO

The demarcation of the FPA's[33] scope is controversial because it includes waters under Moroccan *sovereignty or jurisdiction*.[34] Apart from this, the waters off Western Sahara are not specifically mentioned in the agreement.

A legal opinion submitted by the European Parliament's Legal Service on 13 July 2009 addresses the demarcation of the FPA's scope. The document states that the demography of the region has been substantially modified following the Moroccan occupation of the region. It also states that large parts of the population, the Saharawi, are not integrated and live under difficult conditions in camps, some of which lie outside Western Sahara (e.g. in Algeria).[35]

The legal opinion concludes:

"In the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resource, principles which the Community is bound to respect, the Community should refrain from allowing vessels to fish in the waters off Western Sahara by requesting fishing licences only for fishing zones that are situated in the waters off Morocco."[36]

It is stated here that resource exploitation in Western Sahara is only acceptable if the interests of the local population are safeguarded, and it is underlined that the local population in question is the Saharawi people. The legal opinion provides no guidance as to how arrangements could be implemented to benefit the Saharawi population, as it is Morocco's responsibility to make such arrangements. Repeated requests by the EU to Morocco for clarification on how the interests of the Sahrawi's interests are safeguarded in connection with the FPA have been unsuccessful.[37]

Regarding the statement that the fisheries agreement is in accordance with the legal opinion of the UN Legal Counsel (2002), this is clearly refuted by Ambassador Corell:

"Under all circumstances I would have thought that it was obvious that an agreement of this kind that does not make a distinction between the waters adjacent to Western Sahara and the waters adjacent to the territory of Morocco would violate international law."[38]

3.9 THE FREE TRADE AGREEMENT BETWEEN THE USA AND MOROCCO

In its reply to the Council on Ethics, Potash Corp. also refers to the Free Trade Agreement between the USA and Morocco[39] and an alleged statement by the US government in support of Morocco's presence in Western Sahara. The statement that the company refers to was in fact voiced by a Member of Congress, not by a representative of the US Administration.[40]

The US government for its part has made it clear that the USA does not recognize Morocco's sovereignty over Western Sahara. Consequently, the Free Trade Agreement between the USA and Morocco does not include Western Sahara.[41]

3.10 PREPARATORY WORK FOR THE GPFG'S ETHICAL GUIDELINES

The question of investments in companies with operations in Non-Self-Governing Territories is discussed in the preparatory work for the GPFG's ethical guidelines ('the Graver Report'):

"*Furthermore, one may question the desirability of investing in companies with operations in non-self-governing, disputed or occupied territories. Based on a concrete assessment of the territory and the nature of the operation there may be reason to show restraint with such investments. In one specific case, for example, the Ministry of Foreign Affairs has advised against investments in companies with operations on the continental shelf off Western Sahara.*"[42]

One has to note that it is the *companies' own operations* that are mentioned here. The issue of companies purchasing mineral resources that have been extracted in Non-Self-Governing Territories is not discussed.

3.11 PREVIOUS STATEMENTS MADE BY THE COUNCIL ON ETHICS

In its recommendation to exclude the company Kerr-McGee Corp. in 2005, the Council on Ethics made the following statement:

"The framework of international law, including the UN Charter and the Convention on the Law of the Sea, lay down that economic activity which involves exploitation of natural resources in occupied or Non-Self-Governed Territories must be exercised in cooperation with the people inhabiting those territories. The local population also has a right to the potential profits of such activities.[43] *These rules have been developed through treaty law and state practice, based on the understanding that especially natural resources often constitute the very reason for occupation and violent conflicts. The framework of international law thus seeks to make it unlawful to benefit economically from exploitation of natural resources, if such exploitation has been based on occupation."*[44]

3.12 NBIM'S EXERCISE OF OWNERSHIP RIGHTS IN THIS CASE

In October 2009, the Council asked the Fund's manager, Norges Bank Investment Management (NBIM), how the companies discussed in this recommendation have been handled in GPFG's exercise of ownership rights.

NBIM clarified that the question of phosphate procurement is not a topic in its exercise of ownership rights, and that NBIM has no ongoing engagements with the companies in question.[45]

4 The Council on Ethics' assessments

4.1 PRELIMINARY CONSIDERATIONS

The situation in Western Sahara is unique in the sense that there are no other Non-Self-Governing Territories which do not have a recognized administering Power. There are no clear-cut rules for the exploitation of mineral resources in such territories.

The framework of international law obliges administering Powers of Non-Self-Governing Territories to manage these areas in accordance with the interests of the local inhabitants. Since the UN does not recognize Morocco as the rightful administering

Power of Western Sahara, it may be objected that these rules do not apply to the situation in Western Sahara. Seeing as Morocco occupies Western Sahara and unlawfully claims sovereignty over a large part of the territory, Moroccan mineral resource exploitation in Western Sahara could alternatively be assessed on the basis of the rights and duties of occupying powers. In its assessments, the Council will take as a point of departure that resource exploitation in Western Sahara may be acceptable if the interests of the local population are safeguarded. This approach is in line with the view taken by the UN Legal Counsel in 2002[46] and by the European Parliament's Legal Service in 2009. It should also be mentioned that Norwegian authorities advise against actions that may be interpreted as a legitimization of the situation in Western Sahara.[47]

It is not the Council on Ethics' task to consider the legality of Morocco's mineral resource exploitation in Western Sahara or other legal issues that this case may raise. In the case at hand, the Council will assess whether it may be deemed grossly unethical for companies to purchase phosphate mined in Western Sahara by a state-owned Moroccan company, provided that the companies have contractually specified the phosphate's origin. In order to establish this, several factors must be taken into account. First, one must assess whether OCP's phosphate extraction in Western Sahara should be considered grossly unethical. Second, there must be an assessment of the degree of contribution to OCP's violations of norms by companies that purchase the phosphate mined by OCP in Western Sahara.

4.2 THE SIGNIFICANCE OF PHOSPHATE EXTRACTION FOR MOROCCO'S PRESENCE IN WESTERN SAHARA

Phosphate extraction in Western Sahara amounts to only a small fraction of Morocco's total extraction of phosphate. It is difficult to assess the extent of OCPs investments in Western Sahara and to what extent their profitability influences Morocco's presence in the area.

The Council generally assumes that the grounds for a state's territorial claims are strengthened through presence in the territory, for example in the form of commercial activities. The activities of the state-owned company OCP in Western Sahara amount to a form of presence that may support Morocco's claims. The significance of Morocco's phosphate extraction in Western Sahara as a component of its territorial claims may therefore be greater than the economic scale of this industry in itself would indicate. It is, however, difficult for the Council to provide further assessments of this issue.

4.3 CONSIDERATIONS REGARDING WESTERN SAHARA'S LOCAL POPULATION

As the Council assumes that Moroccan mineral resource exploitation in Western Sahara is grossly unethical if the activity does not benefit the local population, the Council has to consider to what extent the local population actually benefits from the resource exploitation. A key question here is who the local population of the area is, in other words: *Whose interests should be safeguarded in order for the phosphate exploitation in Western Sahara to be acceptable?*

The UN legal opinion (2002)[48] states that the interests of the local population should be safeguarded in connection with the exploitation of natural resources in Western Sahara, but it does not explicitly state *who* this population is.

This question was not explicitly addressed in the Council's recommendation to exclude the company Kerr McGee (2005).[49] It was taken as a point of departure that within the framework of international law, natural resource exploitation in Non-Self-Governing Territories should be exercised in cooperation with the people inhabiting those territories and that such a cooperation does not take place in Western Sahara, without further deliberation of *who* the affected population is. Nor is there any description of *how* such cooperation should take place. The Kerr McGee recommendation places some emphasis on the lack of consideration on the part of Morocco's activities for the interests of the local population, but the activities' contribution to legitimize Morocco's territorial claims is at least equally emphasised.

The legal opinion provided by the European Parliament's Legal Service (2009) on the Fisheries Partnership Agreement between the EU and Morocco makes it unequivocally clear that the local population whose interests are to be considered are the Saharawi population, even if many of these are displaced and live outside Morocco. This legal opinion does not provide any description of *how* their interests are to be safeguarded either. The thought is that it is the obligation of Morocco to ensure that the interests of the Saharawi population, both those within Moroccan territory and those who have been displaced, are actually respected in connection with natural resource exploitation in Western Sahara.

The question of Morocco's responsibilities for refugees exiled by Morocco to territories outside of Moroccan control may raise several complicated issues. From an ethical point of view it would in any case seem unreasonable that a state, by exiling people and preventing their return, should have no responsibilities or obligations towards them.

4.4 ASSESSMENT OF VIOLATIONS OF NORMS BY OCP

For the Council, the problematic aspects of OCP's phosphate extraction in Western Sahara are not connected to the company's behaviour towards its employees or in the local communities where it operates. Nor does the Council assume that OCP's activities have by themselves resulted in the displacement of the local population, or that this displacement has taken place to accommodate for the company's activities. The core of the question in this matter is whether the state-owned Moroccan company OCP conducts mineral exploitation in a territory outside Moroccan sovereignty, without proper consideration given to the interests of the local population.

With regard to the original inhabitants of Western Sahara, these have largely been exiled from the territory and are living under extremely difficult conditions in refugee camps in Algeria. They cannot be said to receive any benefits from the ongoing economic activity in Western Sahara.

The two companies which this recommendation concerns point out that OCP's activities serve the local community of the areas where the company operates, arguing that for instance some of OCP's employees in Western Sahara are Saharawi. In the Council

on Ethics' opinion this cannot be regarded as sufficient to satisfy the requirement that resource exploitation in Non-Self-Governing Territories must occur in accordance with the interests of the local peoples and that it must benefit them. OCP's employment of some Saharawi does not compensate for the fact that the territory is being depleted of its resources and that the great majority of the Saharawi population is not benefiting from this. Since this concerns non-renewable resources, these will be lost to the exiled local population, even if the territory's status at some time in the future should change and the exiled local population is able to return.

The view of the Council on Ethics is therefore that OCP's activities in Western Sahara must be considered grossly unethical.

4.5 EVALUATION OF THE COMPANIES' CONTRIBUTION TO OCP'S VIOLATIONS OF NORMS

The Council on Ethics notes that the GPFG is invested in companies which currently and in the future will buy phosphate from the Moroccan state-owned OCP. The Western Saharan origin of the phosphate is contractually specified.

It is also clear that the companies are not themselves involved in the phosphate mining, and that there is no strategic cooperation with OCP other than long-term phosphate procurement contracts.

The Council on Ethics does not attach much weight to Potash's references made to the Fisheries Partnership Agreement (FPA) between the EU and Morocco. There seems to be no foundation for Potash's assumption that the FPA in effect implies recognition by the EU of Moroccan sovereignty over Western Sahara.[50] In all likelihood there are no grounds for claiming that the fisheries agreement is in accordance with the legal opinion delivered by the UN Legal Counsel[51] although a closer assessment of the FPA in light of the latter is not relevant for the purpose of this recommendation.

Since the USA does not recognize Moroccan sovereignty over Western Sahara, and Western Sahara is consequently not included in the Free Trade Agreement between the two States, it is difficult for the Council on Ethics to see how Potash's reference to this agreement may be used in defence of purchasing phosphate from a state-owned Moroccan company with operations in Western Sahara. To the Council on Ethics this reference appears rather as an argument *against* such trade.

Even if the Council on Ethics considers OCP's phosphate extraction in Western Sahara to be grossly unethical, it is not given that any company which purchases phosphate from the region must also be considered to act grossly unethically. In order to assess this, the Council will consider several factors, such as the companies' knowledge and specification of the phosphate's origin, the phosphate's substitutability and the contractual relationship between the companies and OCP.

The companies Potash Corp. and FMC Corp. make it clear that they purchase phosphate from OCP which has been mined in Western Sahara. Not only are the companies aware of this, they have specifically ordered phosphate which is extracted in Western Sahara.

With regard to the substitutability of the phosphate, the companies explain that this particular phosphate has special properties which make it desirable for use in their production.

Another company in the GPFG portfolio which also imports phosphate from Western Sahara, the Australian company Wesfarmers Ltd., has nevertheless committed itself to making the necessary changes in its production process so that the need to buy phosphate from Western Sahara will be eliminated.[52] The company's decision is, as far as the Council on Ethics understands, the result of a dialogue between the company, some of its investors[53] and interest groups. This recommendation regarding the exclusion of companies does not, therefore, include Wesfarmers Ltd.

Global phosphate production is around 156 million tonnes/year, of which the phosphate mined in Western Sahara makes up approximately three million tonnes/year. This in itself indicates that it is quite feasible to produce fertilizers and chemicals without buying phosphate from Western Sahara, as most of such production takes place without this particular raw material anyway. Besides, production at Bou Craa in Western Sahara only started in the 1970s. A number of companies manufactured fertilizers and chemicals made from phosphate also before that time. It is therefore difficult to imagine that it should not be possible to produce fertilizers and chemicals today without access to phosphate from Western Sahara.

The reason why some companies import phosphate from Western Sahara is probably that their production processes are adapted to the phosphate quality delivered from there. To the extent that companies would wish to use other phosphate sources, such a conversion would, in all likelihood, primarily be a cost issue. The fact that Wesfarmers Ltd. is going to make the necessary changes to reduce its dependence on phosphate from Western Sahara indicates that such a transformation should be possible.

Companies buying phosphate from Western Sahara are in reality supporting Morocco's presence in the territory because phosphate is sold by the state-owned Moroccan company OCP, and the revenues from the activities must to a large degree be assumed to benefit the Moroccan State. In its present form, Morocco's exploitation of the phosphate resources of Western Sahara constitutes a gross violation of norms. This is not only due to the fact that the local population is not receiving the benefits; the current manner of exploitation is also contributing to maintaining an unresolved situation and, consequently, Morocco's presence in a territory over which it does not have rightful sovereignty. In the view of the Council, there is a concrete, mutually beneficial relationship between OCP's violations of norms and the companies purchasing phosphate from Western Sahara.

Moreover, the long-term contracts that have been signed regarding phosphate deliveries make OCP's activities and presence stable. Entering into long-term contracts therefore enhances the companies' degree of contribution to OCP's violations and at the same time creates an unacceptable risk of the companies contributing to future violations of norms.

Based on what is stated above, the Council on Ethics concludes that the companies Potash Corp. and FMC Corp. should be excluded from the GPFG as per the Fund's Ethical Guidelines, which mandate the exclusion of companies from the Fund's investment universe where there is an unacceptable risk of companies contributing to gross violations of fundamental ethical norms.

5 Recommendation

The Council on Ethics recommends that the companies Potash Corporation of Saskatchewan and FMC Corporation to be excluded from the investment universe of the Government Pension Fund Global.

Gro Nystuen Chair	Andreas Føllesdal	Anne Lill Gade	Ola Mestad	Ylva Lindberg
(sign.)	(sign.)	(sign.)	(sign.)	(sign.)

Endnotes

1 Potash Corporation of Saskatchewan, SEDOL: 2696980.

2 FMC Corporation, SEDOL: 2328603.

3 Guidelines for the observation and exclusion of companies from the Government Pension Fund Global's investment universe: www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.

4 Ibid, §2(3):
"*The Ministry of Finance may, on the advice of the Council of Ethics, exclude companies from the investment universe of the Fund if there is an unacceptable risk that the company contributes to or is responsible for:*
a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation;
b) serious violations of the rights of individuals in situations of war or conflict;
c) severe environmental damage;
d) gross corruption;
e) other particularly serious violations of fundamental ethical norms."

5 The system of Non-Self-Governing Territories was established through the UN Charter in connection with decolonization and was intended to regulate the conditions for territories that had not attained independence, i.e. colonies, protectorates and mandates of various kinds. See Charter of the United Nations, Article 73, Declaration regarding non-self governing territories: www.un.org/en/documents/charter/chapter11.shtml.

6 The UN General Assembly has passed a series of resolutions that confirm Western Sahara's status, including A/RES/59/131, 25 January 2005; see www.daccessods.un.org/access.nsf/Get?Open&DS=A/RES/59/131&Lang=E.
The issue of Western Sahara has also been treated in a number of other resolutions during recent years, such as A/RES/50/33, 6 December 1995; A/RES/52/72, 10 December 1997; A/RES/53/61, 3 December 1998; A/RES/54/84, 6 December 1999; A/RES/55/138, 8 December 2000; A/RES/56/66, 10 December 2001.

7 The UN list of Non-Self-Governing Territories: www.un.org/Depts/dpi/decolonization/trust3.htm.

8 ICJ advisory opinion of 16 October 1975: www.icj-cij.org/docket/index.php?sum=323&code=sa&p1=3&p2=4&case=61&k=69&p3=5.

9 S/RES 380 (1975) of 6 November 1975.

10 The Council on Ethics' recommendation to exclude the company Kerr Mc Gee (2005) provides a more detailed account of Western Sahara and the background for the conflict; see www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/Recommendation-of-April-12-2005-on-exclu.html?id=425309.

11 MINURSO website: www.un.org/en/peacekeeping/missions/minurso/.

12 See for example the US Government, Central Intelligence Agency, World Fact Book 2009: www.cia.gov/library/publications/the-world-factbook/geos/wi.html.

13 *Supra*.

14 The United Nations High Commissioner for Refugees, UNHCR, Annual Report on Algeria 2009: www.unhcr.org/pages/49e485e16.html.

15 UN map of Western Sahara with berm outlined: www.un.org/Depts/Cartographic/map/dpko/minurso.pdf.

16 ICBL, Landmine and Cluster Munitions Monitor 2009: "*Western Sahara is contaminated with mines and ERW, especially cluster munition remnants and other UXO, although the precise extent of contamination is not known. More than 2,000km of berms were built during conflict in the 1980s, and remained after the 1991 cease-fire between Morocco and Polisario. Moroccan troops emplaced antipersonnel and antivehicle mines in and around the berms. Landmine Action has claimed that Western Sahara is "one of the most heavily mined territories in the world*".

17 Most fertilizers contain a mixture of nitrogen (N), phosphorus (P), and potassium (K). These are called NPK fertilizers or compound fertilizers.

18 US Department of the Interior – US Geological Survey: Phosphate Rock Statistical Compendium (2000).

19 US Department of the Interior – US Geological Survey: 2007 Minerals Yearbook – Phosphate Rock.

20 Norwatch: www.norwatch.no/200910051343/oljefondet/andre/steinrik-pa-plyndring.html.

21 Corporate website: www.ocpgroup.ma/english/jsp/qui_sommes/ocp_bref.jsp.

22 "*Given the sensitivities of these operations to the particular qualities of the rock source, we have concluded that the use of phosphate rock from other sources, including from our own phosphate mines, is not a viable option",* Letter of 2 March 2010 from Potash Corp. to the Council on Ethics.

23 Bou Craa (alternative spellings: Bo Craa, Bu Craa, Boukra), position 26° 19′ 22″ N, 12° 50′ 59″ W, is OCP's largest phosphate mine in Western Sahara.

24 "*Indeed, we understand that the European Parliament effectively recognized the sovereignty of Morocco over Western Sahara when it ratified the EU-Morocco Fisheries Partnership Agreement on May 22, 2006, noting that this agreement is in conformity with the January 2002 legal opinion of the United Nations*", Letter from Potash Corp. to the Council on Ethics of 2 March 2010.

25 "*The United States' government in its official comments preceding the signing of the US-Morocco Free Trade Agreement praised Morocco for its refusal to accept a terrorist state in the Western Sahara, noting the critical importance of this not only for the national security of Morocco but also for the security of the United States and our European allies. We believe this position bolsters the conclusion that the interests and needs of the people of Western Sahara are being met in a stable environment.*" Letter of 2 March 2010 from Potash Corp. to the Council on Ethics.

26 Covington & Burling, White Paper: 'Legality of Phosphate Resource Development in the Sahara Region', 4 October 2007.

27 Letter from Potash Corp. to the Council on Ethics, dated 9 July 2010.

28 Letter from Covington & Burling LLP to the Council on Ethics, dated 13 September 2010.

29 Letter from the UN Legal Counsel to the Security Council (S/2002/161). Can be accessed here: www.undemocracy.com/S-2002-161.pdf.

30 In 2004 Ambassador Corell retired from his UN position and in 2008 he spoke as a private citizen.

31 Ambassador Hans Corell, Conference on Multilateralism and International Law with Western Sahara as a Case Study, 5 December 2008, page 7; see www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf.

32 UN Resolution 36/51 (1981): www.un.org/documents/ga/res/36/a36r051.htm.

33 Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco, www.ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=2361.

34 Ibid, art. 2(a): "*Moroccan fishing zone' means the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco*"

35 European Parliament's Legal Service, Legal Opinion, 13 July 2009, article 29: "*In this framework the Legal Service considers that it is appropriate to recall a few elements that seem undisputed: [...] b) Following Morocco's occupation, the demography of the region has been substantially modified due to the fact that Moroccan people have been settling in the region. On the other side, the Saharawi population is reported to be not integrated and to live in precarious conditions in camps, even outside the territory of Western Sahara (for instance the Tindouf camp in Algeria). The situation concerning the respect of the human rights of the Saharawi population (including freedom of movement) has been the subject of concern, in particular by the European Parliament.*"

36 Ibid, article 38(9).

37 European Parliament, Parliamentary questions, 22 July 2010, E-5723/2010, Question for written answer to the Commission: "*[...]In what ways, and when, has the Commission requested information on how the exploration and exploitation activities have been carried out in accordance with the interests and wishes of the people of Western Sahara, according to their will and in consultation with their representatives?*" www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2010-5723&language=EN.
European Parliament, Parliamentary questions, 12 October 2010, E-5723/2010, Answer given by Ms Damanaki on behalf of the Commission : "*The Commission has used every possible official and unofficial occasion to solicit relevant information from the Moroccan authorities. If and when such information becomes available, it will be carefully scrutinised by the Commission to determine whether entering into negotiations for a new protocol to the Fisheries Partnership Agreement (FPA) is justified. For the time being, the Commission is not taking any steps which might pre-empt a decision on the future of this Agreement.*" http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-5723&language=EN.

38 *Supra*: *It has been suggested to me that the legal opinion delivered in 2002 had been invoked by the European Commission in support of the Fisheries Partnership Agreement. I do not know if this is true. But if it is, I find it incomprehensible that the Commission could find any such support in the legal opinion, unless of course the Commission had ascertained that the people of Western Sahara had been consulted, had accepted the agreement and the manner in which the profits from the activity was to benefit them. [...] As a European I feel embarrassed. Surely, one would expect Europe and the*

European Commission – of all – to set an example by applying the highest possible international legal standards in matters of this nature.

39 Office of the United States Trade Representative, Morocco Free Trade Agreement: www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text.

40 Congressman Diaz-Balart: *We must understand that Morocco's insistence upon its territorial integrity and its refusal to accept a terrorist state in the Western Sahara is critically important not only for the national security of Morocco but also for the security of the United States and of our European allies.* www.ustr.gov/sites/default/files/uploads/speeches/2004/asset_upload_file409_3734.pdf.

41 "*The Administration's position on Western Sahara is clear: sovereignty of Western Sahara is in dispute, and the United States fully supports the United Nations' effort to resolve this issue. The United States and many other countries do not recognize Moroccan sovereignty over Western Sahara and have consistently urged the parties to work with the United Nations to resolve the conflict by peaceful means.*
The FTA will cover trade and investment in the territory of Morocco as recognized internationally, and will not include Western Sahara. As our Harmonized Tariff Schedule makes clear, for U.S. Customs purposes, the United States treats imports from Western Sahara and Morocco differently." ('FTA' is short for Free Trade Agreement). United States Trade Representative Robert Zoellic, 20 July 2004, quoted here: www.house.gov/pitts/press/speeches/040722s-moroccoFTA.htm.

42 NOU 2003: 22, Annex 7, page 92. (The English translation provided in this document is unofficial.)

43 The expression "*a right to the potential profits of such activities*" does probably not constitute a demand that the total profits originating from economic activities should go to the affected population. The point must be that the activity should be undertaken in accordance with the interests of the population so that for instance tax revenues originating from the activity or revenues from sale of exploitation licences may be granted to the population.

44 The Council on Ethics: Recommendation on Exclusion of the Company Kerr-McGee Corp., 12 April 2005 www.regjeringen.no/pages/1662901/KMG%20eng%2011%20april%202005.pdf.

45 E-mail from NBIM to the Council on Ethics, 27 October 2009.

46 *Supra 29.*

47 "*Norway sees it as important to refrain from actions that can be interpreted as a legitimization of the situation in Western Sahara. In order to prevent trade, investments, resource exploitation and other forms of economic activity that are not in accordance with the interests of the local population and accordingly may be in violation of international law, the Norwegian government advises against such activities.*" Ministry of Foreign Affairs, September 2007: www.regjeringen.no/nb/dep/ud/tema/norgesfremme-og-kultursamarbeid/norges-omdomme/vest-sahara.html?id=480822.

48 *Supra* 29.

49 *Supra* 10.

50 *Supra 24.*

51 *Supra* 31 and 38.

52 "*We continued to communicate with interested parties regarding the importation of phosphate rock from the Boucraa region of Western Sahara, which is used in the manufacture of superphosphate fertiliser at our Kwinana industrial complex. In October 2009 we announced the decision to invest in technology that will enable us to broaden our phosphate rock supply options.*" Wesfarmers 2009 Sustainability Report, page 65 www.media.corporate-ir.net/media_files/irol/14/144042/asx/WES09-098%202009%20Sustainability%20Report.pdf.

53 "*The company's subsidiary CSBP recently responded to investor concerns by announcing a decision to invest in new technology, which will enable the company to successively reduce its reliance on phosphate rock from occupied Western Sahara* [...]" See GES Investment Services: www.ges-invest.com/pages/?ID=150.

To the Ministry of Finance
24 March 2011
(Unofficial English translation)

Letter to the Ministry of Finance regarding the recommendation to exclude companies that buy phosphate from Western Sahara

The Council on Ethics refers to the Ministry of Finance's letter of 7 February 2011, in which the Ministry requests further details on some of the aspects regarding the recommendation to exclude the companies Potash Corp. of Saskatchewan and FMC Corp. from the Government Pension Fund Global (GPFG). The recommendation was submitted on 15 November 2010.

The recommendation examines companies which, through long-term contracts, purchase phosphate mined in Western Sahara by the Moroccan state-owned company OCP. Western Sahara is a Non-Self-Governing Territory without a recognized Administrating Power. In practice Morocco controls most of the area. In the view of the Council on Ethics, the companies' purchase of phosphate through contracts that specify the source as a mine situated in Western Sahara constitutes a serious violation of norms because the interests of the local population are not being considered and because OCP's operations contribute to maintaining the territory's unresolved situation.

The Ministry of Finance asks the Council on Ethics to elaborate on its understanding of the limitations of complicity as concerns purchases in general, as well as to comment on some issues related to the case at hand.

In its letter, the Ministry of Finance also refers to two previous recommendations. One of these is partly concerned with a company's responsibility for matters pertaining to its subcontractors. In this case, the Council on Ethics attached importance to the influence that a company may exercise over a supplier by being its sole customer. The other recommendation emphasizes the extent to which a company contributes to sustain a state's violations.

In light of these earlier cases, the Ministry of Finance asks the Council on Ethics to clarify what actions would normally be considered contributive in a purchasing relationship, also as concerns the buyer's influence over any violation of norms on the part of the seller as well as the dependency-relationship between the two. The Ministry of Finance also requests the Council on Ethics to comment on whether the seriousness of the activity in question may influence the standard of diligence against which companies are benchmarked, for instance in cases where the products purchased originate from occupied territories.

Firstly, the Council on Ethics notes the seeming inaccuracy in the Ministry's reference to this matter as a case in which the Council on Ethics recommends the exclusion of a buyer "*exclusively on the grounds of what the seller does*". As previously mentioned, this is

a case in which the buyer has specified where the phosphate is to come from, and not an instance of buying unspecified phosphate from a seller that also has other production sites within Morocco proper. Furthermore, the Council on Ethics has previously submitted a recommendation to exclude a buyer on the grounds of what the seller does: In 2006, the Council on Ethics recommended the exclusion of the company Monsanto Co.[1] from the GPFG due to an unacceptable risk of contributing to the worst forms of child labour in Indian hybrid cotton seed production. The Council on Ethics took as its point of departure that there was a clear connection between the company's operations and the use of child labour insofar as Monsanto's subsidiaries entered into agreements with local farmers about the cultivation of hybrid cotton seed while providing intermediate goods and controlling the production. Being fully aware that this type of cultivation commonly involved extensive use of child labour, Monsanto bought the seed without doing enough to prevent the practice. In that case, the Council on Ethics considered that the degree to which the company contributed to violations in its supply chain together with the seriousness of the violations indicated that the company should be excluded from the GPFG.

The Monsanto case and the other cases referred to by the Ministry illustrate well how the link between companies in the GPFG and norm violations will vary from case to case. The Council on Ethics does not assess a purchase situation or other forms of corporate relations separately from the underlying violation, but evaluates these against the nature and gravity of the violation and the concrete relationship between the buying and selling parties. It is therefore difficult for the Council on Ethics to offer an accurate description of all the factors which may constitute a contribution to violations in any given purchase situation, as this will indeed depend on the nature of the violation and the overall circumstances. In the case at hand, the Council on Ethics has assessed the companies' knowledge and specification of the product origin, the product's replaceability from the buyer's perspective, and the contractual relationship between the buyer and the seller. Similar factors may also be assessed in other cases where the Council on Ethics evaluates a company's contribution to the violation of norms in a given purchase situation.

In general, the Council on Ethics understands that the severity of the violation will determine how strict the company's obligation to avoid contributing to it will be. The section of the GPFG's Ethical Guidelines that provides the foundation for the conduct-based exclusion of companies comprises, in principle, only serious violations. For the kind of cases that the Council on Ethics considers, it is therefore natural that strict diligence is required from companies to avoid contributing to the violation of norms.

The assessment of companies that buy products which originate from occupied territories may give rise to a number of issues. To date the Council on Ethics has not submitted any recommendation that discusses this matter, nor has it based its evaluation of the present case on the grounds that Western Sahara is occupied. In terms of international law, there are very few areas in the world today that are under military occupation.

The rules of international law seek to delegitimize financial gains that stem from the exploitation of natural resources through occupation, precisely because access to natural resources may form the basis for violent conflict. Pillage is in any case illegal in occupied territories, and the occupying Power is obliged to refrain from pillage and also to prevent

others from doing it.[2] With regard to mineral resource exploitation in occupied areas, it may be legal to continue mining activities that were in progress before the occupation occurred, whereas it may be illegal for the occupying Power to open new mines. On the other hand, it is possible that civilian needs, such as for coal or minerals for local industries, make it necessary to establish new mines. Such considerations must be weighed against each other. An assessment of a company's purchases of products from occupied territories must take into account the property rights to these products, for instance whether they stem from private property confiscated by the occupying Power or from public property in the occupied territory; whether the products are being sold by actors with similar operations in the area before it was occupied; whether the products are based on renewable or non-renewable resources, and so forth. In the case of Non-Self-Governing Territories such as Western Sahara, the requirement that the exploitation of natural resources must take place in accordance with the interests of the local population will be even stronger.[3] It falls outside the scope of this letter to discuss the various and complex issues that may arise from such cases on a general basis. However, the main rule should be that companies must exercise great care if they are engaged in business activities in non-self-governing, occupied or disputed territories, or if they have commercial ties to companies with operations in such areas.

The Council on Ethics acknowledges that assessing a company's purchase of products of 'unethical origin' may pose difficulties in terms of delimitation, and it is also studying other areas where such issues are relevant. For example, if companies in the GPFG buy tropical timber that comes from states with an export ban, it may be appropriate for the Council on Ethics to assess whether the buyer is committing a serious norm violation. Another related topic is illegal or unregulated fishing. It may for example be relevant to analyse whether the purchase of fish by companies within the GPFG should be considered a serious violation if the fish was caught without a licence within a state's economic zone.

As the Ministry of Finance points out, the preparatory work to the GPFG's Ethical Guidelines states: "*Even if a company has unethical subcontractors, it may be sensible to refrain from excluding investment unless there is a pattern where the company uses the subcontractors with dubious practices without seeking to influence the situation. The situation will approach complicity if the customer relationship is long-term or repeated after the unethical practices have been identified.*"[4] In this paragraph the preparatory work stresses that the buyer's awareness of the unethical practices, the lack of willingness to exit the customer relationship after the unethical practices have been identified, as well as the duration of this relationship may be relevant topics for evaluation.

Regarding the present case, the Ministry of Finance asks to what extent the companies that buy phosphate may be said to influence the underlying situation, or whether the situation would continue regardless of their continuing purchase of phosphate under long-term contracts.

In cases involving companies that contribute to violations of human rights or of international law, the formal responsibility will generally lie with the state. The role of the Council on Ethics is to assess the level of involvement in the violations on the part of companies, and the purpose of the GPFG's Ethical Guidelines is to avoid contributing

to unethical practices. The Council on Ethics does not assess whether the exclusion of companies may have an impact beyond this, such as helping to improve the human rights situation or the political situation in a state.

In cases where the buyer's unethical behaviour is a result of the seller's lack of legitimate rights to the resources that are being sold, one issue for the Council on Ethics to assess may be whether the agreement between buyer and seller is comparable to commissioned theft when the buyer, being fully aware of the conditions related to the production, specifies the origin of the product.

In the present case one may also say that there are norm violations taking place at various levels: The companies commit violations by buying phosphate under long-term contracts from OCP, OCP commits violations by mining the phosphate without taking the interests of the local population into consideration, and the authorities commit violations by letting these business operations be conducted in such a way.

If the companies in question stopped buying phosphate through long-term contracts with OCP, the violation for which they may be blamed would obviously cease to exist. Beyond that, it is outside the scope of the Council on Ethics' competence to assess whether the situation in the area would change if the two companies included in the recommendation stopped buying phosphate from Western Sahara under long-term contracts.

The Ministry of Finance also asks the Council on Ethics to comment on whether OCP's phosphate mining in Western Sahara would end if regular deliveries were discontinued. The Ministry's final request is a more detailed analysis of the extent to which companies that buy phosphate sporadically from Western Sahara must be considered to influence the underlying situation, compared with companies whose purchases are made under long-term contracts.

It is difficult for the Council on Ethics to form an opinion of which steps OCP would take under other circumstances than the current. At its meeting with representatives from OCP, the Council on Ethics was given somewhat conflicting information about the scale of its activities and the significance of long-term contracts. Still, the fact of the matter remains that if no companies in the GPFG portfolio buy phosphate under long-term contracts from OCP, the latter's operations and their effects would be immaterial for the GPFG and the Council on Ethics.

The deliberations underpinning this case build on an analogy with the obligations of administrating Powers of Non-Self-Governing Territories. One of these obligations is to ensure that the exploitation of natural resources is carried out in accordance with the interests of the local population. In principle this will apply regardless of the contractual relationship under which the sale of natural resources occurs, being applicable to both long-term contracts and single purchases.

The Council on Ethics may only recommend the exclusion of a company if there is an unacceptable risk of future violations associated with the company's operations. This implies that sporadic buyers of phosphate from Western Sahara should not be recommended for exclusion, seeing as it will be difficult for the Council on Ethics to form a concrete opinion about the future risk of violations. According to the Council on Ethics' assessments, among sporadic buyers of phosphate from OCP there are no companies in

the GPFG's portfolio that have purchased phosphate from Western Sahara in the past three years.

In addition to the different outcomes that an assessment of future risk would have for buyers with long-term contracts vis-à-vis sporadic buyers, the Council on Ethics finds that, as concerns the companies it recommends to exclude, the long-term contracts link them more closely to OCP's violations. Not only are these companies aware of the origin of the phosphate, they have placed orders specifying that it should be mined in Western Sahara.

Yours sincerely,

Gro Nystuen
Chair,
Council on Ethics for the Government Pension Fund Global

Endnotes

1 The Council on Ethics' recommendation to exclude the company Monsanto Co., 20 November 2006.

2 A ban on the pillage of occupied areas is laid down by the Hague Regulations of 1907, art. 47, and the IV Geneva Convention, art. 33. In 2005 the International Court of Justice in The Hague (ICJ) pronounced judgement in the case '*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*', placing the exploitation of natural resources carried out by the occupying Power in the occupied territory in the same category as pillage (paragraph 245): '*Thus, whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the* jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present. The Court notes in this regard that both Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949 prohibit pillage*.'
See www.icj-cij.org/docket/files/116/10455.pdf.

3 Article 73 of the UN Charter instructs administering Powers of Non-Self-Governing Territories to promote the well-being of the inhabitants and ensure economic advancement according to their interests.

4 NOU 2003:22, paragraph 5.3.2.3.

To the Ministry of Finance
Recommendation – 1 December 2010
(Published 6 December 2011)
(Unofficial English translation)

Recommendation on the exclution of Alstom SA

Innhold

1 Introduction

At meetings held on 15 and 16 September 2008, the Council on Ethics for the Government Pension Fund Global (GPFG) decided to assess whether the investments in the company Alstom SA (Alstom) entail an unacceptable risk of the Fund contributing to gross corruption under the Fund's Guidelines. The background for this decision was the initiation of investigations into allegations of corruption against the company in three countries in November 2007, as well as the fact that the company previously had been involved in serious incidents of corruption.

Alstom is a French multinational company that specializes in energy and transport infrastructure through its divisions Alstom Power and Alstom Transport.[1] The company employs 96,500 people in more than 70 countries. As of December 2009, the GPFG held equity holdings in Alstom amounting to a market value of NOK 1.6 billion.

In several countries, Alstom's employees are accused of having bribed both private and public officials in order to secure contracts. Some of these incidents date back 15 years, whereas others are recent.

The allegations of corruption levelled against Alstom concern several parts of the company's activities. Documentation in the form of judicial decisions and court documents related to settlements shows that three of the company's divisions have been involved in serious corruption incidents between 1992 and 2001. Moreover, the company is currently subject to corruption investigations in *inter alia* Brazil, Switzerland, and the UK. The prosecutors suspect Alstom's employees of having used bribes to secure contracts in foreign counties, even after this was banned by French law in 2000. To conceal the corrupt activities, employees have allegedly used fictitious consultancy contracts and invoices, as well as offshore companies. In the Council's view, the older documented incidents involving corruption and the ongoing corruption investigations in recent times might indicate systematic use of bribery.

The Council has written to the company on three occasions, requesting answers to specific questions as well as comments on the facts of the draft recommendation. Alstom has replied to the Council's enquiries, denying that the company has made use of bribery. Additionally, a telephone conference has been held between the Council and the CEO of Alstom, as well as a meeting with the company's head of compliance.

Through their responses to the Council, Alstom's management has indicated that the company is the victim in this case, thereby laying the blame on individual employees. However, the older corruption incidents that the Council has considered demonstrate that senior managers in the company have been aware of – or even effectuated – the bribes. In the Council's view, the fact that Alstom did not uncover the misconduct or implement thorough measures when different authorities initiated investigations against them, indicates a pattern whereby the company's management does not acknowledge corruption as being a problem and where its compliance system does not seem fit to detect and penalize such misconduct. This is particularly problematic given that Alstom is engaged in operations in countries where there is a high risk for corruption, whilst also operating in industries that are considered very vulnerable to corruption.

Based on this, the Council recommends that Alstom be excluded from the Government Pension Fund Global on the grounds that there exists an unacceptable risk of gross corruption.

2 The Council's considerations

The Guidelines, section 2, subsection three, state the following:

"(3) The Ministry of Finance may, on the advice of the Council on Ethics, exclude companies from the investment universe of the Fund if there is an unacceptable risk that the company contributes to or is responsible for:

d) gross corruption;"

Firstly, the Council has evaluated whether it is highly probable that the company has committed acts that constitute gross corruption. Secondly, the Council has assessed whether there is an unacceptable risk that the use of gross corruption may continue in the future. Both of these conditions must be met in order for the Council to recommend the exclusion of a company under the corruption criterion. In its first recommendation regarding gross corruption, the Council elaborated on and specified this criterion.[2]

The Council bases its assessments on the following definition of the concept of gross corruption:

Gross corruption exists if a company, through its representatives,

a) gives or offers an advantage – or attempts to do so – in order to unduly influence:

i) a public official in the performance of public duties or in decisions that may confer an advantage on the company; or

ii) a person in the private sector who makes decisions or exerts influence over decisions that may confer an advantage on the company,

and

b) the corrupt practices as mentioned under paragraph (a) are carried out in a systematic or extensive way.

In its overall assessment the Council will attribute importance to the company's previous involvement in incidents concerning corruption, the company`s reactions to the allegations of corruption, the company's compliance system, as well as any ongoing investigations and court procedures against the company, its employees or other connected persons.

3 About Alstom

Alstom was founded in 1928 as a result of the merger between Thomson-Houston and Société Alsacienne de Constructions Mécaniques (SACM).[3] Today the corporate headquarters are located in Paris, France. Alstom was listed on the Paris Stock Exchange in 1998, and for a short period it was also listed on the London and New York Stock Exchanges before being delisted in 2003 and 2004 respectively.[4]

The company is a leader in the industries of power-generation and rail transport through its units Power System Sector, Power Service Sector and Transport Sector. The Power units design, produce and service a series of products used in the generation of electric power, and the transportation unit supplies equipment and infrastructure to the rail and maritime transport segments. In the year 2009, Alstom had a turnover of EUR 18.7 billion, employing more than 96,500 people in over 70 countries.[5]

4 Sources

The information concerning previous cases of corruption stems from various sources, including final verdicts, court documents related to settlements and a ruling directed at the company in the form of a fine, as well as an order excluding the company from public tenders as a result of corrupt practices.[6]

With regard to ongoing corruption investigations that so far have not resulted in indictments or judgements, the Council has based itself on information contained in two rulings issued by a federal criminal court in Switzerland, as well as information presented by the international media, in particular the German, British, Swiss and Brazilian press. Furthermore, the Council has carried out extensive research to assess and verify information that has emerged in the press. This has been done by consulting several sources in France, Switzerland, Mexico, Brazil and Italy.

Information about Alstom's compliance system stems from the company's homepage, as well as from the company's response to the Council.

The deadline set for gathering source material was set for November 2010. Sources are cited in the endnotes of this recommendation.

5 The facts of the case

In this section the Council gives an account of some of the most important cases where Alstom has been involved in, or is being suspected of, incidents of corruption.

Several investigations and judicial decisions concerning Alstom or its employees were carried out and rendered at a time when the international legal situation in the area of corruption was unclear. Traditionally, corruption bans have been domestic. Only in 1977 did the USA, as the first country in the world, pass an act that banned American citizens and companies from bribing public officials and politicians abroad (Foreign Corrupt Practices Act). In Europe there was no similar legislation; corruption committed abroad was first put on the agenda by the OECD in 1989–90.

In recent years however, several international anti-corruption conventions have been drawn up: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[7] the European Council Criminal Law Convention on Corruption,[8] the European Council Civil Law Convention on Corruption[9] and the UN Convention against Corruption.[10] This has led most countries today to introduce national

bans on the bribery of foreign public officials. As concerns the Council's assessment however, it is of minor importance under which legal conditions the decisions have been issued, provided that the corruption criterion of the Guidelines *de facto* has been met.

5.1 PREVIOUS INVESTIGATIONS AND COURT DECISIONS

In its assessment the Council has placed emphasis on court decisions stating that Alstom's employees have used bribes to secure contracts for the company. The first case concerns the use of bribes to secure a contract in South Korea in 1992.[11] At the time, such practices were not banned by French legislation. The Council nevertheless attaches some relevance to the incident as it meets the criteria of the Guidelines and constitutes part of a pattern. The Council also presents a decision by Mexican authorities from 2008 and an Italian settlement from 2008. Both cases concern the use of bribery to secure contracts for Alstom.

5.1.1 INVESTIGATION IN SOUTH KOREA 1995

In 1995, South Korean public prosecutors launched an investigation into suspicious money transfers from Alstom to two South Korean nationals (hereinafter X and Y). Witness statements revealed that in 1992 the CEO of Alstom Asia had requested X to assist Alstom in finding someone who could influence the South Korean government so that the company would be awarded a contract for the delivery of high-speed trains to a national express rail system.[12] Alstom's chairman is said to have met X and Y at a hotel in Seoul and asked them to influence government representatives in order for Alstom to win the rail contract. In return, X and Y were supposedly promised a one per cent commission of the total contract sum, provided that Alstom was in fact awarded the contract. X and Y are said to have accepted Alstom's offer. In the same month, X apparently met the Secretary-General of the governing party of South Korea, who was also a member of parliament, and asked him to use his influence so that Alstom would be awarded the rail contract.[13]

On 14 June 1994 Alstom was selected as contractor for the rail project and, honouring its agreement, Alstom allegedly transferred some USD 11 million to a Hong Kong account belonging to X.[14] Subsequently, X is said to have paid the Secretary-General WSK 400 million (South Korean won) in return for wielding political influence on Alstom's behalf.[15] Under the Korean penal code, the act of receiving money from a company in order to lobby public officials constitutes a crime.[16]

According to the South Korean public prosecutor's office, the investigation of this case was dropped in 1996 following a bribe of USD 80,000 which X paid to the then chief of Kimpo Airport Police Station. In 1998, however, the South Korean prosecuting authority reopened the investigation of Alstom's transfers to X and Y. X fled to the USA in 1999, but South Korean authorities requested his extradition.

The United States District Court of California, to which the extradition request was presented, states the following:

'*There is ample information provided by Korea to support a reasonable belief that X accepted money from Alsthom*[17] *in violation of Korean law. Y testified that she and X met with Alsthom where they were promised money in exchange for lobbying government officials for the rail contract. Y further testified that she and X approached Z about exerting his influence*

on behalf of Alsthom. A few months after Alsthom was awarded the contract, Alsthom transferred approximately 11 000 000 USD into X's account. ***Alsthom CEO Ambroise Jean Cariou confirmed that Alsthom paid X in exchange for his lobbying efforts.*** *In addition, Korea has provided* ***copies of the bank records which show Alsthom's transfer of money to X's Hong Kong account, and X's subsequent transfer of money to Y's Hong Kong account.*** *Thus, this Court finds* ***that probable cause exists*** *to believe that X is guilty of the first offence charged.'*[18][Text highlighted by the Council]

On this basis, the Council finds it highly probable that the incidents took place as described above.

5.1.2 RULING BY THE DECIMO TRIBUNAL COLEGIADO EN MATERIAL ADMINISTRATIVA DEL PRIMER CIRCUITO 2008

In December 2005, Mexican authorities issued a press release informing that Alstom had been fined USD 31,000 by Mexico's Ministry of the Public Services in July 2004.[19] As a further measure, the decision stated that the company would be excluded from public tenders in Mexico for two years. No criminal charges were brought against the company or any of its employees. Alstom appealed the decision several times, but on 29 August 2008 the *Decimo Tribunal Colegiado en Material Administrativa del Primer Circuito* upheld the ruling issued by the *Secretaria de la Funcion Publica* on 11 July 2007 to fine Alstom and exclude the company from public tenders for two years.[20] However, it is unclear whether the authorities' measures were enforced because in its reply to the Council Alstom denies that the company was fined at all or was excluded from public tenders as a result of this. The background for the ruling was that in 2001 Alstom had apparently paid USD 653,000 to two top executives of the electricity utility LFC-Luz y Fuerza Centro in order to secure two contracts for Alstom in Mexico worth USD 5.7 million.

In its response to the Council, the company has confirmed that three employees were dismissed as a result of the incident and that the Swiss authorities investigated the case. Alstom did not detect the misconduct themselves, but launched an internal investigation and cooperated with the prosecutors after the company was made aware of the incident. The Council thus considers that the incident took place as mentioned above.

5.1.3 COURT SETTLEMENT REACHED IN ITALY 2008

On 28 March 2008, a so-called "Patteggiamento" settlement was reached at the Tribunale Ordinario di Milano between Italian authorities and Alstom.[21] Italian criminal procedure allows for this special procedure, provided that a settlement agreement exists between the parties with respect to both the court proceedings and the sentencing, where the latter must not exceed two years. The court deemed it proven that in 2001 four Alstom executives had bribed two public officials at the partly state-owned Italian company Enel in order to secure the so-called Sulcis contract. The employees were given suspended prison sentences of nine to eleven months, and two of Alstom's wholly-owned subsidiaries were fined. Among other things the verdict shows that the bribes went through Alstom Prom in Switzerland. An audit revealed that Alstom and Siemens had transferred some USD 6 million to foreign bank accounts belonging to two Enel employees in order to win

sub-contractor agreements with Enel. In 2004 Siemens was banned from public tenders in Italy for this reason.[22] Alstom was informed about the investigation in April 2003, and is supposed to have initiated an internal investigation of the incident.[23]

The documents pertaining to the court settlement show that the court found it proven that Alstom employees used a fictitious consultancy agreement to conceal the bribes, which amounted to two per cent of the total contract sum. The fictitious consultancy agreement was entered into by Alstom's then European Director for International Operations and an intermediary in Dubai.[24] Following this, the Chairman of Alstom Power Inc., who also held the position as Country President in the USA, made an agreement with Enel's managing director about the awarding of the contract, as well as the size of the bribe. The then Corporate Compliance manager at Alstom signed the fictitious consultancy agreement. During the trial the intermediary from Dubai confessed that his accounts in Switzerland were used by Alstom to conceal the bribes. He was fined 116,000 EUR. The court settlement entailed that Alstom Power Inc. and Alstom Prom Ltd. were each fined EUR 240,000 for the administrative illegality of not having implemented adequate management and organizational models to prevent the use of bribery.

Based on the court's assessment, the Council considers that the incident took place as described above.

5.1.4 SUMMARY OF PREVIOUS CASES

Despite there not being any criminal convictions of Alstom employees in the South Korean, Mexican and Italian cases, their facts render it probable that employees in different ways have made use of bribes to secure contracts for the company. In the South Korean case this is evident from the judge's assertion that there is 'probable cause' indicating that the act took place. Among other factors this decision is grounded on the acknowledgement from Alstom's CEO of paying for lobbying efforts, as well as documents showing the related bank transactions. It is important to point out that in 1992 there was no prohibition, either in France or other European countries, on bribing foreign public officials. Such practices were only outlawed through the ratification of the OECD Convention on Combating Bribery. France introduced such a ban in 2000.[25] The incidents in Mexico and Italy in 2001 were consequently criminalized by the time they were carried out. In the Mexican case, the authorities found evidence that Alstom employees had resorted to bribery, something that resulted in administrative procedures that would exclude the company from public tenders and fined it. Only in the Italian case, under a so-called 'Patteggiamento' procedure, were Alstom employees held accountable according to penal legislation for the use of bribery.

5.2 ONGOING INVESTIGATIONS

In 2007 Swiss, French and Brazilian public prosecutors launched investigations of Alstom in connection with suspicions of corrupt practices. The investigations are still ongoing. In October 2009, Polish authorities initiated the investigation of a public official in Warsaw who is said to have received bribes from Alstom from 1998 to 2002.[26] Moreover, in March 2010, British authorities of the Serious Fraud Office (SFO) opened an investigation into

Alstom's operations in the UK. In May 2010 Swiss state prosecutors brought charges against an alleged intermediary for money laundering and complicity in corruption on behalf of Alstom.[27] One of Alstom's wholly owned subsidiaries was also formally indicted by French authorities in October 2010 for having bribed in connection with business operations in Zambia. The World Bank and the European Investment Bank have initiated an investigation of the incident.[28]

Below is a description of the public prosecutors' suspicions based on two verdicts issued by a Swiss criminal court, as well as information that has come to light in the international press. In addition to this, the Council has consulted sources in France, Switzerland, Italy, Brazil and Mexico to assess and verify the information that has been reported in the media.

5.2.1 INVESTIGATIONS IN SWITZERLAND, FRANCE AND BRAZIL

In connection with a probe of Tempus Privatbank AG commissioned by the Swiss Banking Commission,[29] auditors from KPMG Fides Peat discovered documents that supposedly showed that USD 20 million were paid by Alstom to shell companies in Switzerland and Liechtenstein. The amounts are to have been forwarded to Alstom's marketing managers in Singapore, Indonesia, Venezuela and Brazil, who withdrew the amounts in 100-dollar notes.[30] The documents describing the transactions were handwritten, something that made the auditors suspect corruption.[31]

The Swiss investigation was suspended in 2006, but reopened in 2007 because new circumstantial evidence was uncovered in connection with the investigation of a Swiss citizen, a former CEO of the previously mentioned Tempus Privatbank AG. In light of the new circumstantial evidence the Swiss public prosecutors initiated an investigation in November 2007, while requesting the French and Brazilian public prosecuting authorities for judicial assistance.[32] The Swiss prosecutors suspect people associated with Alstom for misappropriation of funds, corruption and money laundering.[33] In May 2010 the Swiss prosecutors brought charges against an alleged intermediary for money laundering and complicity in corruption on behalf of Alstom.[34] The trial was scheduled for 11 November 2010, but was postponed until further notice due to procedural reasons.[35]

The Swiss investigation is supposedly threefold:[36]

- First, the investigators suspect French nationals connected to Alstom of having bribed foreign public officials in connection with infrastructure projects in South America and Asia. These investigations are taking place in cooperation with Brazil, covering corrupt practices from 1998 to 2003. French investigators were also involved in this part of the investigation.
- The second part of the investigation is directed at a Swiss citizen, who is said to have been partially involved in these practices as an intermediary.[37]
- The third part of the investigation targets Alstom Prom AG in Switzerland. On 21 August 2008, Swiss police carried out searches on various company premises, taking former Alstom employees into custody. According to the public prosecutor's press release, one of the suspects is the former head of Alstom's corporate compliance department.[38] The police suspect company employees or persons connected to the company of having paid bribes since the year 2000.[39]

A Swiss ruling from 23 September 2008 presents the Swiss public prosecutor's suspicions against Alstom, namely that the company has channelled money earmarked for bribes through Alstom Prom AG in Switzerland.[40] According to several media sources, the investigation is said to have uncovered that the corruption amounts to hundreds of millions dollars, which appear to have been paid to individuals in Asia and South America from 1995 and at least until 2006, with the intention of securing contracts for Alstom in countries such as Brazil, Venezuela, Singapore and Indonesia.[41] The amounts were supposedly deposited in shell companies in Switzerland, USA, Singapore, Hong Kong, Bahrain, Thailand and Liechtenstein. Such shell companies may operate as intermediaries in money transactions without having assets or activities of their own. The companies are not illegal per se, but they are well suited to conceal suspicious money transfers, particularly if they are located in closed jurisdictions where there is a lack of transparency in financial matters.[42]

According to KPMG Fides Peat's investigative report and the state prosecutor's press release, Alstom has used intermediaries, *inter alia* a Swiss national, to carry out the aforementioned transactions.[43] Following the French prohibition on bribery of foreign officials in 2000, Alstom is said to have hired the Swiss national to create shell companies and manage the company's secret bank accounts. The Swiss middleman is supposed to have transferred USD 12 million from Alstom to various shell companies in 2001, USD 1.5 million in 2002, and USD 800 000 in 2003. He is said to have received a two percent commission.[44]

French public prosecutors suspected Alstom employees of having bribed foreign public officials in the period 1995 to 2003. In 2008 Alstom requested civil-party status in the proceedings, arguing that the company was the victim of fraud that had inflicted an economic loss on the company. During the investigations, the French police questioned a former consultant to Alstom in connection with suspicions of corruption in South America and Asia.[45] In an interview with the Wall Street Journal the consultant apparently said that he was only doing his job: '*I never took a cent for myself. I didn't think the transactions were illegal, because they were done to get civil-engineering contracts around the world*.'[46] The consultant also explained that he thought the payments were legal because they were ordered by senior executives at Alstom.[47] During the police interrogation he is said to have testified that he managed an account named 'Zurich' in BNP Paribas' Swiss subsidiary. The account is said to have been part of a whole network of accounts and shell companies created for Alstom in Liechtenstein, Switzerland, USA, Singapore, Hong Kong, Bahrain and Thailand with the purpose of hiding bribes. Moreover, the consultant is said to have testified that in 1999 USD 1.8 million were transferred via one such shell company called *Janus Holding*.[48] In its reply to the Council, Alstom reports that the part of the French investigation relating to the Swiss intermediary was dismissed by the French prosecutors in October 2009 due to lack of evidence for prosecution.[49] To the Council's knowledge, there is still an ongoing investigation of Alstom in France and charges have been raised against a wholly owned subsidiary of Alstom.

In connection with the Swiss investigation of Alstom Prom AG, the Federal Criminal Court in Bellinzona, Switzerland, issued yet another ruling in October 2008. The Court granted a request to release Alstom's seized documents. Alstom demanded

that the documents seized during the search in their offices in May should be released. According to the public prosecutor, the documents showed payments made by Alstom to consultants who did not deliver any form of verifiable service in return. In favour of the documents' release Alstom argued that the company's ongoing operations should be taken into consideration; the documents were necessary in order to continue paying the consultants. The prosecutors' arguments for seizing the documents are stated in the ruling, namely that they suspect Alstom employees of having operated with fictitious consultancy contracts since 2000. Alstom is said to have transferred CHF 70 million (Swiss francs) annually to consultants.[50] Overall, this amounts to over 500 million CHF in the period the prosecutors are investigating. It appears from the verdict that a large part of the payments are described as suspicious, because the consultants have not provided any form of verifiable service in return.[51] Several millions are said to have been destined for foreign officials with a view to securing large contracts for the company in Italy, Zambia, Mexico and elsewhere. In the case concerning Zambia, EUR 1 million has apparently been transferred to a minister in Zambia through a shell company.[52] One of Alstom's subsidiaries is now charged with bribery in connection with operations in Zambia. The World Bank and the European Investment Bank are also involved in the investigation of the incident.

In May 2008, federal authorities in Brazil confirmed to the Brazilian press that they are investigating Alstom.[53] There are two ongoing investigations: one criminal investigation at the federal level and a civil investigation at state level in São Paulo. The investigators are examining 139 contracts that Alstom signed with São Paulo authorities totalling USD 4.6 billion. Bank statements inspected by the police are said to show that between 1998 and 2001, one of Alstom's consultants in Brazil received USD 1.4 million via a Swiss account belonging to the company he controls. In April 2009 it was reported that the public prosecutor in São Paulo had dropped three of 29 cases brought against Alstom in 2008.[54]

5.2.2 INVESTIGATIONS IN THE UK AND POLAND

In March 2010, having investigated Alstom for six months, the Serious Fraud Office (SFO) and British police carried out the largest corruption raid in the UK to date. A total of 150 officers were deployed in a three-day raid at five of Alstom's premises in the UK. Alstom's UK president, financial director and legal director were arrested and interrogated on the grounds of suspicion of bribery aimed at winning energy and transport contracts for the company in Africa and the Middle East. The suspects were later released. The media claims that the amounts transferred from Alstom's operations in the UK and Switzerland are in the order of GBP 90 million. The SFO initiated its investigation into corruption, money laundering and false accounting following a request from the public prosecutor in Switzerland.[55]

In October 2009, the Polish police launched an investigation of a public official in Warsaw based on suspicion of corruption. He is said to have received bribes from Alstom in order to award the company a EUR 105 million contract in 1998 for the construction of a subway system.[56]

5.2.3 SUMMARY OF INVESTIGATIONS

The investigations currently in progress in Switzerland and the UK seem to be extensive, both in regards to the size of the amounts and the number of countries involved. The public prosecutors suspect that the company's units in both Switzerland and the UK have been used in connection with the disbursement of bribes. So far the Swiss public prosecutor has brought charges against one of Alstom's alleged middlemen in Switzerland. It is uncertain if the public prosecutor's office may press further charges. The investigation in the UK is still in an initial phase and it will therefore take time before any charges may be presented. The investigations in Brazil and Poland concern nationals who allegedly received bribes from Alstom. The investigation in France is partly aimed at Alstom's subsidiary, and in October 2010 the prosecutors raised formal charges. The company has confirmed the investigation in Switzerland, Brazil, UK and France, but has not yet commented on the investigation in Poland.

6 Alstom's reactions to the exposure of corruption

The company's responses to the incidents and allegations of corruption are of interest to the Council, as these reflect the corporate management's attitude towards corruption. The reactions will be included as one of several elements in the assessment of whether there is a future risk of continued gross corruption.

In 2006 Alain Toubiana, President of Alstom in Mexico, commented on the Mexican corruption case in a report to the US Securities and Exchange Commission:

'*Our company is fully committed to the strict compliance of the laws of Mexico and we take the resolution very seriously and with much preoccupation. From the moment the facts were reported in 2001, through the support in the investigation process, Alstom has collaborated in full openness with the authorities. Alstom is examining the order of the Ministry and confirms its intention to look positively to the continuity of its operations in the fields of energy and transportation that we believe are essential for attaining the infrastructure development that the country needs*'.[57]

Shortly afterwards, Alstom dismissed three employees, including the Country President, who were responsible for the bribery. In addition to initiating an internal investigation of the case, the management is to have cooperated with Mexican authorities and the Swiss state prosecutors.[58] However, Alstom appealed the decision to exclude the company from public tenders several times, before it was finally upheld in 2008.[59]

The court settlement in Milan in 2008, where four Alstom employees were found guilty of corruption, was referred to by Alstom as a settlement that did not concern '*bribery, but (...) mistakes in the contract process*....'[60]

However, in the documents relating to the settlement, the Italian judge points out the following:

'*...in particular, the examination of the case documents, also regarding the factors that are to be assessed at this stage, shows* ***numerous and deliberate incidents of corruption*** *related*

to the awards and control of public tenders regarding the supply of equipment, machinery and components necessary for the construction of electric power plants.

In view of this, with regard to the factors presented to the judge in the present case, it is evident that the verdict cannot be acquittal under section 129 of the Criminal Justice Act, considering everything that has come to light through all the documents in this case, especially what is shown by the investigation abroad, more specifically regarding bank statements, wire tapping and the analysis of the seized documents, ***in addition to the statements made by the individuals involved, who, in a large number and to a great extent, have admitted responsibility for what will very briefly presented in the following****...'*[61] [Text highlighted by the Council]

In its reply to the Council the company stresses that none of the defendants pleaded guilty to the charges and that they held important positions in the company.

'*(...) we reiterate that neither Mr. X who was our SVP Representation Compliance and therefore held to a very high standard of care of supervision nor Mr. Y ever accepted guilt nor would they ever had accepted the sentences handed out had they believed that the Pattegiamento procedure could be equated with a plea of guilty to corruption.*'

However, the counts of the charges against Mr. Y state the following:

'*... once more it needs to be emphasized that the defendant during the procedures has behaved correctly,* ***acknowledged his responsibility*** *and provided the prosecuting authority with an* ***important contribution*** *as regards the* ***investigation and the establishment of other defendants' responsibilities****, something that justifies the admission of mitigation to the extent indicated above.'*[62] [Text highlighted by the Council]

The Magistrate's court in Milan emphasized that Y acknowledged responsibility for the action and assisted with the clarification of the other defendant's responsibilities in the same case. Y was held responsible under the provisions of the Italian Penal Code and was handed a suspended prison sentence of 11 months.

With regard to the accusations of corruption in France, Brazil and Switzerland, Alstom confirmed, in August 2008, that French public prosecutors had carried out a search on their premises in Paris, but that Alstom did not have suspect status in the case and that they cooperated with the French investigators. Patrick Kron, CEO and chairman of Alstom, declared that they were related to circumstances dating back to the 1990s, of which he had no knowledge.[63] He has pointed out that the company sees itself as '*a victim of former employees' unlawful acts*'[64], having also stated that:

'I know nothing about any payments that may violate international rules. As I already said, I am assuming that our company works in accordance with international trade rules. I have taken all necessary steps and shall take all necessary steps to ensure that our processes are well developed and that our control systems defend us from all types of violations.'[65]

In connection with the ongoing investigation in Switzerland Alstom's press contact, Philippe Kasse, has denied all accusations and stressed that there is no evidence to support the accusations.[66] Moreover, Alstom has confirmed that the company did carry out an internal inquiry into the accusations of corruption related to the investigations in Switzerland, France and Brazil, and no wrongdoing was detected.[67]

According to the magazine *Der Spiegel*, a press contact at Alstom is said to have pointed out that Alstom has changed its corporate culture so drastically in recent years that all

employees holding managing positions during the period in question have now left the company.[68] However, the Council has received confirmation from Alstom that one of the executives who received a suspended prison sentence in Milan, worked as a Vice-President of Global Business Partners at Alstom's corporate headquarters in Paris until the middle of 2010.

In September 2008 Alstom notified that it would sue a journalist at the *Wall Street Journal* who had written about the Swiss investigation into the allegations of corruption against the company. Alstom argued that the articles constituted '*libel and [did] not [respect] the presumption of innocence.*'[69] In addition, Alstom announced that they '*are studying legal recourse against the publication of privileged information related to an ongoing judicial investigation in Switzerland.*'[70] In September 2009, the journalist was summoned to a hearing at the tribunal in Paris, where he was informed of his suspect status in the lawsuit. French police is not investigating the case and will let the company present the evidence against the journalist.

Alstom has confirmed the recent raids in the UK, and the company has pointed out that it cooperates closely with the investigators. At the same time the company has made clear that the investigation is not directed at the parent company in France. Alstom informed the Council that it has completed an internal investigation.

The company has neither confirmed nor denied the investigation launched in Poland.

At the company's General Assembly Meeting in May 2008, half a year after the exposure of allegations of corruption, the ongoing investigations were not on the agenda.[71] The accusations of corruption were not discussed in the General Assembly Meeting the following year either.[72]

7 Alstom's internal compliance system

The purpose of a company's compliance system is to prevent, detect and react to violations of internal and external laws and regulations. Consequently, the internal compliance system may provide information about the risk of unethical actions continuing in the future. The Council has assessed the material that is publicly available about Alstom's internal compliance system. This is one of several elements assessed to consider whether there is *future risk of continued gross corruption.*

The fact that Alstom operates in the energy and transport sectors, where large public contracts are common, and also has activities in countries where corruption is widespread, means that the company is exposed to an elevated risk of corruption.[73] Over the last six months, the company has entered into contracts in countries like Iraq, Kazakhstan, India, Russia, Egypt and China. These countries are ranked 175, 105, 87, 154, 98 and 78 respectively in Transparency International's corruption index. Alstom's internal compliance system must therefore meet rigorous standards.

Alstom's compliance program was designed by the top management of Alstom in 2000. The company currently has 17 full-time employees who are responsible for the implementation of the program. Of those six are based in France, one in England, China, USA and Brazil respectively, two are based in India and five are based in Switzerland.

Furthermore, the company has appointed 250 employees as so-called "compliance ambassadors". In addition to their regular duties they are tasked with disseminating information about the compliance program in the company's various divisions.

Alstom's Code of Ethics outlines the company's visions, values and ethical principles. It states that the company does not accept any form of corruption in its operations. 'No undue advantage in order to obtain business' is one of their three fundamental principles. It also states that employees who violate the code may be subject to civil or penal prosecution and possibly dismissal. Alstom's Code of Ethics is partly characterized by stating general principles and partly by constituting legally formulated rules. The company's Annual Report from 2007/2008 informs that the management distributed 89,000 copies of the Code of Ethics to its employees in 2007.[74] Alstom has distributed the booklet before, but it was the first time the booklet was distributed in 17 different languages. The Code of Ethics makes reference to the Corporate Instructions, which treat in more detail the defined rules and procedures. The Corporate Instructions are not publicly available. Alstom signed the Global Compact in 2008. This means that the company should avoid bribery, extortion and other forms of corruption, and also develop policies and concrete programmes to address corruption.[75]

When it comes to the training of employees, Alstom informs on its website that 800 senior managers concluded an Ethics & Compliance training program three years ago, and that the company has introduced similar programs in some countries where Alstom operates. In that regard, only Italy is mentioned on the company's website. In its 2008/2009 Annual Report Alstom states that 1,200 individuals were trained as part of the Internal Control Project in 2005 and that 380 finance professionals and managers were trained in the past two years. A further 3,400 people participated in the Internal Control Self-Assessment Exercise.[76] The Annual Report further informs that 1,000 employees responsible for handling consultants have received training through the *Ethics & Compliance* programme, while 1,150 have concluded a web-based programme on anticorruption and competition law during the past year. In January 2010 the company distributed an updated version of the Code of Ethics, as well as an accompanying web-based training programme directed at 30,000 employees in management positions.

In 2007 the company introduced an Alert Procedure for employees who discover breaches of laws and regulations. Employees should primarily notify their superiors, but if they have reason to believe that doing so will cause problems or that the incident will not be investigated, they may use the Alert Procedure.[77] This implies that the employee contact the company's Group General Counsel or the Senior Vice-President (SVP) of Ethics & Compliance.[78] In other words, the company's compliance department as well as the company's legal department is informed. The company's legal department is thus responsible for investigating internal alerts and possibly initiate internal investigations, while at the same time also being responsible for defending Alstom externally if the company faces public prosecution. The company further states that '*All measures will be taken to respect employees' wishes for confidentiality.*' [79] How this is to be ensured through an internal alert procedure is not described. Besides, the *Code of Ethics* imposes strict confidentiality rules on the employees: '*do not share information with third parties not authorised to receive it*'.

The company has only opened the door to anonymous alert procedures in the USA where this is decreed by law.

In March 2009, Alstom received a "*Specific AC Certificate*" from the ETHIC Intelligence International Certification Committee for the company's compliance procedures vis-à-vis external service providers.[80] The certification committee at ETHIC Intelligence International was commissioned by Patrick Kron to check the quality of Alstom's compliance procedures for external service providers in relation to international best practice, as well as controlling the quality of the implementation of these procedures within each corporate unit.[81] Following an audit period of 4 months, the certification committee concluded that Alstom's procedures and the implementation of these were in accordance with international best practice, and it issued a certificate for 2 years. The certificate applies only to a small part of Alstom's overall compliance system, that is the part referring to certain external service providers. Such sales agents are used in 30% of the company's total revenue. The approval system consists of five comprehensive steps, where the agents are approved at various levels within the company. It usually takes between one to two months to approve an agent. According to Alstom about 60 agents are approved each year.[82]

Alstom's reporting on the compliance system seems to be limited. Among other factors this is due to the fact that the company does not make public information on the control and audit system, it does not release investor dialogues regarding the issue, nor does it report whether there actually have been alerts or cases of non-compliance. Since the compliance program was implemented in 2000, no surveys of employee understanding and awareness of the program have been carried out.[83]

8 Alstom's reply to the Council's enquiry

In accordance with the Guidelines, the Council sent a draft recommendation to Alstom for comments. This was done for the first time on 7 August 2009, and the Council received Alstom's reply on 9 September 2009. Subsequently, the Council held a telephone conference with CEO Patrick Kron and lawyers from the Compliance and Legal Department. This conversation was followed up with a letter containing another 13 questions. In January 2010 the Council received a reply from Alstom. After reviewing the company's response, the Council in May 2010 sent a new draft recommendation for comments. The Council received a response and a request for another meeting in June 2010. In October, a meeting was held between the Council and the head of the compliance department at Alstom. The Council then sent a letter with detailed questions to the company's legal department and the compliance department. In November 2010 the Council received a reply from the company. Alstom's response is mainly cited above in Chapter 7. In general Alstom has highlighted the following:

In its replies to the Council, Alstom denies the accusations of corruption, pointing out that the Council's draft recommendation is mainly based on information presented by the press and that it therefore is mistaken. CEO Patrick Kron points out that Alstom is an ethical company and is not involved in any form of corruption, having several times

fired employees and consultants who have been involved in unethical practices. Alstom stresses that the company is the victim whenever employees have used bribes to secure contracts for the company, and that these individuals are violating the company's internal guidelines. Alstom gives an account of the measures that the company has implemented since 2001 in order to prevent bribery. The company also refers to the control mechanisms in place to enforce the guidelines.

9 The Council's assessment

Based on the available documentation, the Council has assessed whether Alstom should be excluded in accordance with the Guideline's criterion on corruption.

First, the Council has assessed whether it is highly probable that the company has committed actions that constitute gross corruption according to the Guidelines, including whether the corrupt practices have been carried out in an extensive or systematic way. The Council's assessment takes into consideration that there are various constructions of liability in different legal systems; for instance, some have and others do not have corporate penalty. This means that the Council may conclude that a case involves gross corruption even if the company itself has not been found guilty by the court system, because it has been established that company representatives committed the acts.

In the Council's view, the court rulings issued in the USA and Italy, as well as the Mexican administrative proceedings described in Chapter 5, show that the company has been involved in corruption in the past. Despite the fact that neither Alstom nor its employees were convicted under *criminal law* for the incidents involving corruption in South Korea, Mexico or Italy, the authorities found evidence that employees had resorted to bribery in order for the company to win contracts. In the Italian case Alstom's employees were held accountable under criminal law for bribery aimed at securing a contract, and two of Alstom's wholly-owned subsidiaries were fined for not having prevented the corrupt practices. The method used by employees included fictitious consultancy agreements and commission payments via offshore accounts. The common denominator in all three cases is that the top management of the units in question has been directly involved in the corruption. In the South Korean case the CEO of Alstom Asia organized the bribery, and in the Mexican case Alstom's Country President, among others, facilitated the bribery and was therefore forced to resign once the incident became known. In the Italian case four Alstom senior executives were responsible for committing the bribery. These cases show that corruption has taken place in various company divisions and that it occurred over a long period of time.

Since 2007, five states have initiated corruption investigations against Alstom. The ongoing investigations seem to concern large bribes used to win contracts for the company. The federal prosecutors in Switzerland suspect Alstom employees of having used an intricate system to facilitate and conceal the bribes,[84] including the use of fictitious consultancy agreements to conceal suspicious money transfers, as well as shell companies and secret accounts in several closed jurisdictions. The public prosecutors have now

brought charges against Alstom's alleged intermediary and charged him of complicity in corruption. The recently initiated investigation in the UK also relates to suspicion of bribing public decision-makers to secure the company contracts in Africa and the Middle East. The French public prosecutors have formally charged Alstom's subsidiary for the use of bribery in connection with operations in Zambia. The World Bank and the European Investment Bank are now engaged in this case.[85]

Alstom's past involvement in incidents of corruption, where large amounts were paid by high-ranking company executives, as well as the recent corruption investigations against the company's alleged use of fictitious consultancy contracts, offshore companies and secret accounts to conceal bribes, indicate that the practices must be considered serious according to the Guidelines. Based on an overall assessment, the Council finds that the criterion of gross corruption has been met.

The next question that the Council has assessed is whether there is an unacceptable risk that the use of gross corruption will continue in the future.

The present recommendation has looked into decisions of a legal nature that refer to acts committed in the past. Information about the company's previous conduct may provide an indication as to the company's future behaviour. The three documented instances involving corruption dating from 1992 and 2001, as well as the extensive corruption investigations currently underway against Alstom, suggest that the company must take effective measures if the risk of future corruption is to be significantly reduced. It is reasonable to expect that a company has solid routines and that it announces the implementation of certain measures following serious accusations and incidents of corruption. The Council's main concern is therefore to assess whether the steps taken by Alstom and which are known to the Council may be sufficient to prevent corruption. The Council attaches importance to the way in which Alstom has responded to the disclosure of corruption in the company, partly through the documentation that Alstom has sent to the Council and partly through information that has emerged in the media.

The company reports that it has implemented a series of measures since the Italian case in 2001 aimed at improving the internal guidelines and control systems. The Council makes a particular note of measures aimed at centralizing consultancy agreements and certifying this system, increasing the number of employees in compliance positions, the establishment of alert procedures and the execution of internal corruption inquiries. These are measures which, seen in isolation, are suitable for preventing corrupt practices. In view of the five ongoing corruption investigations against company representatives, however, the Council questions the implementation and efficacy of the company's measures.

The investigations in Switzerland and in the UK are directed at alleged incidents involving corruption committed after 2000. If there is a foundation for the suspicions, this indicates that the company's compliance system is not particularly well functioning when it comes to combating corruption. Alstom's reply to the Council shows that the company has not received a single alert regarding corruption since the implementation of the Alert Procedure in 2007. In the USA the company has an anonymous whistle-blowing channel, but in other countries employees are encouraged to report upwards in the system, to the Country President or the SVP of Ethics & Compliance. Considering who has previously

been involved in incidents of corruption, these solutions may seem unsuitable. In the Mexican case, it was the Country President who arranged the bribery; in the Italian case Alstom's Country President for the USA and the company's SVP of Ethics & Compliance were the ones responsible for the bribery.

The company has never registered a non-compliance related to corruption. It is the company's legal department in cooperation with the compliance department which handles internal alerts and non-compliances. The former department is also tasked to defend Alstom externally if the company should be subject to public prosecution. This could potentially place the department in a problematic position.

The internal corporate guidelines establish that employees who have been involved in corrupt practices shall be dismissed and possibly be subject to criminal proceedings. The Council doubts that this is done consistently, among other reasons, because the company in April 2003 was informed about the Italian investigation, but none the less allowed two of the responsible managers for the bribe continue in their positions. One of the individuals continued his post as a compliance manager until December 2005. The other individual worked as a Vice President for Global Business partners at the Alstom headquarters in Paris until the middle of 2010.

In its reply to the Council Alstom has further pointed out that there has been an internal investigation into the allegations of corruption following the investigations in Switzerland, Brazil, UK and France. The investigation did not uncover any reprehensible conditions. The Council observes that as a rule the company does not itself uncover incidents of corruption, but rather that the cases brought to light so far are a result of interventions and investigations by the authorities.[86] The Council is aware that it may be problematic for a company to publicly admit the existence of very reprehensible practices in its midst. In light of the documented incidents in this case, the Council is nevertheless surprised that Alstom denies involvement in corruption in its response to the Council.

In recent times the company has entered into contracts in countries like Iraq, Kazakhstan, India, Russia, Egypt and China. According to Transparency International's corruption ranking, all of these countries are considered high-risk areas as far as corruption is concerned.[87] This, in addition to the fact that Alstom is currently under investigation by five prosecuting authorities, means that the company should implement adequate measures to prevent bribery. However, Alstom has not announced any radical changes to its internal-compliance system; the company considers itself "best in class" in this area. The Council further notices that the management is not willing to acknowledge even well documented instances of corruption, and therefore questions the company's ability to recognize ongoing problems. In the one case in which Alstom has acknowledged the use of bribery, the management considers that the company is the victim, and thus transfers the responsibility for the misconduct onto individual employees. In the Council's opinion, this indicates that the management of Alstom does not take the problem seriously enough.

There is not as extensive evidence of systematic corruption in this case compared with the Siemens case.[88] The Council notices however that there are three documented cases of corruption, that there are five ongoing corruption investigations against the company and that Alstom, in contrast to Siemens, has shown very little willingness to acknowledge that

a problem exists and to clean up. In the Siemens case, it was particularly the intervention and investigation of American authorities that led to the management actually acknowledging the misconduct and implementing comprehensive cleanup in their own ranks. This element is absent in the present case.

In view of the above, the Council deems it improbable that Alstom will be able to prevent future gross corruption. Based on an overall assessment the Council finds that there is an unacceptable risk of continued use of bribery in the future.

10 Recommendation

The Council on Ethics recommends that Alstom SA be excluded from the investment universe of the *Government Pension Fund Global*.

Gro Nystuen Chair	Andreas Føllesdal	Anne Lill Gade	Ola Mestad	Ylva Lindberg
(sign.)	(sign.)	(sign.)	(sign.)	(sign.)

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17 At the time the company name was Alsthom.

18 The United States District Court for the Central District of California Western Division. Case No. CV 06-01544-RGK (MLG) 'In the matter of the extradition of Man Seok Choe, a fugitive from the Republic of Korea'. 10 October 2006, page 18.
Man Seok Choe was arrested by American police in 2006, as an arrest warrant had been issued by the South Korean police. Man Seok Choe invoked the act of *Protection of Personal Liberty* against the extradition decision and ended up being released in the USA. The South Korean arrest warrant against Man Seok Choe was extended till 2010. However, Man Seok Choe died in the USA in December 2009, and on 2 February 2010 the South Korean public prosecutor dismissed the case on the grounds that '*no prosecution right is established*'.

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82 Alstom's reply to the Council, 10 November 2010.

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84 The New York Times, '*Swiss judge says Alstom investigation almost complete*': www.iht.com/articles/2008/06/23/business/alstom.php.
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88 The Council's recommendation of 15 November 2007. Siemens AG.

To the Ministry of Finance
Recommendation – 15 February 2011
(Published 25 August 2011)
(Unofficial English translation)

Recommendation on the exclusion of Grupo Carso SAB de CV

1 Introduction

The GPFG's ethical guidelines' paragraph 2[1] states, "*The Fund's shares shall not be invested in companies which, themselves, or through entities they control, produce tobacco.*"

The Council on Ethics continuously monitors the Fund's investment portfolio in order to identify companies which carry out activities that may be inconsistent with the ethical guidelines. This review has shown that the Mexican company Grupo Carso SAB de CV[2] could be involved in the production of tobacco.

2 Contact with the company

In September 2010, the Council on Ethics sent a letter to Grupo Carso SAB de CV to enquire as to whether the company produces tobacco[3], either itself or through entities under its control. The company responded to the inquiry and made it clear that it owns 69, 94 percent of the company Compañia Mercantil de Productos de Tabaco SA de CV, which produces tobacco products. The company further informs that it owns 20 percent of Philip Morris SA de CV, which produces cigarettes.[4]

3 The Council on Ethics' evaluation

The Council on Ethics considers that the company's ownership of Compañia Mercantil de Productos de Tabaco SA de CV falls within the ethical guidelines' criterion of control. Consequently, Grupo Carso SAB de CV produces tobacco through a company it controls.

4 Recommendation

Based on the information above, the Council on Ethics recommends the exclusion of the company Grupo Carso SAB de CV from the investment universe of the Government Pension Fund Global.

Gro Nystuen	Dag Olav Hessen	Ylva Lindberg	Ola Mestad	Bente Rathe
Chair				
(sign.)	(sign.)	(sign.)	(sign.)	(sign.)

Endnotes

1 The guidelines for the observation and exclusion of companies from the investment universe of the Government Pension Fund Global: www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.
2 Sedol: 2393452.
3 Letter from the Council on Ethics to Grupo Carso SAB de CV, 16 September 2010.
4 Letter from Grupo Carso SAB de CV to the Council on Ethics, 22 October 2010.

To the Ministry of Finance
4 May 2011
(Unofficial English translation)

The Council on Ethics' annual report on Siemens to the Ministry of Finance

As a result of the Council on Ethics' recommendation of 15 November 2007 to exclude Siemens AG, the Ministry of Finance decided in March 2009 to place the company on an observation list for up to four years. During this period the Council on Ethics and Norges Bank are required to keep Siemens under special observation and submit annual reports to the Ministry of Finance regarding the company's development. In this letter, the Council on Ethics summarizes the most recent developments in Siemens' anti-corruption efforts and gives an account of key events related to the after-effects of previous corruption exposure. In the present reporting period no reason has been found to resubmit the recommendation that Siemens be excluded from the Government Pension Fund Global (GPFG).

Key events in 2010 related to previous exposure of corruption

Having disbursed EUR 2.5 billion in attorneys' fees and fines related to the corruption scandal that was revealed in 2006, Siemens brought an action for civil damages against former board members and corporate executives charging them with having facilitated systematic corruption through a lack of control of company operations in the period from 2003 to 2006. Following the settlements reached with nine out of eleven former managers and board members in 2009, only two managers are now standing trial. As of April 2011, the case is being heard by the *Landgericht* in Munich[1]. Regarding the corrupt practices that have come to light at the company's operations in Greece, Siemens reached a settlement in May 2010 with the former director of its Greek subsidiary. The ex-director paid Siemens EUR 1.2 million in damages for having bribed Greek politicians so that the company would be awarded contracts in the country.

In the course of 2010 several corruption investigations have come to a close through settlements or dropped prosecutions. In April 2010 the prosecuting authority in Wuppertal, Germany, decided not to continue the investigation of Siemens employees that stood accused of bribing civil servants in Serbia in 2002 in return for awarding the company an EU contract to renovate a power plant. In November 2010, Siemens Nigeria and the Nigerian Economic and Financial Crimes Commission (EFCC) reached a settlement requiring the company to pay a double-digit million amount (EUR) in exchange for which the Nigerian government dropped the criminal charges against the company and its staff and refrained from banning Siemens from the country. The charges were based on accusations that Siemens had paid bribes to civil servants in Nigeria in the period between 2002 and 2005.

As mentioned in the Council on Ethics' recommendation of 15 November 2007, based on the investigative report by the Dalseide Committee, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime

(Økokrim) initiated an investigation of employees at Siemens Business Service (SBS) in Norway on suspicions that SBS staff had bribed Norwegian military officials in the period between 2003 and 2004. In 2008, Økokrim pressed charges against two SBS employees for violations of the corruption ban laid down in the Criminal Code, but they were acquitted by the district court in July 2009. The related overbilling case, which involved serious intentional fraud of NOK 60 million against the Norwegian armed forces, resulted in the acquittal of SBS in March 2011, even though the court found a series of irregularities in the company's invoicing. Økokrim did not appeal the decision.

On the basis of the settlement reached between Siemens and the World Bank in 2009, Siemens has committed itself to pay USD 100 million over the next 15 years to non-profit organizations engaged in anti-corruption efforts. In 2010, Siemens, in cooperation with the World Bank, selected over 30 anti-corruption projects from 20 different countries that will receive financing in the order of USD 40 million.[2] In 2010, Collective Action Guide, a project launched in 2008 by Siemens in partnership with the World Bank, has led competitors and clients to sign integrity agreements in order to create corruption-free competition, including in Vietnam and Russia.

A number of corruption investigations against Siemens are still ongoing in countries such as Hungary, Austria, Russia, Argentina, Bangladesh and Germany. These investigations are directed at corrupt practices dating from before 2007. In the last year, no information has emerged regarding new instances of corruption linked to the company.

Siemens' anti-corruption efforts in 2010

In April 2011 the Council on Ethics' Secretariat had a meeting with Josef Winter, Siemens' Chief Compliance Officer, Christof Schwab from Investor Relations, and Niels Hartwig from the Independent Compliance Monitoring Unit. The monitoring unit is headed by Dr. Theodor Waigel, a former German Minister of Finance, and was implemented as part of the settlement between Siemens and US justice and financial authorities in 2008.[3] Waigel's mandate is to evaluate the effectiveness of Siemens' anti-corruption system, to inform Siemens' General Council or Audit Committee of any irregularities he may discover, and to submit annual reports of his assessments and recommendations to the US Department of Justice and the Securities and Exchange Commission. The topic for the Council on Ethics' meeting with Siemens was the company's anti-corruption measures, as well as the effectiveness of the new compliance system.

Siemens' Chief Compliance Officer, Josef Winter, presented the most recent restructuring of the company's compliance management. The responsibility for compliance is now shared between two departments, Compliance Operations and Compliance Governance, headed by Josef Winter and Dr. Klaus Moosmayer respectively. The former is responsible for operation and sales related compliance issues, whereas the latter is responsible for legal procedures, monitoring and internal investigations. According to the company, this arrangement will strengthen the company's overall compliance through an increased focus on compliance in the operational tasks.

During the past year the compliance organization has been engaged in raising employees' awareness of what compliance implies. Siemens has defined this as observing

both established corporate policy and the legislation in each country where the company has operations. Among other measures, Internal Compliance Perception Surveys have been carried out, showing that employees are aware of their compliance obligations and that they perceive the company's practices as being in accordance with the compliance regulations. In 2010 the compliance budget is still at EUR 100 million, comprising 600 compliance positions. The Council on Ethics has described the company's compliance programme in greater detail in its letter of 3 September 2008 and in it's reporting letter of 12 April 2010.

In its second year, the monitoring unit headed by Waigel has taken a closer look at Siemens' compliance system by carrying out practical project and contract based reviews focusing on financial systems in individual countries, including Argentina, Egypt, Greece, Russia and Turkey. In addition to this, more than 800 interviews have been conducted with employees in positions exposed to corruption, such as sales, financial and auditing managers. In 2010, based on findings in tests and interviews, Waigel has issued a certificate where he confirms that the company has a well-implemented compliance programme. Further, no corrupt practices have been reported which are not being handled by the system.

The monitoring unit's strategy for 2011 is to evaluate the implementation of its previous recommendations, 81 per cent of which have already been implemented, as well as carrying out surveys to establish the sustainability of Siemens' compliance system. Moreover, eleven countries have been selected for more thorough examination, including China and Russia. In light of the unrest in the Middle East, the company's internal control mechanisms will have a special focus on these countries in 2011.

The Council on Ethics will continue the observation of Siemens' anti-corruption efforts through a dialogue with corporate compliance managers and with the monitoring unit headed by Waigel. The Council on Ethics will also pay attention to whether any information should emerge from other sources regarding new incidents of corruption in the company.

Yours sincerely,

Gro Nystuen
Chair

Endnotes

1 *Landgericht* is a court of second instance in the German court system that hears criminal cases and ordinary civil actions.

2 The World Bank's website: web.worldbank.org/wbsite/external/news/0,,contentmdk:22786119~pagepk:34370~pipk:34424~thesitepk:4607,00.html.

3 See reporting letter of 12 April 2010.

Recommendations on excluded companies

Summary of recommendations on excluded companies

Recommendations to exclude companies that produce cluster munitions

16.06.2005 **Companies producing cluster munitions**
The companies General Dynamics Corp., L3 Communications Holding Inc., Raytheon Co., Lockheed Martin Corp., and Alliant Techsystems Inc. are excluded on the basis of the production of components for cluster munitions.
(Published 2 September 2005)

06.09.2006 **Poongsan Corp.**
The South-Korean company Poongsan Corp. is excluded on the basis of the production of cluster munitions.
(Published 6 September 2006)

15.05.2007 **Hanwha Corp.**
The South-Korean company Hanwha Corp. is excluded on the basis of the production of cluster munitions.
(Published 11 January 2008)

26.08.2008 **Textron Inc.**
The US company Textron Inc. is excluded on the basis of the production of cluster munitions.
(Published 30 January 2009)

Recommendations to exclude companies that produce key components for nuclear weapons

19.09.2005 **Companies developing and producing key components for nuclear weapons**
The companies BAE Systems Plc., Boeing Co., Finmeccanica Sp. A., Honeywell International Inc., Northrop Grumman Corp., and Safran SA are excluded on the basis of the development and production of key components for nuclear weapons.
(Published 5 January 2006)

18.04.2006 **EADS Co.**
The Dutch company EADS Co. (European Aeronautic Defence and Space Company) was excluded in 2005 on the basis of the production of cluster munitions. In 2006, this was no longer the case, but as the company was producing key components for nuclear weapons, the decision to exclude the company was upheld.
(Published 18 April 2006)

15.11.2007 **GenCorp Inc.**
The US company GenCorp Inc. is excluded on the basis of the production of key components for nuclear weapons.
(Published 11 January 2008)

15.11.2007 **Serco Group Plc.**
The British company Serco Group Plc. is excluded on the basis of the production of key components for nuclear weapons.
(Published 11 January 2008)

Recommendations to exclude companies that produce antipersonnel landmines

22.03.2002 **Singapore Technologies Engineering Ltd.**
The company Singapore Technologies Engineering Ltd. is excluded because of the production of antipersonnel landmines based on a recommendation from the Council on International Law, which preceded the Council on Ethics.
(Published 26 April 2002)

Recommendations to exclude companies that supply weapons and military equipment to Burma

14.11.2008 **Dongfeng Motor Group Co. Ltd.**
The Chinese company Dongfeng Motor Group Co. Ltd. is excluded because it supplies military trucks to the Burmese Government.
(Published 13 March 2009)

Recommendations to exclude companies that produce tobacco

22.10.2009 **Companies producing tobacco**
The companies Alliance One International Inc., Altria Group Inc., British American Tobacco BHD, British American Tobacco Plc., Gudang Garam tbk pt., Imperial Tobacco Group Plc., ITC Ltd., Japan Tobacco Inc., KT&G Corp, Lorillard Inc., Philip Morris International Inc., Philip Morris Cr AS., Reynolds American Inc., Souza Cruz SA, Swedish Match AB, Universal Corp VA, and Vector Ltd. Group are excluded due to the production of tobacco.
(Published 19 January 2010)

15.11.2010 **Shanghai Industrial Holdings Ltd.**
The Chinese company Shanghai Industrial Holdings Ltd. is excluded because a wholly owned subsidiary produces tobacco.
(Published 15 March 2011)

15.02.2011 **Grupo Carso SAB de CV**

The mexican company Grupo Carso is excluded because of its involvement in the production of tobacco.

(Published 25 August 2011)

Recommendations to exclude companies that contribute to violations of human rights

15.11.2005 **Wal-Mart Stores Inc.**

The US retailer Wal-Mart Stores Inc. and its subsidiary Wal-Mart de Mexico are excluded because of unacceptable working conditions both in some of the company's own stores and among its global suppliers.

(Published 6 June 2006)

Recommendations to exclude companies that contribute to violations of the rights of individuals in situations of war or conflict

16.09.2009 **Africa Israel Investments Ltd. and Danya Cebus Ltd.**

The Israeli company Africa Investments Ltd., including its subsidiary, the company Danya Cebus Ltd., are excluded because of their activities in the building of Israeli settlements in the West Bank.

(Published 23 August 2010)

Recommendations to exclude companies that contribute to severe environmental damage

15.02.2006 **Freeport McMoRan Copper & Gold Inc.**

The US mining company Freeport McMoRan Copper & Gold Inc. is excluded due to severe environmental damage caused by the company's practice of using riverine tailings disposal at the Grasberg Mine in Indonesia.

(Published 6 June 2006)

15.05.2007 **Vedanta Resources Plc.**

The British metals and mining company Vedanta Resources Plc., including its subsidiaries Sterlite Industries Ltd. and Madras Aluminium Company Ltd., are excluded on the grounds of causing severe environmental damage associated with pollution and irresponsible waste disposal at the companies' copper and aluminium works in India, as well as human rights violations, including the abuse and forced displacement of tribal peoples.

(Published 6 November 2007)

15.02.2008 **Rio Tinto Plc. and Rio Tinto Ltd.**

The British/Australian mining group Rio Tinto is a joint venture partner to the Grasberg Mine operated by Freeport McMoRan in Indonesia. Freeport McMoRan was excluded from the Fund in 2005 due to environmental damage caused by the company's riverine tailings disposal. Rio Tinto was

excluded because the company is regarded to be directly involved in the severe environmental damage caused by the mining operation.
(Published 9 September 2008)

15.08.2008 **Barrick Gold Corp.**
The Canadian mining company Barrick Gold Corp. is excluded on the grounds of severe environmental damage caused by the company's riverine tailings disposal from the Porgera Mine in Papua New Guinea.
(Published 30 January 2009)

16.02.2009 **MMC Norilsk Nickel**
The Russian company MMC Norilsk Nickel is excluded because its nickel plant on the Taymyr Peninsula causes serious damage to the environment.
(Published 20 November 2009)

22.02.2010 **Samling Global Ltd.**
The Malaysian forest company Samling Global Ltd. carries out forest operations in tropical rainforest. Samling is excluded on the grounds of illegal logging and severe environmental damage in Sarawak (Malaysia) and Guyana.
(Published 23 August 2010)

15.09.2010 **Lingui Developments Berhad**
The Malaysian forest company Lingui Developments Berhad carries out forest operations in tropical rainforest. Lingui is excluded on the grounds of illegal logging and severe environmental damage in Sarawak (Malaysia). Lingui is a subsidiary of Samling Global Ltd. The exclusion of Samling was partly based on violations in Lingui's operations.
(Published 16 February 2011)

Recommendations to exclude companies that violate fundamental ethical norms

15.05.2009 **Elbit Systems Ltd.**
The Israeli company Elbit Systems Ltd. is excluded because it supplies surveillance systems to the separation barrier on the West Bank.
(Published 3 September 2009)

15.11.2010 **Potash Corp. of Saskatchewan and FMC Corp.**
The Canadian company Potash Corp. of Saskatchewan and the American company FMC Corp. are excluded because of their purchase of phosphate minerals extracted in Western Sahara.
(Published 6 December 2011)

Guidelines for the observation and exclusion of companies from the Government Pension Fund Global's investment universe

(Unofficial English translation)

Adopted by the Ministry of Finance on 1 March 2010 pursuant to Act no. 123 of 21 December 2005 relating to the Government Pension Fund, section 7

Section 1. Scope

(1) These guidelines apply to the work of the Ministry of Finance, the Council on Ethics and Norges Bank concerning the exclusion and observation of companies.

(2) The guidelines cover investments in the Fund's equity and fixed income portfolio, as well as instruments in the Fund's real-estate portfolio issued by companies that are listed in a regulated market.

Section 2. Exclusion of companies from the Fund's investment universe

(1) The assets in the Fund shall not be invested in companies which themselves or through entities they control:

a) produce weapons that violate fundamental humanitarian principles through their normal use;

b) produce tobacco;

c) sell weapons or military material to states mentioned in section 3.2 of the guidelines for the management of the Fund.

(2) The Ministry makes decisions on the exclusion of companies from the investment universe of the Fund as mentioned in paragraph 1 on the advice of the Council on Ethics.

(3) The Ministry of Finance may, on the advice of the Council of Ethics, exclude companies from the investment universe of the Fund if there is an unacceptable risk that the company contributes to or is responsible for:

a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation;

b) serious violations of the rights of individuals in situations of war or conflict;

c) severe environmental damage;

d) gross corruption;

e) other particularly serious violations of fundamental ethical norms.

(4) In assessing whether a company shall be excluded in accordance with paragraph 3, the Ministry may among other things consider the probability of future norm violations; the severity and extent of the violations; the connection between the norm violations

and the company in which the Fund is invested; whether the company is doing what can reasonably be expected to reduce the risk of future norm violations within a reasonable time frame; the company's guidelines for, and work on, safeguarding good corporate governance, the environment and social conditions; and whether the company is making a positive contribution for those affected, presently or in the past, by the company's behaviour.

(5) The Ministry shall ensure that sufficient information about the case has been obtained before making any decision on exclusion. Before deciding on exclusion in accordance with paragraph 3, the Ministry shall consider whether other measures may be more suitable for reducing the risk of continued norm violations or may be more appropriate for other reasons. The Ministry may ask for an assessment by Norges Bank on the case, including whether active ownership might reduce the risk of future norm violations.

Section 3. Observation of companies

(1) The Ministry may, on the basis of advice from the Council on Ethics in accordance with section 4, paragraphs 4 or 5, decide to put a company under observation. Observation may be chosen if there is doubt as to whether the conditions for exclusion have been fulfilled, uncertainty about how the situation will develop, or if it is deemed appropriate for other reasons. Regular assessments shall be made as to whether the company should remain under observation.

(2) The decision to put a company under observation shall be made public, unless special circumstances warrant that the decision be known only to Norges Bank and the Council on Ethics.

Section 4. The Council on Ethics for the Government Pension Fund Global – appointment and mandate

(1) The Ministry of Finance appoints the Council on Ethics for the Government Pension Fund Global. The Council shall consist of five members. The Council shall have its own secretariat.

(2) The Council shall monitor the Fund's portfolio with the aim of identifying companies that are contributing to or responsible for unethical behaviour or production as mentioned in section 2, paragraphs 1 and 3.

(3) At the request of the Ministry of Finance, the Council gives advice on the extent to which an investment may be in violation of Norway's obligations under international law.

(4) The Council gives advice on exclusion in accordance with the criteria stipulated in section 2, paragraphs 1 and 3.

(5) The Council may give advice on whether a company should be put under observation, cf. section 3.

Section 5. The work of the Council on Ethics

(1) The Council deliberates matters in accordance with section 4, paragraphs 4 and 5 on its own initiative or at the behest of the Ministry of Finance. The Council on Ethics shall develop principles that form the basis for the Council's selection of companies for closer investigation. The principles shall be made public.

(2) The Council shall obtain the information it deems necessary and ensure that the case has been properly investigated before giving advice on exclusion from the investment universe.

(3) A company that is being considered for exclusion shall be given the opportunity to present information and viewpoints to the Council on Ethics at an early stage of the process. In this context, the Council shall clarify to the company which circumstances may form the basis for exclusion. If the Council decides to recommend exclusion, its draft recommendation shall be presented to the company for comment.

(4) The Council shall describe the grounds for its recommendations. These grounds shall include a presentation of the case, the Council's assessment of the specific basis for exclusion and any comments on the case from the company. The description of the actual circumstances of the case shall, insofar as possible, be based on material that can be verified, and the sources shall be stated in the recommendation unless special circumstances indicate otherwise. The assessment of the specific basis for exclusion shall state relevant factual and legal sources and the aspects that the Council believes ought to be accorded weight. In cases concerning exclusion pursuant to section 2, paragraph 3, the recommendation shall, as far as is appropriate, also give an assessment of the circumstances mentioned in section 2, paragraph 4.

(5) The Council shall routinely assess whether the basis for exclusion still exists and may, in light of new information, recommend that the Ministry of Finance reverse a ruling on exclusion.

(6) The Council's routines for processing cases concerning the possible reversal of previous rulings on exclusion shall be publicly available. Companies that have been excluded shall be specifically informed of the routines.

(7) The Ministry of Finance publishes the recommendations of the Council on Ethics after the securities have been sold, or after the Ministry has made a final decision not to follow the Council on Ethics' recommendation.

(8) The Council shall submit an annual report on its activities to the Ministry of Finance.

Section 6. Exchange of information and coordination between Norges Bank and the Council on Ethics

(1) The Ministry of Finance, the Council on Ethics and Norges Bank shall meet regularly to exchange information about work linked to active ownership and the Council on Ethics' monitoring of the portfolio.

(2) The Council on Ethics and Norges Bank shall have routines to ensure coordination if they both contact the same company.

(3) The Council on Ethics may ask Norges Bank for information about how specific companies are dealt with through active ownership. The Council on Ethics may ask Norges Bank to comment on other circumstances concerning these companies. Norges Bank may ask the Council on Ethics to make its assessments of individual companies available.

Section 7. Notification of exclusion

(1) The Ministry of Finance shall notify Norges Bank that a company has been excluded from the investment universe. Norges Bank shall be given a deadline of two calendar months to complete the sale of all securities. Norges Bank shall notify the Ministry as soon as the sale has been completed.

(2) At the Ministry's request, Norges Bank shall notify the company concerned of the Ministry's decision to exclude the company and the grounds for this decision.

Section 8. List of excluded companies

The Ministry shall publish a list of companies that have been excluded from the investment universe of the Fund or put under observation.

Section 9. Entry into force

These guidelines come into force on 1 March 2010. The Ethical Guidelines for the Government Pension Fund – Global, adopted by the Ministry of Finance on 19 November 2004, are repealed on the same date.

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