

COUNCIL ON ETHICS

THE GOVERNMENT PENSION FUND GLOBAL

To Norges Bank

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Recommendation to exclude Kosmos Energy Ltd. and Cairn Energy Plc. from the Government Pension Fund Global

Summary

The Council recommends the exclusion of the companies Kosmos Energy Ltd. and Cairn Energy Plc. from the Government Pension Fund Global (GPF) due to an unacceptable risk of the companies contributing to serious violations of fundamental ethical norms through their hydrocarbon exploration offshore Western Sahara.

Western Sahara is a non-self-governing territory without a recognised administering power. The Council bases its assessment on, *i.a.*, the UN Convention on the Law of the Sea (UNCLOS), article 73 of the UN Charter regarding non-self-governing territories and other sources relevant to the determination of international law. Under the framework of international law, the utilisation of natural resources in non-self-governing territories may be acceptable if it takes place in accordance with the wishes and interests of the local people.

The Council has had an extensive dialogue with the companies during the past year and has also met with Moroccan authorities and representatives of Western Sahara's local people. Based on, *i.a.*, a consultation process, the companies believe that their activities are in accordance with the wishes and interests of the local people. The companies also refer to the fact that they so far do not produce oil, they are only mapping petroleum resources in the area. The companies believe that such mapping may help the parties to reach an agreement on the future status of Western Sahara.

The Council is of the view that no distinction can be made between exploration and exploitation activities in this context. No such distinction can be derived from the UNCLOS. Morocco's objective with carrying out exploration activity is undoubtedly to exploit petroleum deposits. The companies are contributing to this future objective, irrespective of whether the companies themselves only carry out exploration activities or if they will also take part in any future production in the area.

The Council finds that it has not been satisfied that the operations take place in accordance with the wishes and interests of the local people. The companies have confirmed that they have not had a dialogue with Polisario, which the UN recognises as the representative of the people in the area. The companies have consulted with some other stakeholders but it appears difficult to draw conclusions about the wishes and interests of the local people when their recognised representative has not been consulted. On the other hand, it is publicly known that Polisario regards the companies' activities in this area to be unlawful.

Moreover, the Council attaches weight to the fact that the exploration activity contributes to maintaining an unresolved situation in the area. The UN Charter stipulates that the utilisation of natural resources in non-self-governing territories can only take place if it takes place in accordance with the wishes and interests of the people in the area. This is precisely due to the conflict potential inherent in access to natural resources. As long as there is no political solution for the area and one of the parties is expressly opposing the exploration activity, warning that it may lead to an escalation of the conflict, it is reasonable to assume that this activity contributes to maintain the unresolved situation in the area and may even cause it to deteriorate.

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1 Introduction

In April 2014, the Council on Ethics initiated a review of the Fund's investment in Kosmos Energy Ltd.¹ («Kosmos») and Cairn Energy Plc.² («Cairn») based on the guidelines for the observation and exclusion of companies from the Government Pension Fund Global (the Ethical Guidelines).³

The background was information that the companies were involved in hydrocarbon exploration offshore Western Sahara on assignment by Moroccan authorities. Western Sahara is a non-self-governing territory without a recognised administering power. Most of the area is administered by Morocco in practice. Morocco however does not have sovereign rights over the resources in the area.

At the end of 2015, the GPFG owned shares in Kosmos valued at NOK 138 million and shares in Cairn valued at NOK 338 million, corresponding to ownership interests of 0.78 per cent and 2.85 per cent respectively.

In 2006, Kosmos entered into a contract with the state-owned Moroccan oil company ONHYM regarding oil exploration on the Cap Boujdour field offshore Western Sahara. No activities had been initiated at the time. The contract was renewed in 2011 and in 2013 Kosmos entered into a *joint venture* agreement to develop the field with Cairn Energy Plc. Kosmos owns 55 per cent of this licence and is the operator. Cairn owns 20 per cent. The remaining ownership interest is held by ONHYM.

Seismic surveys were conducted in 2013-2014 and Kosmos drilled a test well in the autumn of 2014. The company has undertaken to drill 10 test wells in the field.

The problem arising from the activities of the companies is not connected to the effects that they may cause to the local environment where they operate. The question is whether it is acceptable for the companies to assist the Moroccan authorities in mapping, with the aim of producing, potential hydrocarbon deposits over which Morocco has no sovereign rights, without it being satisfied that this takes place in accordance with the wishes and interests of the local people.

1.1 What the Council has considered

The Council has considered whether there is an unacceptable risk of Kosmos and Cairn contributing to particularly serious violations of fundamental ethical norms pursuant to section 3 letter f of the Ethical Guidelines through their exploration activities offshore Western Sahara on assignment by Moroccan authorities.

The preparatory work to the GPFG's Ethical Guidelines (Government White Paper, NOU 2003:22) specifically point to problems regarding investments in companies with activities in non-self-governing, disputed or occupied areas, and refers to activities on the continental shelf offshore Western Sahara as an example where there may be reason to show restraint.⁴

¹ Issuer ID: 8651619

² Issuer ID: 111323

³ Guidelines for observation and exclusion from the Government Pension Fund Global: <http://etikkradet.no/en/guidelines/>

⁴ Government White Paper (NOU) 2003: 22, page 92 (Norwegian language only): <https://www.regjeringen.no/no/dokumenter/nou-2003-22/id118914/>

The Council assumes that exploration activity in the area may be acceptable if it takes place in accordance with the wishes and interests of the people in the area. The specific question to be considered in this case is whether this condition has been met. It has also been considered whether the companies' activities contribute to maintain an unresolved situation in the area.

1.2 Sources

This recommendation is mainly based on information from the companies, various UN documents, the Moroccan authorities and Polisario.⁵

The Council has had an extensive dialogue with the companies. This has happened through Kosmos, which is the operator for the exploration activities. The information received from Kosmos has also served as basis for the assessment of Cairn.

2 Background

2.1 Previous cases

The Kerr McGee Corp. engaged in offshore oil exploration in Western Sahara, and was excluded from the Fund in 2005 at the recommendation of the Council.⁶ Two main arguments led to this conclusion:

- It could not be satisfied that the activities took place in accordance with the wishes and interests of the people in the area.
- The activities contributed to maintain an unresolved situation in the area.

The Council on Ethics has also recommended the exclusion of two companies that purchase phosphate which is extracted in Western Sahara.⁷

2.2 The situation in Western Sahara

The Council has described the situation in Western Sahara in previous recommendations (2005, 2010 and 2014) to the Ministry of Finance, and in 2015 to the Bank. The fundamental conditions in the area have not changed since these recommendations were made.

The territory of Western Sahara, which became a Spanish protectorate in 1884, was established as a non-self-governing Territory in 1963 in accordance with the provisions

⁵ Polisario was appointed by the UN as a representative of the population of Western Sahara in UN Resolution 34/37 (1978): «*The General Assembly [...] recommends to that end that the Frente Popular para la Liberacion de Saguia el-Hamra y de Rio de Orom [i.e. Polisario], the representative of the people of Western Sahara, should participate fully in any search for a just, lasting and definitive lasting solution of the question of Western Sahara [...]*», <http://www.un.org/documents/ga/res/34/a34res37.pdf>

⁶ Recommendation to exclude the Kerr McGee Corp, April 2005: <http://etikkradet.no/files/2014/12/KMG-12-apri-2005-norsk.pdf>

⁷ Recommendations in 2010 and 2011 regarding the exclusion of FMC Corporation and Potash Corporation of Saskatchewan: http://etikkradet.no/files/2014/12/Rec_phospahte_ENG.pdf
Recommendation dated 26 September 2014 regarding the exclusion of Innophos Holdings Inc: http://etikkradet.no/files/2015/01/Recommendation_Innophos_Sept-2014_ENGLISH.pdf

of the UN Charter. Simultaneously, Spain was appointed the administering Power of what was then called Spanish Sahara.

Western Sahara still retains the UN status of a non-self-governing territory. Unlike other such territories, Western Sahara does not have a recognised administering power.⁸

Morocco has *de facto* control over most of the territory of Western Sahara. However, no UN body has recognised either Morocco's sovereignty over Western Sahara or Morocco as the administering power in the area. No states recognise Moroccan sovereignty over Western Sahara. Nonetheless, Morocco refers to Western Sahara as a Moroccan province, claiming sovereignty over most of the area.

In 1973, an organisation called Polisario was formed with the aim of making Western Sahara an independent state. Polisario initiated an armed insurgency against the Spanish administration. In 1975, the International Court of Justice in the Hague (ICJ) rejected Morocco's and Mauritania's claims to sovereignty over their respective parts of Western Sahara. Morocco then invaded parts of Western Sahara, provoking in strong condemnation by the UN Security Council. Later that year, Spain entered into an agreement with Mauritania and Morocco concerning the transfer of the administrative authority in Western Sahara (the Madrid Accords). They confirmed Spain's intention to support the decolonisation of Western Sahara and to transfer its duties as the administering power to Morocco and Mauritania. The agreement did not transfer sovereignty over the Territory. Spain had no such status, and thus could not unilaterally cede or transfer it. Nor did the agreement alter Western Sahara's status as a non-self-governing territory under the UN Charter. The Spanish authorities presumed that a referendum would be held in Western Sahara regarding the territory's future status. In 1976, Morocco and Mauritania agreed to divide Western Sahara between them. However, Mauritania withdrew in 1979 and Morocco has in practice controlled most of the territory ever since.

Morocco has administered most of the territory since 1979 without being the administering power pursuant to the provisions of the UN Charter.

In 1991 a ceasefire was signed, bringing the armed conflict between Polisario and Morocco to an end. The UN peacekeeping force MINURSO is surveilling the ceasefire and was originally intended to monitor the referendum on the future of the territory as well.

Since the 1990s, several initiatives have been launched under the auspices of the UN with the aim of holding the referendum. Moroccan authorities and Polisario resumed talks in April 2007. They have broken down several times and have made little progress. In 2007, Morocco presented a proposal implying Moroccan sovereignty over the territory but offering a certain level of self-rule (autonomy). Polisario is maintaining its demand for a referendum that includes the option of independence.

On the occasion of an official celebration in 2014, Morocco's King Mohammed VI stated:

«[...] the Sahara will remain part of Morocco until the end of time. [...] The fact that Morocco chose to cooperate in good faith with all parties should not be interpreted as a sign of weakness; nor should it be used as a means

⁸ UN list of non-self-governing territories:

<http://www.un.org/en/events/nonselfgoverning/nonselfgoverning.shtml>

to ask for more concessions. [...] The autonomy initiative is the maximum Morocco can offer to achieve a final solution to this regional conflict.»⁹

There is thus little indication that any negotiated solution to the conflict will be achieved soon.

Western Sahara is at the current stage populated largely by people of Moroccan origin who moved to the area after 1979. The population of Western Sahara is estimated to be approximately 550,000. Some 165,000 of the area's indigenous population, the Saharawi, have been displaced to refugee camps in Algeria, where they live in very difficult conditions.¹⁰

2.3 Rules of international law

Article 73 of the UN Charter

Chapter XI of the UN Charter pertains to non-self-governing territories. Article 73 stipulates the duty on states that have or assume responsibility for the administration of such territories *«to ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment and their protection against abuses»*, and additionally *«to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement»*.¹¹

Article 73 stipulates that the economic and political developments in such areas are to take place in accordance with the wishes and interests of the people in the area. As regards Western Sahara, this principle has been confirmed in a number of UN resolutions.¹²

UN Convention on the Law of the Sea (UNCLOS)

As a point of departure, coastal states have sovereign rights over natural resources on the continental shelf off their land territory. This principle is enshrined in the UN

⁹ Quoted in *«Report of the Secretary-General on the situation concerning Western Sahara»*, 10 April 2015 (S/2015/246), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/246

¹⁰ *«The Sahrawi refugees in Algeria are settled in five camps near Tindouf. Owing to the remoteness of the area, they remain dependent on humanitarian assistance with little prospect of self-reliance as income-generating activities are scarce. The Government estimates that there are 165,000 refugees in the camps.»*, UNHCR, 2015: <http://www.unhcr.org/pages/49e4861f6.html>

¹¹ The UN Charter, 1945: <http://www.un.org/en/sections/un-charter/chapter-xi/index.html>

¹² Inter alia General Assembly RES 3458 (XXV) of 10 December 1975 which states *«the right of the people of the Spanish Sahara to self-determination, in accordance with General Assembly Resolution 1514 (XV)»*.: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/001/71/IMG/NR000171.pdf?OpenElement> Western Sahara has otherwise been dealt with in a number of other resolutions over the past years, including 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, A/RES/ 63/102, 18 December 2008, A/RES/65/119, 10 December 2010, and in Security Council Resolutions such as 1754 (2007), 1783 (2007), 1813 (2008), 1871 (2009), 1920 (2010), 1979 (2011), 2044 (2012), 2099 (2013), and 2152 (2014).

Convention on the Law of the Sea¹³ to which Morocco is a Party and in international jurisprudence.

Morocco does not have sovereignty over Western Sahara and is as such not entitled to utilise the resources on the continental shelf of Western Sahara. Article 73 of the UN Charter and General Assembly resolutions¹⁴ all stipulate that natural resources in non-self-governing territories may only be exploited with the consent of the people in the area and in accordance with their interests. This is reiterated in the UN Convention on the Law of the Sea. Resolution III a, which forms an annex to the Convention, states:

*«In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.»*¹⁵

This provision covers Western Sahara, which is a non-self-governing territory, and thus states that the rights under the Convention on the Law of the Sea are to be exercised for the benefit of the people in non-self-governing areas.

Resolution III further states that when a dispute arises regarding the rights to natural resources in a non-self-governing territory, the parties shall hold consultations in which *«[...] the interests of the people of the territory concerned shall be a fundamental consideration.»* In addition, the states concerned are obliged not to *«jeopardize or hamper the reaching of a final settlement of the dispute.»*

Article 77 (1) of the Convention on the Law of the Sea also states that: *«The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.»*

It is thus worth noting that, according to article 77 (1), the rights to the continental shelf, which in this case belong to the people of Western Sahara in accordance with the abovementioned provision in resolution III a, include both *exploration* and *exploitation*.

Legal opinion from the UN's legal advisor (2002 UN Legal Opinion)

A legal opinion from a UN legal advisor in 2002 reviews the legality of extracting mineral resources in non-self-governing territories in general and provides an assessment of the particular situation in Western Sahara.

Not all forms of economic activity in non-self-governing territories can be regarded as problematic according to the legal opinion. Reference is made to several UN resolutions which draw a distinction between economic activity in non-self-governing territories that is harmful to the local people and economic activity that benefits the local people:

¹³ United Nations Convention on the Law of the Sea, 1982 (UNCLOS), i.a. articles 76 and 77, http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm

¹⁴ Inter alia General Assembly RES 3458 (XXV) of 10 December 1975 which states *«the right of the people of the Spanish Sahara to self-determination, in accordance with General Assembly Resolution 1514 (XV)»*. <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/001/71/IMG/NR000171.pdf?OpenElement>

¹⁵ Resolution III, Third United Nations Conference on the Law of the Sea, <http://legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html>

«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.»¹⁶

This legal opinion issued in 2002 thus states that the extraction of mineral resources in non-self-governing territories is only acceptable if it takes place in accordance with the wishes and interests of the people of the area.

Legal opinion from the African Union's legal advisor, 2015

A legal opinion published in October 2015 regarding the legality of Morocco exploring and exploiting natural resources in Western Sahara concludes that all such activity in the area is unlawful and an impediment to a peaceful solution to the conflict regarding the area:

«Any exploration and exploitation of natural resources by Morocco is illegal as it violates international law and resolutions of the UN and the AU relating to the right to self-determination and permanent sovereignty of the people of Western Sahara over their natural resources. In addition, the exploration and exploitation seriously undermines the efforts and negotiations for a just and peaceful settlement over Western Sahara.»¹⁷

The Geneva Conventions

In 2015, Polisario submitted a declaration¹⁸ to Switzerland, the depositary state for the Geneva Conventions (I-IV)¹⁹ and their Protocol I, where Polisario commits to apply the Convention and Protocol in the conflict with Morocco in accordance with article 96 (3)

¹⁶ Letter from the UN Legal Office to the UN Security Council (S/2002/161), 12 February 2002, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/249/87/PDF/N0224987.pdf?OpenElement>

¹⁷ Legal Opinion, the Office of the Legal Counsel and Directorate for Legal Affairs of the African Union Commission. This document is undated but was published on 14 October 2015: <http://legal.au.int/en/sites/default/files/The%20Legal%20Opinion%20%28final%20for%20posting%20on%20the%20website%29.pdf>

¹⁸ Switzerland is the depositary state for the Geneva Conventions. Notification from the Swiss foreign-affairs authorities 23 June 2015: https://www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150626-GENEVE_en.pdf

¹⁹ ICRC: <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>

of Protocol I, cf article 1(4).²⁰ This will imply that Morocco and Polisario, by being «*the authority representing a people engaged against a High Contracting Party*», is bound by the rules of the Geneva Conventions for international conflict and occupation, cf. Protocol 1, article 96(3)(a) and (b). Morocco has protested, stating, *i.a.*, that more than 25 years had passed since there were conduct of hostilities between Polisario and Morocco, and that Polisario cannot qualify as a representative under Protocol I.²¹

Court decision by the General Court, the court of first instance, of the European Court of Justice, December 2015

In a court decision²² issued in December 2015, the General Court agreed with Polisario's claim that the EU's trade agreement with Morocco in 2012 must be deemed invalid in so far as it concerns trade in products from Western Sahara. Although the decision is likely to be appealed to the European Court of Justice, the decision recognises Polisario as a party to the proceedings, stipulating that the EU and Morocco cannot amongst themselves enter into a trade agreement that concerns goods produced in Western Sahara if the EU has failed to comply with its independent duty to assess the effects of the agreement on the area.

2.4 The Council's meetings with Moroccan authorities

Moroccan authorities have requested two meetings with the Council on Ethics: in December 2014, the Council met the Secretary General at the Moroccan Ministry of Foreign Affairs and in February 2015, the Council met Morocco's ambassador to Norway.

Morocco's starting point for these conversations is that Western Sahara is Moroccan. As regards the question of safeguarding the wishes and interests of the people in the area, it stated that the authorities safeguard everyone's interests through democratic processes. It was also underlined that Morocco has made considerable investments in the area over the past decades and that the standard of living has improved. Morocco emphasizes that the state investments in the area are far greater than the value of the natural resources extracted from the area. In addition, a regional development plan has been established for the area and will increase investments and further reinforce this development.

²⁰ «*The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:*

- (a) *the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;*
- (b) *the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and*
- (c) *the Conventions and this Protocol are equally binding upon all Parties to the conflict.»*

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4B3EBFB356E8FA04C12563CD0051E2FC>

²¹ Morocco's letter to the Swiss foreign-affairs authorities, 30 June 2015:

https://www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150709-GENEVE-avec-ann_e.pdf

²² Ruling of the General Court, 11 December 2015:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=172870&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=164110>

2.5 The Council's meetings with Polisario

The Council met Polisario's Nordic envoy in May 2015 and representatives of Polisario's leadership in October.

In Polisario's view, the oil exploration activities carried out by Morocco offshore Western Sahara are blatantly unlawful. The activities can only be lawful if Polisario, which is the recognised representative of the people of the area, gives its consent. Polisario has not been consulted. In January 2015, Polisario protested against Kosmos' operations in a letter to the UN Security Council.²³

Polisario expressed concern that oil exploration and possible Moroccan oil production in the area may lead to a higher level of conflict in the area and reduce the possibilities for a negotiated solution. Polisario supports foreign investment, the extraction of natural resources and the economic development of the area, but is concerned that this must take place in the proper order, i.e. after the question of the area's future status has been resolved. If oil is discovered, Polisario believes that Morocco will never relinquish the area.

3 Information from Kosmos and Cairn

Kosmos

The Council has held a number of meetings with Kosmos at which the company has explained its operations in Western Sahara.

Kosmos alleges that the circumstances relating to its operations offshore Western Sahara must be distinguished from those on the basis of which Kerr McGee was excluded from the GPF in 2005. It points to two factors in particular:

- The company has negotiated a joint declaration (*«Joint Declaration of Principles»*) with the Moroccan authorities which states that the exploitation of natural resources in the area will take place in accordance with the 2002 UN Legal Opinion, including that the wishes and interests of the local people are to be taken into account.²⁴
- The company has conducted a *Social Impact Assessment* (*«SIA»*) in order to survey interested parties and the effect that the company's operations has on them. The SIA assesses the possible environmental and socio-economic effects of the company's operations offshore Western Sahara. The Council has been given access to this document.

The company has repeatedly assured the Council that its operations have so far been limited to exploration, that it does not remove resources from the area, and that so far no commercially exploitable discoveries have been made either. The company also states that, if the exploration work is successful, this may lay the foundation for economic developments for the benefit of the people in the area, as the joint declaration states. In the company's view, the exploration activities will not negatively affect the process of finding a solution for the future status of the area; establishing the facts (whether or not

²³ Published by Sahara Press Service: <http://www.sprasad.info/en/content/president-republic-urges-un-security-council-stop-seabed-oil-drilling-coast-occupied-western>

²⁴ Published on Kosmos' website: <http://www.kosmosenergy.com/pdfs/ONHYM-Kosmos-Joint-Declaration-of-Principles-English.pdf>

there are hydrocarbons there) will simply bring clarity to the situation and may even encourage the parties to reach a negotiated solution.

A draft of this recommendation was submitted to Kosmos in November 2015 and the company was invited to comment on it. Kosmos replied to this invitation in an extensive letter to the Council in January 2016.²⁵

In its letter, the company goes into more detail on several of the arguments that have previously been stated to the Council, such as:

- The development of natural resources in the area may help to reach a political solution to the question of the area's future status.
- The company's activities in the area are not unlawful.
- The exploration activities do not conflict with the 2002 UN Legal Opinion.
- The company has mapped the environmental and socio-economic aspects of its operations in the area and is interested in developing the area.
- The company is committed to ensuring that its activities do not contribute to violations of human rights.

The company underlines that it only carries out exploration activities and does not extract resources from the area, and that it is by no means not certain that the company will take part in any future production of oil in the area:

«Our work offshore Western Sahara does not involve the removal of resources and focuses solely on exploration. There is a clear distinction between exploration and exploitation (i.e. production) and it is worth noting that exploration does not always lead to exploitation. Exploration is a combination of activities to determine if hydrocarbons exist in commercial quantities and whether capital should be invested on development, which can include consideration of many factors such as the socio-political and regulatory context, commodity prices, development costs, production costs, and others. Kosmos may have exploration success, but choose not to develop the resource due to insufficient volume of hydrocarbons, recognition that the requirements of the UN Legal Opinion cannot be met, or some other ethical or financial consideration. On the other hand, we may not discover hydrocarbons at all.»

Finally, the company questions how the Council can find that its activities in the area constitute a serious violation of ethical norms and invites the Council to further dialogue on the topics on which this recommendation is based.

Cairn

Since Kosmos is the field's operator and Cairn has not had any physical presence in the area, most of the contact has been with Kosmos. The Council has nonetheless had talks with Cairn, most recently in December 2014, when the company gave an account of its operations relating to Western Sahara. In Cairn's opinion, the final status of Western Sahara does not have to be settled before its hydrocarbon resources are mapped. Cairn underlines that the exploration does not remove resources from the area and that any production will benefit the people of the area. These views are also stated on the company's website.²⁶

²⁵ Letter from Kosmos to the Council dated 14 January 2016.

²⁶ Cairn Energy: Case Study – Complying with Our Business Principles in Cap Boujdour: <http://www.cairnenergy.com/index.asp?pageid=338>

A draft of this recommendation was submitted to Cairn in November 2015 and the company was invited to comment on it. Cairn replied to this invitation in a letter to the Council in January 2016.²⁷ The company points out the following:

- The status of the area does not have to be finally settled in order for its resources to be utilised.
- Morocco is the area's *de facto* administering power and, as such, can award exploration licences.
- The area should be developed economically in parallel with the work of finding a political solution.
- The joint venture with Kosmos is only involved in exploration activity in the area, not in production activity.
- Reference is again made to the *Joint Declaration of Principles* regarding the development of the area and the distribution of any future oil revenues.

4 The Council's assessment

The Council takes as its point of departure that Morocco does not have legal, sovereign rights over the natural resources offshore Western Sahara. It is not the task of the Council to decide on the legality of Morocco's exploration activities in the area or on the future status that the disputed area should have. The Council only considers whether, according to the Fund's Ethical Guidelines, it can be regarded as grossly unethical of the companies under the current circumstances to conduct hydrocarbon exploration in the area on assignment for the Moroccan authorities.

In line with its assessment in the Kerr McGee case (2005), the Council will not distinguish between exploration and exploitation activities in the case at hand. No such distinction is made in the UN Convention on the Law of the Sea, and in any case the aim of the exploration activities is undoubtedly exploitation. The companies, on their part, seem to find support in the 2002 UN Legal Opinion for a view that a distinction can indeed be drawn between exploration and exploitation activities in this context. There is thus a possible point of discrepancy between the legal framework concerning the UN Convention on the Law of the Sea and the 2002 UN Legal Opinion. The Council does not pretend to determine any further on the prevailing international law in the area. It should be pointed out, however, that in a situation of contradictory interpretations of international law, treaty law would prevail over a legal opinion.

The situation in Western Sahara is unique in the sense that it is the only non-self-governing territory without a recognised administering power. There are no clear rules on the utilisation of natural resources in such areas. Under the framework of international law, administering powers of non-self-governing territories are under an obligation to manage the territories in accordance with the wishes and interests of the people of the area. Since the UN does not recognise Morocco as the lawful administering power for Western Sahara, it can be argued that these obligations do not apply to this situation. The legal opinion issued by the UN legal advisor in 2002 is based on an analogy of the obligations of administering powers of non-self-governing territories. An alternative approach could be an assessment based on international humanitarian law. This would probably impose even stricter limitations on companies' operations in the area, as the legal opinion from the African Union concludes.

²⁷ Letter from Cairn to the Council, dated 15 January 2016.

In the Kerr McGee case, the Council placed emphasis on the fact that the company's exploration activities were not in accordance with the wishes and interests of the local people and that they contributed to maintaining an unresolved situation in the area. The Council attributes importance to on the same factors in its assessment of this case.

In their dialogue with the Council, the companies have referred to the fact that the joint declaration with the Moroccan authorities and the SIA were intended to ensure that the local people's wishes and interests were taken into account. Both of these documents are, in the Council's view, problematic:

The *Joint Declaration* refers to the 2002 UN Legal Opinion regarding the right of the people of the area to be consulted. This declaration must be interpreted in light of the fact that Morocco regards the area as its own and that it is consequently the Moroccan authorities who safeguard the local people's wishes and interests, decide on the exploration and the extraction of resources, invite applications for licences, allocate potential oil revenues, etc. This is a *fait accompli* and not an expression of a consultative process with the people of the area in the sense assumed by the 2002 UN Legal Opinion.

Kosmos' *SIA* fails to address the main question of cooperation:

What are the wishes and interests of the local people regarding the exploration for and exploitation of the area's hydrocarbon resources? Instead, it is a study of how Kosmos' activities may affect in various areas (especially environmental and socio-economic factors related to fisheries, tourism, employment, business development, etc.).

As in previous cases, the Council assumes that Morocco's exploitation of natural resources in Western Sahara may be acceptable if the wishes and interests of the local people are safeguarded. It will primarily be the responsibility of the authorities to ensure that the people of an area has given its consent. The Council assumes that the measures which a company can implement on its own to ensure such consent are limited.

It appears difficult to draw conclusions about the wishes and interests of the people in the area when their recognised representative has not been consulted. The UN regards Polisario as the representative of the area's people, and Morocco does negotiate with Polisario when talks on the area's future status take place from time to time. It appears to the Council therefore that the fact that Polisario has not been consulted seems to be a fundamental shortcoming in the assessment of the wishes and interests of the area's local people. It is true that the *SIA* does refer to some other interested parties who have been consulted, but the fact that the main representative of the local people is entirely excluded from the consultation process means that, in the Council's view, little weight can be assigned to it.

In turn, it can be questioned whether the situation in the area is such that meaningful consultation processes can take place there at all. On the other hand, it is not difficult to establish Polisario's views on the issue if one is interested. Polisario's attitude to Morocco's exploration activities in the area is a matter of public knowledge and requires no extensive consultation process for clarification.

When the UN Charter and UN Convention on the Law at Sea state that the natural resources in non-self-governing territories are to be utilised in cooperation with the affected people. This is precisely due to the conflict potential inherent in access to natural resources. Morocco is the only country in the region without an oil and gas industry. Given the lack of progress in the negotiations over the past 30 years, it seems unlikely that any discovery of oil or gas now would make Morocco more willing to meet obligations imposed on it by the international community. As long as there is no

political solution for the area and one of the parties is expressly opposing the exploration activity, warning that it may lead to an escalation of the conflict, it is reasonable to assume that this activity contributes to maintain the unresolved situation in the area and may even cause it to deteriorate.

In the Council's view, Kosmos' exploration activities offshore Western Sahara must be regarded as a serious violation of ethical norms pursuant to the GPFG's ethical guidelines because the wishes and interests of the people of the area are not given due regard, and the activity contributes to maintain an unresolved situation in the area.

As regards Cairn, this company can be said to play a more limited role in the exploration activities in question since it owns a smaller part of the joint venture than Kosmos and is also no operator. The Council nevertheless considers the fact that both companies have entered into a joint venture with one single objective to be important: they are to map any petroleum deposits on Western Sahara's continental shelf on assignment by Moroccan authorities. The Council's assessments regarding Kosmos thus also apply to Cairn.

5 Recommendation

The Council on Ethics recommends excluding Kosmos Energy Ltd. and Cairn Energy Plc. from the Government Pension Fund Global due to the unacceptable risk of the companies contributing to particularly serious violations of fundamental ethical norms.

Johan H. Andresen Chair (Signature)	Hans Chr. Bugge (Signature)	Cecilie Hellestveit (Signature)	Arthur Sletteberg (Signature)	Guro Sletteberg (Signature)
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