



Council on Ethics Government Pension Fund – Global

Annual report 2005

Photo Tor Schmedling
Design Tori Falch
Print Melsom Grafisk as



Table of contents

Introduction	5
Mandate	6
The Council and the Secretariat	7
Overview of Recommendations published by 6 January 2006	8
List of companies excluded in accordance with Recommendations by the Council	9
Attachments	
The Recommendations (full text)	
– Recommendation on exclusion of Kerr-McGee Corp.	12
– Recommendation on exclusion of companies producing cluster weapons	19
– Recommendation on exclusion of companies developing and producing nuclear weapons	25
– Recommendation concerning whether the weapons systems Spider and Intelligent Munition System (IMS) might be contrary to international law	35
– Recommendation on Total S.A.	40
The Ethical Guidelines	62



Introduction

The Council on Ethics for the Norwegian Government Pension Fund – Global (previously the Government Petroleum Fund) was established by governmental decision 19 November 2004, simultaneously with the adoption of the Ethical Guidelines for the Fund. We had our first meeting on 21 December 2004, and have since met about once a month.

The Council on Ethics is an independent Council that shall give Recommendations to the Ministry of Finance. Our mandate is to assess whether companies within the investment opportunities of the Fund should be excluded because of acts or omissions that are inconsistent with the criteria in the Ethical Guidelines. As of 6 January 2006, the Ministry of Finance has published five Recommendations submitted by us. We have, based on the criteria in the Guidelines, recommended exclusion of one company because of violations of ethical norms through exploration activities off-shore the non-self-governed territory of Western Sahara. We have further recommended exclusion of seven companies because of their involvement in production of components to cluster weapons and seven other companies because of their involvement in the development and production of nuclear weapons. Both of these weapons categories can, according to the preparatory work of the Guidelines, violate fundamental humanitarian principles. Moreover, we have given a legal opinion on whether a certain weapons system is inconsistent with the Mine Ban Treaty. Finally, we have issued a recommendation on non-exclusion of a company because of its alleged complicity in human rights abuses in Burma. The Ministry of Finance has decided to follow these Recommendations. Only Recommendations that have been made public before 6 January 2006 are discussed in and attached to this annual report.

The Council on Ethics shall, in accordance with its mandate, report annually of its activities to the Ministry of Finance. The Council's work is reflected in our Recommendations. These are annexed in their entirety to this annual report. We have also included information concerning the mandate of the Council of Ethics, about the members of the Council and of the Secretariat, as well as an overview of the companies that have been excluded. All published Recommendations, in addition to other relevant information and links are available at our website www.etikkradet.no in both Norwegian and English.

It is our ambition that the Recommendations shall be thorough, well documented and of good quality. If the Ethical Guidelines are to have an impact in the long run, we think this is essential. We rely on a number of different sources in order to document facts and substantiate assessments in our recommendations. These range from NGOs, governmental institutions, re-search institutes, commercial screening companies, companies and international organisations. The Council has a Secretariat of four persons working with information gathering and quality control of this information, as well as facilitating the decision-making process of the Council. The footnotes in the Recommendations indicate the sources that have been relied upon in each individual case. Implementing the Ethical Guidelines has been inspiring to us, and could hopefully inspire other Funds to promote ethical ends. We would like to thank for every input, advice and criticism given.

Gro Nystuen Andreas Føllesdal Anne Lill Gade Ola Mestad Bjørn Østbø
(Chair)

Mandate for the Council of Ethics

In the Amendment to the 2004 National Budget of Norway, the Ministry of Finance presented Ethical Guidelines for the Government Petroleum Fund. The Ethical Guidelines were based on a proposal from a Government appointed committee lead by Hans-Petter Graver (NOU 2003:22). The Norwegian Parliament approved of the proposal in the Budget Proposal Report No. II. (2003-2004). The Ministry of Finance established the Guidelines, which entered into force 1 December 2004.

The mandate for the Ethical Council states, among other things:

“The Council on Ethics for the Government Pension Fund – Global shall consist of five members. The Council shall have its own secretariat. The Council shall submit an annual report on its activities to the Ministry of Finance.

Upon request of the Ministry of Finance, the Council issues recommendations on whether an investment may constitute a violation of Norway’s obligations under international law.

The Council shall issue recommendations on negative screening of one or several companies on the basis of production of weapons that through normal use may violate fundamental humanitarian principles. The Council shall issue recommendations on the exclusion of one or several companies from the investment universe because of acts or omissions that constitute an unacceptable risk that the Fund contributes to:

- Serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other forms of child exploitation
- Serious violations
- Severe environmental damages
- Gross corruption
- Other particularly serious violations of fundamental ethical norms

The Council shall raise issues under this provision on its own initiative or at the request of the Ministry of Finance.

The recommendations and decisions shall be made public. The Ministry may, in certain cases, postpone the time of public disclosure if this is deemed necessary in order to ensure a financially sound implementation of the exclusion of the company concerned.”

In accordance with a letter from the Ministry of Finance of 24 October 2005, the Council shall submit to the Ministry of Finance a letter with Recommendations on fixed dates four times per year (15 February, 15 June, 15 September and 15 November). If the Ministry, on the basis of the Recommendations by the Council, decides upon exclusion of companies, the Norwegian Central Bank shall have two entire months to dispose of any securities in the company held by the Fund. The Ministry will publish Recommendations and decisions regarding any exclusion after the completion of such disposals.



Members of the Council and of the Secretariat

The Council on Ethics

Gro Nystuen (Chair), dr. juris and Associate Professor at the Center for Human Rights, the University of Oslo

Andreas Føllesdal professor PhD in Philosophy at the Center for Human Rights, the University of Oslo

Anne Lill Gade MSc in limnology (freshwater ecology), Product Safety Manager at Jotun AS

Ola Mestad dr. juris and Professor at the Centre for European Law, University of Oslo

Bjørn Østbø economist HAE, Chief Executive Officer at Vital Eiendom AS

The Secretariat

The Council has a Secretariat that investigates and prepares cases for the Council.

As of 31 December 2006, the Secretariat had the following employees:

Malin Helgesen (cand. jur, LLM)

Hilde Jervan (cand. agric)

Aslak Skancke (graduate engineer)

Heidi Ulstein (economist)

Kamil Zabielski (post graduate student)

Overview of Recommendations issued by the Council on Ethics published as of 6 January 2006

- 12.04.05 Letter to the Ministry of Finance recommending disinvestment in Kerr-McGee Corp**
Recommendation on disinvestment in the American oil company Kerr-McGee Corp. on the basis of the company's exploring activities off-shore West Sahara, a non-self-governing territory.
(Published 6 June 2005.)
- 16.06.05 Letter to the Ministry of Finance recommending exclusion of seven companies producing Cluster Weapons components**
Recommendation on disinvestment in the companies General Dynamics Corporation, L3 Communications Holdings, Inc., Raytheon Company, Lockheed Martin Corporation, Alliant Techsystems, Inc., EADS N.V. (European Aeronautic Defence and Space Company) and Thales S.A.
(Published 2 September 2005.)
- 19.09.05 Letter to the Ministry of Finance recommending exclusion of seven companies developing and producing nuclear weapons components**
Recommendation on exclusion of the companies BAE Systems Plc., Boeing Co., Finmeccanica Sp.A., Honeywell International Inc., Northrop Grumman Corp., United Technologies Corp. and Safran SA.
(Published 5 January 2006.)
- 20.09.05 Letter to the Ministry of Finance assessing the consistency of two weapons systems with international law**
Legal opinion on whether the two weapons systems Spider and Intelligent Munition Systems (IMS) constitute a violation of the Antipersonnel Mine Convention. For the time being, no recommendation on exclusion.
(Published 13 October 2005.)
- 14.11.05 Letter to the Ministry of Finance recommending continued investment in Total S.A.**
Assessment of whether investments in the oil company Total SA, because of the company's operations in Burma, is contrary to the Ethical Guidelines. In particular, the recommendation deals with the question of companies' complicity in human rights violations.
(Published 5 January 2006.)

The Ministry of Finance has followed the Recommendations by the Council.



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

As of 6 January 2006, the Ministry of Finance had, based on the Recommendations from the Council on Ethics, decided to exclude the following companies from the Government Pension Fund – Global:

- Kerr-McGee Corp.
- General Dynamics Corporation
- L3 Communications Holdings, Inc.
- Raytheon Company
- Lockheed Martin Corporation
- Alliant Techsystems, Inc.
- EADS N.V (European Aeronautic Defence and Space Company)
- Thales S.A.
- BAE Systems Plc.
- Boeing Co.
- Finmeccanica Sp.A.
- Honeywell International Inc.
- Northrop Grumman Corp.
- United Technologies Corp.
- Safran SA.

The Ministry of Finance has also excluded the company **EADS Finance BV** in connection with the exclusion of Cluster Weapon components producers. In addition, the Ministry of Finance has previously (22 March 2002) excluded the company **Singapore Technologies Engineering** because of antipersonnel mines production.



The Recommendations

To the Ministry of Finance

Oslo, 12 April 2005
(Published 6 June 2005)

Recommendation on exclusion of the company Kerr-McGee Corporation

Introduction

In a letter from the Ministry of Finance dated 12 December 2004, the Petroleum Fund's Council on Ethics was asked to assess whether the investments by the Fund in the company Kerr-McGee could constitute a violation of the Ethical Guidelines for the Government Petroleum Fund. The background for this request was that the Minister of Finance had received letters from the Western Sahara Support Committee and the Government of the SADR (Saharawi Arab Democratic Republic), asking him to disinvest from the Fund's investments in the company Kerr-McGee Corporation. Subsequently, the Ministry of Finance also received a letter from Kerr-McGee Corporation,¹ arguing that their company should not be subject to disinvestment from the Fund. In its meeting on 21 December 2004, the Petroleum Fund's Council on Ethics decided to evaluate the merits of the case.

According to the Annual Report of Norges Bank ² for 2004, which was published on 1 March 2005, the Fund had equity holdings of NOK 221 978 000 and fixed income securities of NOK 115 344 000 in Kerr-McGee Corporation.

The Council on Ethics has decided to make the following recommendation to the Ministry of Finance, which, according to point 4.5 of the Ethical Guidelines, shall be submitted to the company for comments.

Background for the case

The company Kerr-McGee Corporation ³ entered in 2001 into a contract with the governmental Moroccan oil company ONAREP regarding geological and geophysical studies off shore Western Sahara. This contract has since been renewed. Moroccan authorities have informed the Office of the Legal Adviser of the UN that the contract contains "standard options for the relinquishment of the rights under the contract or its continuation, including an option for future oil contracts in the respective areas or parts thereof." ⁴

Moroccan authorities describe Western Sahara as "Moroccan Saharan Provinces", and claim sovereignty over the area. According to the UN, however, Western Sahara is still a *Non-Self-Governing Territory*, and, as such, not subject to Moroccan sovereignty. Western Sahara, a Spanish protectorate since 1884, was, according to the provisions of the UN Charter, established as a Non-Self-Governing Territory in 1963. Spain was appointed Administrative Power for the area.

The liberation movement POLISARIO⁵ was established in 1973. Its aim was to achieve independence for Western Sahara. POLISARIO started an armed uprising against the Spanish Administrative Power. In October 1975, the International Court of Justice (ICJ) rejected claims from Morocco and Mauritania regarding their alleged sovereignty over the territory.⁶ Subsequently Morocco invaded parts of Western Sahara, which led to strong reactions from the Security Council.⁷ Later that year, Spain entered into an agreement with Morocco and Mauritania concerning the transfer of power over Western Sahara.⁸ In the Agreement, Spain confirmed her intentions of contributing to the decolonisation of Western Sahara, and to transfer the duties as Administrative Power to Morocco and Mauritania. The agreement thus did not transfer sovereignty over the territory, as Spain had no such sovereignty in the first place. The agreement did not alter the status of Western Sahara as Non-Self-Governing Territory under the UN. In the agreement, Spain recommended that a referendum should be held concerning the future status of Western Sahara. In 1976, however, Morocco and Mauritania agreed to divide Western Sahara between them.⁹ In 1979, Mauritania withdrew from Western Sahara. Morocco has since occupied the whole territory.

Since 1979, Morocco has exercised de facto sovereignty over this territory without taking on the formal role as Administrative Power pursuant to the provisions of the UN Charter. Morocco would, as Administrative Power, have had 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...”*¹⁰

Even though Morocco has control over Western Sahara, Moroccan sovereignty over the territory has never been recognised by the UN. According to the UN, Western Sahara is still a Non-Self-Governing Territory. The UN General Assembly has adopted a number of resolutions confirming this.¹¹ The Western Sahara exile Government, while not being recognised as a State by the UN, has been recognised by more than 70 states, and is a Member of the African Union.¹²

Between 1975 and 1991 there was an armed conflict going on in Western Sahara, between POLISARIO and Morocco. In 1991, the UN managed to negotiate a cease-fire between the parties, which is still in force. In this connection, the UN peace-keeping force MINURSO¹³ was established to oversee the cease-fire and to prepare for a referendum on the future status of Western Sahara. During the period from 1991 to 2004, the UN Envoy for Western Sahara, James Baker, put forward two proposals for peaceful settlement of the conflict. Both peace proposals were rejected. One of the difficult points has been the UN plan to determine the future status of Western Sahara through a referendum. Moroccan authorities have allegedly moved many thousand Moroccans to the territory in question, thus seeking to outnumber the original Saharawi population.¹⁴ The latest peace proposal would give the SADR limited self government for the first five years, and then put the question of future status of Western Sahara up for a referendum. This proposal, even though it provided for voting rights at the referendum for everybody within the territory, irrespective of ethnic origin, was rejected by Morocco.

The UN envoy James Baker withdrew from his position when the second peace proposal was rejected.¹⁵ The UN Secretary-General subsequently appointed Alvaro de Soto, a senior UN official, as his successor. There seems to be no present developments indicating a breakthrough anytime soon. Mandated by the Security Council, the MINURSO is still monitoring the cease-fire.¹⁶

The Norwegian official position with regard to the situation in Western Sahara is that no governmental agency should act in a manner that might prejudice the outcome of the ongoing peace efforts by the UN. The Ministry for Foreign Affairs has also, on several occasions, expressed the view that Norwegian companies should avoid participating in economic enterprises in this area because such involvement might be seen to make Moroccan claims on Western Sahara more legitimate.

Some of the legal issues

The Moroccan occupation of Western Sahara seems inconsistent with norms of international law, as well as with UN decisions and resolutions. There are, however, still rules for what may be considered lawful or not lawful *within* such an overall situation.

According to the UN Convention on the Law of the Sea,¹⁷ the point of departure is that all coastal states have sovereign rights to the natural resources on the continental shelf outside their territory.¹⁸ According to the UN, Morocco does not have sovereignty over Western Sahara, and therefore, as a point of departure, no rights to the resources in this area. Article 73 of the UN Charter as well as several General Assembly resolutions¹⁹ imply that economic activities in Non-Self-Governing Territories shall not adversely affect the interests of the peoples of such territories, and may only take place subject to the consent of the local people. The same principles are laid down in the legal framework concerning the law of the sea. Resolution III, which is annexed to the UN Convention on the Law of the Sea, says that:

*"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."*²⁰

Western Sahara, as a Non-Self-Governing Territory, clearly falls within the scope of this provision. Article 77 (1) of the UN Convention on the Law of the Sea specifies that:

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."

According to the aforementioned provision in Resolution III, Article 77(1) thus indicates that the rights related to the continental shelf, which in this case seems to belong to the people of Western Sahara, encompasses both exploring and exploiting.

In the above mentioned legal opinion from the UN Office of the Legal Adviser,²¹ however, it seems that the assumption is that because there is yet no exploitation, only exploration, the activity of Morocco on the continental shelf is lawful:

*"...while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories."*²²

This thus seems to indicate a possible point of discrepancy between the legal framework concerning the law of the sea, and the legal opinion of the UN Legal Adviser. The Council on Ethics does not intend to make an attempt on deciding what the legally correct

answer would be in this case. It should be pointed out, however, that in a situation of contradictory interpretations of international law, treaty law would prevail over a legal opinion. One might therefore suggest that there are sound legal arguments for arguing that not only exploitation of natural resources, but also exploration, could be deemed unlawful in the present case.

The arguments put forward

As mentioned in the introduction, both the exile government of the SADR, the Western Sahara Support Committee as well as Kerr-McGee, has approached the Ministry of Finance and the Council on Ethics concerning this case. The SADR considers the “activities of Kerr-McGee to be unauthorised, illegal and an insult to the Saharawi people.” In its letter, the SADR foreign minister moreover claims that they repeatedly have contacted Kerr-McGee in order to persuade them stop their exploration activities, but that their requests so far have been ignored by the company.

The Support Committee for Western Sahara claims in its letter that Kerr-McGee contributes to maintain a conflict situation that has lasted for 29 years and that the company is contributing to making Morocco’s occupation seem more legitimate. The Support Committee points to the fact that other companies, which have been active in the area, have withdrawn. The Support Committee is of the opinion that the Petroleum Fund should end its ownership in Kerr-McGee on account of what they describe as Kerr-McGee’s “*political controversial, strictly unethical, legally doubtful and, security wise, risky enterprise in Western Sahara for the Moroccan occupation authorities.*”

Kerr-McGee states in its letter to the Minister of Finance that it is not correct that their contract with Morocco is illegal. In this connection, they point to the aforementioned legal opinion from the UN Legal Adviser, which says that the contract in itself is not illegal. Kerr-McGee says in its letter that they support the ongoing efforts of the UN to find a permanent and amicable solution to the Western Sahara issue.

Application of the Ethical Guidelines in this case:

According to point 4.4 of the Ethical Guidelines, the Council on Ethics can issue recommendations on the exclusion of a company from the investment universe when there is an unacceptable risk of contributing to acts or omissions that involve

- Serious or systematic violations of human rights...
- Grave breaches of individual rights in war or conflict situations
- Severe environmental degradation
- Serious corruption
- Other particularly serious violations of fundamental ethical norms

The risk of contributing

It seems that in this case there is a basis for identification between Kerr-McGee Corporation and its subsidiary Kerr-McGee du Maroc Ltd., which also seems to be confirmed in the letter from Kerr-McGee. The Council of Ethics must determine whether investments in Kerr-McGee can constitute an unacceptable risk for contributing to possible violations of the Guidelines. The point of departure for the Ethical Guidelines is that even modest investments can constitute such contribution. It is not necessarily only the size of the investment, but also the character of the alleged violation of the guidelines that must be

taken into account. The share of the Petroleum Fund's ownership in Kerr-McGee is in any case considerable, and it seems unproblematic, in this case, to determine that such ownership can constitute a contribution within the meaning of the guidelines.

Legal basis for the evaluation

The company Kerr-McGee as such cannot be held responsible for *serious or systematic human rights violations* (Bullet point 1 of the Ethical Guidelines). Only states have direct obligations according to human rights treaties. Companies, however, can through acts or omissions, contribute to, or profit from, human rights violations conducted by states.

One might argue that one possible legal basis for determining a human rights violation by Morocco could be Morocco's alleged violation of the Sharawi peoples' right of self determination. In the view of the Council, however, it is not necessary, in this case, to pursue a discussion concerning the possible contribution by Kerr-McGee to Morocco's alleged human rights violations.

The situation in Western Sahara could be characterised as a latent armed conflict. The cease-fire is still under UN monitoring. The situation today between the parties appears to constitute more of a stalemate that it has for years. 165.000 persons, most of them women and children, have lived in refugee camps in Algeria since the early 1990's. It is doubtful, however, to what extent one can blame Kerr-McGee for contributing to *grave breeches of individual rights* in this conflict (Bullet point 2 of the Ethical Guidelines). The company appears to have been involved in exploration activities since 2001. This was 25 years after the occupation took place and 10 years after the cease-fire entered into force.

It appears that the topics *environmental damage* and *corruption* (Bullet points 2 and 3 of the Ethical Guidelines), have not featured significantly in the public discussion pertaining to Kerr-McGee's activities in Western Sahara.

The Council on Ethics is therefore of the opinion that the assessment of this case should be based on whether Kerr-McGee's activities off shore Western Sahara can be considered to constitute other *particularly serious violations of fundamental ethical norms* (Bullet point 4 of the Ethical Guidelines).

The Assessment of the Council on Ethics

One of the premises for the Ethical Guidelines was that the Government Petroleum Fund should not contribute to *future* acts or omissions that would be deemed unethical. In the *travaux préparatoire* for the Ethical Guidelines it was stated that: "The aim is to determine whether the company will, in the future, represent an unacceptable unethical risk for the Government Petroleum Fund." ²³ It seems clear that it is the *potential for future exploitation of natural resources* that constitutes the driving force behind the exploration of the continental shelf outside Western Sahara. As mentioned earlier, Kerr-McGee has informed the UN legal Adviser that the company has "standard options for the relinquishment of the rights under the contract or its continuation, including an option for future oil contracts in the respective areas or parts thereof." ²⁴ In the view of the Council, however, it is not decisive to this case whether Kerr-McGee has such options. The aim of Morocco is clearly exploitation of natural resources in the area. Kerr-McGee seems to contribute to this aim, irrespective of whether the company itself has options on exploitation in its contracts with Morocco.

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 natu-

ral 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. 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. As mentioned before, it is not entirely clear whether Morocco's exploration activities constitute a violation of international law, but based on the rationale behind the general rules of international law in this area, the Council on Ethics finds that the economic activities off shore Western Sahara can be considered unethical. In this connection, it should be mentioned that the *travaux préparatoire* to the Ethical Guidelines especially mentions the dilemma related to investments in Non-Self-Governing Territories, occupied territories or otherwise legally undetermined territories, and points to the activity on the continental shelf outside Western Sahara as an example where one should show restraint with regard to investments.²⁵

Moreover, it seems clear that the economic activities of Kerr-McGee off shore Western Sahara, on behalf of Morocco, contribute to a possible strengthening of Morocco's sovereignty claims regarding the territory. In the aforementioned Resolution III, pertaining to Non-Self-Governing Territories under the UN Convention on the Law of the Sea, it is specified that when there is a conflict concerning the rights to natural resources in a Non-Self-Governing Territory, the parties shall enter into consultations where *"the interests of the people of the territory concerned shall be a fundamental consideration"*. Furthermore, *the States are under obligation not to "jeopardize or hamper the reaching of a final settlement of the dispute."*²⁶ As mentioned above, Norwegian authorities have warned Norwegian companies against entering into economic activities in this area because such activities can be seen as support for the Moroccan sovereignty claims and thus weaken the UN sponsored peace process. The fact that Norwegian authorities have warned against participation in economic activities in this area supports the above-mentioned arguments.

Conclusion

The Council on Ethics thus recommends to the Ministry of Finance that the Government Petroleum Fund should be excluded from Kerr-McGee Corporation on the basis of point 4.4, bullet point 4 of the Ethical Guidelines for the Government Petroleum Fund, which states that companies may be excluded from the investment universe because of acts or omissions which may be considered to constitute an unacceptable risk for contributing to other *particularly serious violations of fundamental ethical norms*.

KerrMc-Gee has commented on the draft recommendation from the Council in a letter dated 5 April. The letter did not contain arguments or facts that alter the Council's recommendation.

Footnotes

- ¹ Letter dated 4 January, 2005.
- ² The Norwegian Central Bank.
- ³ Through its subsidiary Kerr-McGee du Maroc Ltd.
- ⁴ Letter from the Office of the Legal Adviser to the President of the Security Council (S/2002/161) dated 12 February 2002, para 2.
- ⁵ (Frente) Popular para la Liberacion de Saguia el-Hamra y del Rio de Oro.
- ⁶ ICJ, Advisory Opinion of 16 October 1975.
- ⁷ S/RES 380 (1975), dated 6 November 1975.
- ⁸ The “Madrid-Agreement”, dated 14 November 1975.
- ⁹ Agreement dated 14 April 1976.
- ¹⁰ Article 73 of the UN Charter.
- ¹¹ The most recent General Assembly resolution was adopted on 25 January 2005 (A/RES/59/131).
Western Sahara has been subject to a number of GA resolutions over the past years, e.g. 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.
- ¹² Information contained in the above mentioned letter to the Ministry of Finance from SADR's Minister for Foreign Affairs, Mohamed Salem Ould Salek.
- ¹³ United Nations Mission for a Referendum in Western Sahara.
- ¹⁴ The population in Western Sahara (the Sahrawi people) counts approximately 260.000 persons. Some 165.000 of these are in refugee camps in Algeria.
- ¹⁵ In June 2004.
- ¹⁶ The Security Council prolonged MINURSO's mandate until 30 April 2005 in Resolution S/RES/1570 (2004).
- ¹⁷ United Nations Convention on the Law of the Sea, 1982 (UNCLOS).
- ¹⁸ Articles 76 and 77.
- ¹⁹ E.g. GA RES 3458 (XXV) dated 10 December 1975 which specifies “the right of the people of the Spanish Sahara to self-determination, in accordance with General Assembly Resolution 1514 (XV)”.
- ²⁰ Resolution III, Third United Nations Conference on the Law of the Sea.
- ²¹ S/2002/161, see footnote 4.
- ²² S/2002/161, para 25.
- ²³ The Government White Paper from the Graver-Commission, NOU 2003: 22, page 35 (unofficial translation).
- ²⁴ The aforementioned letter from the UN Legal Adviser, (S/2002/161), para 2.
- ²⁵ The Government White Paper from the Graver-Commission, NOU 2003: 22, page 92 (unofficial translation).
- ²⁶ Resolution III, 1 (b) under the UN Convention on the Law of the Sea.

To the Ministry of Finance

Oslo, 16 June 2005
(Published 2 September 2005)

Recommendation on exclusion of companies producing cluster weapons

Introduction

The Advisory Council on Ethics for the Government Petroleum Fund recommends that the companies General Dynamics Corp, L3 Communications Holdings Inc, Raytheon Co, Lockheed Martin Corp, Alliant Techsystems Inc, EADS Co (European Aeronautic Defense and Space Company) and Thales SA be excluded from the Petroleum Fund because they are presumed to be involved in production of cluster weapons.

In the Ethical Guidelines' point 4.4, first sentence, it is stated:

"The Advisory Council shall issue recommendations on negative screening of one or several companies on the basis of production of weapons that through normal use may violate fundamental humanitarian principles."

In the Government whitepaper on ethical guidelines (NOU 22: 2003), and through the subsequent treatment of the guidelines in Parliament, it was decided that cluster weapons would be considered to be within this category of weapons / ammunition.

The reason for this was that although cluster weapons are not subject to specific restrictions under international law, it can nevertheless be seen as unethical to use such weapons as this may constitute a violation of "*fundamental humanitarian principles*". The concept fundamental humanitarian principles encompasses the principle of proportionality – that the potential for humanitarian suffering must be weighed against the potential military advantage, and the principle of distinction between military and civilian goals.¹ Particularly the principle of distinction could be violated through use of cluster weapons for the following reasons: *During* an attack, explosive devices are scattered indiscriminately over a large area and it is difficult to avoid civilian casualties. *After* an attack, many types of cluster munitions remain unexploded and therefore continue to constitute a danger to the civilian population.

'Cluster weapons' is the common description for weapons which consists of a canister that contains bomblets or explosive devices. Size and type of canisters, as well as type and number of bomblets, varies. The weapons are being made with the intention of spreading the effect of bombing over a large area. They are therefore often labeled "area weapons".

One normally distinguishes between different "generations" of cluster weapons which have been developed since World War II. The first "generation" is normally referred to as "*Improved Conventional Munitions*" (ICM). These have mechanical detonating systems,

and have a high percentage of duds. The next “generation” of cluster munitions is designed to both penetrate heavy armour while simultaneously injuring military personnel. These are therefore called “*Dual Purpose Improved Conventional Munitions*” (DPICM) or “*Combined Effects Munitions*” (CEM). Such cluster munitions have somewhat more advanced fuse mechanisms which increase the chances that the bomb will be detonated, but these weapons also have, on the whole, high percentages of duds. Even cluster ammunition that is fitted with self destruct or self neutralizing mechanisms will, for several reasons, in many instances fail, and thus remain as explosive remnants or duds.

The Advisory Council has recommended excluding companies which are involved in production of key components for such cluster weapons. Such components may typically be the bomb canister as well as the bomblets which constitute the ammunition, in addition to other parts which are essential for the functioning of the weapon.

The Advisory Council has examined the Petroleum Fund’s portfolio as well as the benchmark portfolio with a view to identifying companies which are involved in production of such cluster weapons that are mentioned above. It is emphasized that this recommendation does not contain an exhaustive list of possible producers of cluster weapons, and that new recommendations concerning the exclusion of companies on this basis may be given later.

Cluster weapons

There is a range of delivery methods for cluster munitions. Air-delivered cluster munitions are normally contained in various bombs, but also missiles with cluster munitions can be delivered from aircraft. The air-dropped cluster bombs can be equipped with various types of steering mechanisms. The surface-delivered cluster munitions can be delivered by artillery shells, mortars and missiles.

Estimates concerning the dud rates for cluster munitions vary. Producers often refer to a failure percentage between 2 and 5. Military forces have, under some circumstances, accepted a failure rate of up to 10–12 percent. Mine clearers often report that the portion of cluster munitions duds is between 10 to 30 percent. A series of statistics exists concerning the failure rate connected to the use of cluster munitions, both from the users (for example from the Ministry of Defense in the United Kingdom and the US Department of Defense) and from various humanitarian organizations and mine clearers.

The failure rate depends on various factors such as what type of ammunition is used, the delivery method and the circumstances pertaining to where the ammunition lands. In recent years, cluster munitions have increasingly been used as rocket- or artillery-fired ammunition, while at the same time the use of air-dropped cluster munitions has diminished. The most common firing system of late is the so-called Multi Launch Rocket Systems (MLRS). Humanitarian organizations have alleged that cluster munitions fired by this method caused over 4,000 deaths after the Gulf War in 1991. Under this (“Desert Storm”) operation in Iraq, artillery-delivered cluster munitions (with a capacity for 7728 explosive devices dispersed by 12 rockets) had a failure rate of approximately 16 percent (the Pentagon’s estimate in a report from 2000).² This implies that there would be approximately 1236 undetonated explosive devices in an area of 12 to 24 square kilometers. This type of cluster weapon has also been much used in the latest Iraq War.

The fact that an area has been exposed to cluster bombing often has the result that one cannot risk using the area for agriculture or other civilian purposes. Areas which have been exposed to cluster bombing often has to be cleared in a manner which is just as resource- and time-consuming as ordinary minefields.

Key components

As mentioned above, a “cluster weapon” consists of a canister which contains smaller explosive devices. This will constitute main components. Both types these components are comprised, however, of a number of other components.

The small explosive devices or bomblets are certainly key components in a cluster weapon. These consist of components such as the explosives themselves, the surrounding canister and a detonation mechanism or fuse which make the explosive charge detonate. The canister which contains bomblets is, as a rule, specially designed for this purpose and must therefore be regarded as a key component in a cluster bomb. This also consists of several sub-components. All canisters will have a mechanism or a fuse which makes the canister open and drop the smaller explosive devices. Both the containers and bomblets will, in many instances, have guidance mechanisms which can make them steer toward the target, and make them strike at the correct angle. Such guidance mechanisms make it possible to drop cluster bombs from greater heights and therefore avoid anti-aircraft fire. They could therefore also be considered as key components.

Due to a very large variety of types and product specifications within the term cluster weapons, the Advisory Council will not attempt to establish an exhaustive list of what are “key components” in such weapons. The above section is therefore only meant to exemplify what could be key components in cluster weapons.

Cluster weapons which are not considered covered by the guidelines

Production of certain types of cluster weapons is not considered to constitute a basis for divestment. These weapons are the so-called “Advanced Munitions” of the type CBU 97/CBU 105 with bomblets of the type BLU 108. The number of bomblets is very low, a maximum of 10 submunitions per bomb, and these are target-seeking and made to detonate only when they hit armored vehicles. This weapon is therefore not classified as an “area-weapon” designed to hit randomly within a larger area.

There seems to be a rather limited risk that civilians will be hit during an attack with this kind of ammunition because the number of bomblets is so low. A low number also yields greater reliability because there is then room for better fuse mechanisms, which again means that there is also not much danger that civilians are affected after an attack because the dud-percentage is extremely low. The Advisory Council does not consider these weapons to be in violation with fundamental humanitarian principles.

Companies which are involved in production of cluster weapons

The Advisory Council has based this recommendation on information which has been received and obtained from a number of different sources. In addition to our own research, we have obtained information through the database of *Jane's Information Group*, from the Norwegian People's Aid landmine division, the Human Rights Watch's Arms Division, the International Campaign to Ban Landmines (ICBL), the Norwegian Defence Research Establishment (FFI) and the British screening company EIRIS (Ethical Investment Research Service). The Advisory Council has processed this information with a view to identifying companies which are involved in production of cluster weapons.

In the middle of April 2005, the Advisory Council requested that Norges Bank contact a number of companies with a view to receiving confirmation on the information concerning the possible involvement in cluster weapons production. These companies were asked to answer the following questions:

"In connection with the implementation of these Guidelines we have been asked by the Advisory Council on Ethics for the Government Petroleum Fund to enquire whether it is correct that your company, or subsidiaries of your company, are producing, assembling or planning to produce or assemble: key components to air delivered or surface delivered cluster dispensers such as aerial bomb dispensers, rockets or other containers, and/or sub-munitions for such dispensers, such as ICM (Improved Conventional Munitions) or DPICM (Dual Purpose Improved Conventional Munitions)/CEM (Combined Effects Munitions)."

The below companies received this letter at the end of April 2005. The companies have, through this communication, been given the opportunity to comment on the recommendation to disinvest and the background for this in accordance with the guidelines' point 4.5.

Recommendation

The Advisory Council on Ethics recommends that the following companies be excluded from the Government Petroleum Fund according to the Guidelines' point 4.4, first sentence, which constitutes the basis for exclusion of companies that are involved in production of weapons that through normal usage may violate fundamental humanitarian principles:

General Dynamics Corporation acknowledged in a letter dated 2 May 2005 to Norges Bank that the company produces fuses for BLU-97 which are explosive devices in various cluster weapons, among others those that are included in JSOW-A (Joint Standoff Weapon). This is considered as a key component in cluster weapons.

The Advisory Council recommends that **General Dynamics Corporation** should be excluded from the Government Petroleum Fund.

L3 Communications Holdings, Inc. acknowledged in a letter dated 2 June 2005 to Norges Bank the following: *"... Norges Bank requested information regarding Y L-3 Communications' involvement in the development and/or production of components for cluster munition dispensers or the sub-munition contained therein. Two companies within L3 Communications Corporation manufacture and design such products."* This concerns "safety and arming devices", which

is to say fuses and percussion caps to various types of air- and ground-delivered cluster weapons. This is considered as key components in cluster weapons.

The Advisory Council recommends that **L3 Communications** should be excluded from the Government Petroleum Fund.

Raytheon Company produces, according to its own web-site,³ JSOW (Joint Stand Off Weapon), and cluster munitions to these: *“JSOW integrates the BLU-97 combined effects bomblets and the BLU-108 sensor fused weapon submunitions for area targets or armoured vehicles”*. These are considered as cluster weapons. This information is confirmed by Jane’s Information Group. The company has not replied to the communication from Norges Bank.

The Advisory Council recommends that **Raytheon Company** should be excluded from the Government Petroleum Fund.

Lockheed Martin Corporation produces, according to its own web-site,⁴ various missiles which can be categorized as cluster weapons. One of these is the MLRS M 26-S. This is a surface-to-surface missile which is fired from artillery systems of the type MLRS. M 26 contains 644 bomblets of the type M77 DPICM cluster ammunition. The company also produces other types of weapons within this category. This information is confirmed by Jane’s Information Group. The company has not replied to the communication from Norges Bank.

The Advisory Council recommends that **Lockheed Martin Corporation** should be excluded from the Government Petroleum Fund.

Alliant Techsystems Inc. produces cluster bombs of the type CBU-87/B, which contain 202 pieces of BLU-97 explosive devices. This is one of the most commonly used air-delivered cluster weapons. This information is verified by Jane’s Information Group. The company has not replied to the communication from Norges Bank.

The Advisory Council recommends that **Alliant Techsystems, Inc.** should be excluded from the Government Petroleum Fund.

EADS (European Aeronautic Defense and Space Company) has confirmed in a letter to Norges Bank, dated 8 June 2005, that the company is part of a 50 % / 50 % joint venture with Thales SA (see below), in the company TDA. According to the letter TDA produces, among other things, the artillery grenade PR Cargo, which is described as follows in the above mentioned letter: *“This is a submunition projectile for 120 mm rifled mortars. Equipped with dual effect-submunitions, it engages dismounted troops and light armored vehicles.”* According to Janes Information Group’s database Infantry Weapons, PR Cargo contains 16 bomblets each. This type of weapon is an “area-weapon” and is primarily used against personnel. The Mine Section in Norwegian Peoples Aid confirms that the use of artillery delivered cluster munitions constitutes a substantial humanitarian problem.

The Advisory Council recommends that **EADS (European Aeronautic Defense and Space Company)** should be excluded from the Government Petroleum Fund.

Thales SA confirms on its own web-site⁵ that the company, together with EADS, constitutes 50 % of the company TDA, and it is thus recommended that this company be excluded on the same basis as EADS. Thales has not answered a letter from Norges Bank. The Advisory Council recommends that **Thales SA** should be excluded from the Government Petroleum Fund.

This recommendation was given to the Ministry of Finance on 16 June 2005 by the Advisory Council on Ethics for the Government Petroleum Fund.

Gro Nystuen Andreas Føllesdal Anne Lill Gade Ola Mestad Bjørn Østbø
(Chair)

Footnotes

- ¹ See NOU 2003: 22, pages 142-143 concerning the Graver Committee's understanding of fundamental humanitarian principles.
- ² Human Rights Watch "A Global Overview of Explosive Sub-munitions", May 21-24, 2002.
- ³ http://www.raytheon.com/products/stellent/groups/public/dokuments/contents/cms01_055754.pdf
- ⁴ http://www.missilesandfirecontrol.com/our_products/firesupport/MLRS-M26_Rocket/product-MLRS-M26_Rocket.html
- ⁵ http://www.thalesgroup.com/ga/buisness_zone/defence/air_defence.htm

To the Ministry of Finance

Oslo, 19 September 2005
(Published 5 January 2006)

Recommendation on exclusion of companies developing and producing nuclear weapons

Introduction

The Advisory Council on Ethics for the Government Petroleum Fund recommends that the companies BAE Systems Plc., Boeing Co., Finmeccanica Sp.A., Honeywell International Inc., Northrop Grumman Corp., United Technologies Corp. and Safran SA be excluded from the Petroleum Fund because they are presumed to be involved in production of nuclear weapons.

In the Ethical Guidelines' point 4.4, first sentence, it is stated:

"The Advisory Council shall issue recommendations on negative screening of one or several companies on the basis of production of weapons that through normal use may violate fundamental humanitarian principles."

In the Government whitepaper on ethical guidelines (NOU 22: 2003),¹ and through the subsequent discussions of the guidelines in Parliament it was decided that the Fund shall not invest in companies that *"develop and produce key components to nuclear weapons"*. The Council assumes that *"development and production"* encompasses somewhat more than the actual production of nuclear warheads. It is presumed that the missile carrying the warhead as well as certain forms of testing of new weapons and maintenance of existing weapons also fall within the scope of the exclusion criteria.

The Council has reviewed the Petroleum Fund's portfolio and benchmark portfolio with the purpose of identifying companies that are involved in development and production of key components for nuclear weapons. It is to be emphasised that this recommendation does not necessarily contain a complete list of companies that fall within the exclusion criteria and that further recommended exclusions on this basis may follow later.

Further details on nuclear weapons

According to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),² nuclear weapons are weapons of mass destruction that are illegal for most states to possess. The five so-called nuclear states (USA, UK, France, Russia and China) are, for historical reasons that will not be discussed here, exempted from this ban. It can also be assumed that India, Pakistan and Israel have developed nuclear weapons.

The effects from the use of nuclear are of a nature that makes it difficult to envisage that such use could discriminate between military and civilian targets. Use of such weapons will in any case render long term environmental damage and it can also be argued that it will lead to unnecessary suffering and superfluous injury which must be weighted against the military necessity. Many would therefore argue that use of nuclear weapons violates fundamental humanitarian principles.³ This problem is subject to further discussion in the Government Whitepaper on Ethical Guidelines (NOU 22: 2003).⁴

There are two main forms of nuclear weapons; fission and fusion based. The principle of fission based weapons is that atoms of fissionable material (enriched uranium or plutonium) are split into smaller components. This fission releases energy which creates the nuclear explosion. Fusions based weapons, also called hydrogen bombs, are based on the principle of isotopes of hydrogen merging to form helium. In order to start a fusion reaction, a fission process is used. The fusion process is the same as the sun's and releases huge amounts of energy.

Nuclear weapons have much greater explosive effects than conventional weapons. The most powerful fusion weapons tested had an effect equivalent to 50 million tons of conventional explosives (TNT). In addition to the shock wave caused by a nuclear detonation, energy in the form of intense heat and radioactive and electromagnetic radiation is emitted.⁵

Nuclear weapons have been used twice in conflict when the USA in 1945 dropped atomic bombs on Hiroshima and Nagasaki. Both these bombs were fission based. The bomb dropped on Hiroshima used enriched uranium, where as the bomb dropped on Nagasaki used plutonium as fissionable material. Both had explosive effects equivalent to approximately 20 000 tons TNT.

During the cold war, increasingly powerful nuclear weapons were developed as means of deterrence. A recent development that has been reported⁶ is the development of so called "mini nukes",⁷ i.e. tactical nuclear arms to be used against underground fortifications. These weapons are reported to have an explosive effect of approximately 1000 tons TNT. The purpose is to use such weapons in actual warfare and not as a deterrent. Such a strategy will lead to the collapse of the non-proliferation regime and will probably also lead to more states seeking to acquire nuclear weapons.

The production of nuclear weapons is very resource demanding and requires a broad range of means and efforts. The most critical component in a nuclear warhead is a sufficient amount of fissionable material, either plutonium or enriched uranium. Plutonium is not a naturally occurring element but is produced in nuclear reactors on the basis of uranium. Uranium occurs in nature and is extracted from mining, but must be processed and enriched to be usable in nuclear weapons. Enrichment may be done in different ways but is in any case very demanding with regard to resources and technology.⁸ Also uranium used as fuel in power producing nuclear reactors must be enriched. The grade of enrichment of uranium is lesser for nuclear fuel for civilian purposes than for fissionable material in nuclear weapons. Plutonium refined to so-called weapon's grade has no civilian applications.

Other components of a nuclear warhead can be relatively simple. Explosives and detonators to start the chain reaction are required, and the warhead must be packaged such that it is intact when it reaches its intended target.

Nuclear weapons can be brought to their targets by different means; they can be dropped or launched from aircraft, or launched by missiles from stationary or mobile sites on land or from surface ships and submarines.

Interpretation of the term “development and production of key components”

Production of fissionable material and warheads

To the knowledge of the Council, production of fissionable material that can be used in warheads and the production of the warheads themselves only take place at government owned facilities.

Development and testing of warheads

Private companies may be directly involved in the development and testing of nuclear warheads.

As a consequence of i.a. the political development related to the nuclear test ban treaty, the extent of testing of nuclear weapons has been significantly reduced in recent years, despite the treaty not having entered into force.⁹ However, testing of nuclear weapons may include simulations and other forms of testing that are not comprised by the treaty.

The Council considers any form of testing of nuclear weapons to be crucial to the development of nuclear weapons, and therefore such activity falls within the fund’s exclusion criteria. This corresponds to the Whitepaper (NOU 2003:22),¹⁰ which states that the Government Petroleum Fund should not be invested in companies that “*develop and produce key components to nuclear weapons*”. This applies regardless of whether such activities take place within the framework of the test ban treaty.

Infrastructure for production of nuclear warheads

Companies that provide services related to operation and maintenance of buildings and general infrastructure at government facilities that may produce nuclear warheads, but take no other part in the actual production, are not subjected to the fund’s exclusion criteria.

“Dual use” components

The complex problems related to so-called “dual use”, i.e. components for nuclear weapons that may also have other applications, is an important issue in the advancement of non-proliferation.

The Council finds that development or production of products or materials or other activities that may be categorised as “dual use” is, as a point of departure, not covered by the guidelines. This is in line with the recommendations provided in the Whitepaper (NOU 2003:22). This includes production or enrichment of uranium for other purposes than nuclear weapons. It also includes production and maintenance of delivery platforms (aircraft, surface ships, submarines, missiles) that can also be used to deliver conventional weapons. Also included are so-called nuclear submarines. Such submarines can carry both conventional and nuclear weapons although they are propelled by means of nuclear energy.

Missiles

Missiles that serve no purpose other than to deliver nuclear warheads are not categorised as “dual use”. These can for instance be intercontinental ballistic missiles launched from land (ICBM), or submarines (SBLM). The NPT does not include missiles, although

the treaty's preamble uses the phrase "...the elimination from national arsenals of nuclear weapons and the means of their delivery..." Neither are there any other international treaties that govern the development, production or use of missiles as such. In 2002, a separate report on "The issue of missiles in all its aspects"¹¹ was produced by the United Nations.¹² The background for this report was concerns related to the number, range and geographic spread of missiles and their capability of delivering weapons of mass destruction. Since 1990, Norway has been a member of the Missile Technology Control Regime and through this worked to limit the proliferation of technology and components for missiles that can deliver weapons of mass destruction.¹³

The Council regards development and production of missiles that have no other purpose other than to deliver nuclear warheads to be covered by the investment restriction; as such missiles must be regarded as key components to nuclear weapons.

Missile upgrades

Weapon systems can be kept operational for decades by systematic maintenance and upgrade programs. In this way, e.g. nuclear weapons systems initially produced in the 1960s are being updated with technological developments. The Council has learnt that for example in the USA there are extensive programs for upgrading of the country's ICBM weapons. These weapons systems are subjected to upgrade programs which, over time, include renewal of several components such as propulsion, guidance and communications systems. The Council regards such programs of upgrade and renewal as a continuous production process and equals this to initial production of key components to nuclear weapons.

Infrastructure for maintenance of nuclear weapons systems

The fund may be invested in companies that are involved with e.g. maintenance of naval ships that carry nuclear weapons. As part of such maintenance, nuclear weapons may be handled, offloaded and temporarily stored elsewhere. Because naval vessels generally fall within "dual use", maintenance of vessels is not subjected to the investment restriction. Nor does the Council regard handling or transport of nuclear weapons (or missiles for their delivery) related to maintenance of launch platforms to fall inside the investment restriction, as this is viewed as too remote from the actual development and production of such weapons.

Other means and efforts

Through participation in Nuclear Suppliers Group (NSG), Norway contributes to limit the proliferation of nuclear weapons by upholding restrictions on trade in technology and components which may be used to produce nuclear weapons.¹⁴

The NSG has produced comprehensive guidelines for export of technology and components which are developed for nuclear purposes.¹⁵ This includes i.a. radioactive material as well as equipment and components for reactors and for enrichment of fissionable material. Further more, guidelines for export of components categorised as "dual use" are also established.¹⁶

The means and efforts for which the NSG has established guidelines fall within the investment restriction to the extent that they are key components to nuclear weapons. However, several of the means and efforts that are described in the NSG's guidelines are related to enrichment of uranium and operation of nuclear reactors. This will normally fall outside the Petroleum Fund's guidelines point 4.4. The fund does not have invest-

ment restrictions related to generation of nuclear energy.

Illegal trade

Extensive international treaties and control regimes have been established to prevent proliferation of components for nuclear weapons to non-nuclear states. Despite this, illegal trade of such components may occur. It is not possible for the Council to obtain first hand information on this type of activity, but if in the future it becomes known that companies in the Fund's portfolio or reference index are involved in such illegal trade, the Council may recommend that they be excluded from investment, as recommended in NOU 2003:22.¹⁷

Companies involved in production of nuclear weapons

The Council has based this recommendation on information received and acquired from different sources. Companies' internet web-sites have been searched as well as databases of Jane's Information Group. In addition, information has been acquired from the Norwegian Defence Research Establishment (FFI) and from the Ministry of Foreign Affairs.

In June and August this year, the Council requested that Norges Bank approach a number of companies in order to clarify whether they were involved in production of nuclear weapons. The companies were requested to answer the following:

"In connection with the implementation of these Guidelines, we have been asked by the Advisory Council on Ethics for the Government Petroleum Fund to enquire into whether your company, or any of its subsidiaries, is involved in the development, testing, production, assembly or maintenance of components made for nuclear weapons."

The companies have, through this communication, been given the opportunity to comment on the recommendation to disinvest and the background for this in accordance with the guidelines' point 4.5.

The Council has learnt that some companies, i.a. Lockheed Martin and EADS, which already have been excluded from investment by the fund due to production of cluster munitions, may also be involved in production of key components of nuclear weapons. The Council does not find it necessary to discuss this further here.

Recommendation

The Advisory Council on Ethics recommends that the following companies be excluded from the Government Petroleum Fund according to the Guidelines' point 4.4, first sentence, which constitutes the basis for exclusion of companies that are involved in production of weapons that through normal usage may violate fundamental humanitarian principles:

Honeywell International Inc. is, through its subsidiary Honeywell Technology Solutions Inc, responsible for repair, development, calibration, operations and maintenance of instrumentation and recording of data from simulated nuclear detonations at White Sands Missile Range in New Mexico. The company itself describes this activity as follows: 18

"As the Instrumentation Support Contractor, HTSI is responsible for maintaining an inventory of instrumentation to monitor and record data associated with simulated nuclear weapons and conventional weapons effects testing at White Sands Missile Range, New Mexico. Activities include repair, calibration, maintenance, operations, software development, engineering, documentation, and logistics support."

The Council regards this form of simulated nuclear warhead testing to be essential to the development of new nuclear weapons and to keep existing nuclear weapons operational.

Honeywell has not replied to the request from Norges Bank with question regarding the company's possible involvement in production of nuclear weapons components.

The Council recommends that **Honeywell Inc.** be excluded from the Petroleum Fund's portfolio.

BAE Systems Plc, Finmeccanica SpA and EADS have together formed the joint venture MBDA. The ownership structure, according to EADS' homepage, 19 is 37,5 % BAE, 37,5 % EADS and 25 % Finmeccanica. This is also confirmed on the homepages of BAE Systems²⁰ and Finmeccanica.²¹

According to *Jane's Air Launched Weapons*, MBDA is under contract to develop and produce the ASMP-A missile for the French armed forces. ASMP-A is described as a "nuclear warhead air-to-surface missile".

ASMP-A will, according to *Jane's* be equipped with a nuclear warhead to be supplied by the French government operated CEA (Commissariat à l'Énergie Atomique). The contract for delivery of ASMP-A was signed in 1996 and deliveries will be completed in 2008.

MBDA displays components of ASMP-A on its own homepage.²² It is not known that ASMP-A may have any function other than delivering nuclear warheads. The Council therefore considers ASMP-A to be a key component of a nuclear weapon.

MBDA produces missiles for various military purposes. It is not clear whether BAE and Finmeccanica play an active role in the development and production specifically of ASMP-A other than being partners in MBDA. This is in any event not decisive, as the Council will base its recommendation on the fact that both companies are active owners of MBDA and thus directly contribute to the production of key components to nuclear weapons.

In a letter to Norges Bank, BAE declines to comment whether the company is involved in development or production of key components to nuclear weapons. Finmeccanica has not replied to the request from Norges Bank. EADS is already excluded from the Petroleum Fund because the company probably produces cluster munitions and was therefore not approached with a request regarding nuclear weapons.

The Council recommends that **BAE Systems Plc** be excluded from the Petroleum Fund's portfolio.

Safran SA is the mother company of companies Snecma and Sagem. On 2 February 2005, Jane's Missiles and Rockets²³ wrote

«TEADST SPACE Transportation has signed a contract with the French armament procurement agency (DGA) for production of the TM51T submarine-launched ballistic missile (SLBM) The contract covers series production of the TM51T weapon system for a period of 10 years. Worth more than EUR3 billion (US\$4 billion), it includes a fixed tranche and several conditional options. TEADST SPACE Transportation is prime contractor for the programme, while TSNECMAT, SNPE, TDCNT, TThalesT and Sagem are the main subcontractors.»... «The TM51T missile will enter service in 2010 on board the ballistic-missile submarine Le Terrible, followed by Le Vigilant, Le Triomphant and Le Téméraire after retrofit.

The new missile weighs more than 50 tonnes compared with the 35 tonnes of the current TM45T. Maximum range will be more than 6,000 km, with altitudes of up to 1,000 km at the peak of its trajectory. It has an increased payload capacity and a higher accuracy than the TM45T. The TM45T can carry up to six TN-75 warheads, each with an estimated yield of 100 kT.»

This information pertains to the development of a new missile system (M51) for strategic nuclear weapons for the French navy. Exact data for the weapons are not publicly available, but it is compared to the existing M45, which has six warheads, each with a yield equivalent to 100 000 tons of TNT. Although M51 is not explicitly described as a nuclear weapon, this is obvious given the weapon's explosive effect.

As of December 31, 2004, the fund was invested in companies Snecma²⁴ and Sagem.²⁵ These companies are no longer independently listed, but are wholly owned subsidiaries of Safran SA which is in the fund's reference portfolio.

Production of thrusters for the M51 is described on Safran's home pages:²⁶ *"The DGA (military procurement office) notifies EADS SPACE Transportation of an order for 3 billion € for the production of the M51 ballistic missile for which Snecma Propulsion Solide supplies various thrusters."* The Council considers thrusters for the M51 to be key components for nuclear weapons.

Safran SA has not replied to the request from Norges Bank with question regarding the company's possible involvement in production of nuclear weapons components. EADS and Thales are already excluded from investment by the fund because the companies probably produce cluster munitions and were therefore not approached with a request regarding nuclear weapons.

The Council recommends that **Safran SA** be excluded from the Petroleum Fund's portfolio.

Northrop Grumman is, according to its own press release,²⁷ contractor for maintenance and upgrading of the US Air Force's Minuteman III ICBM:

"Northrop Grumman is the Air Force's ICBM prime integration contractor charged with maintaining readiness of the United States' ICBM weapon system through 2020. In addition to sustaining and maintaining the force, Northrop Grumman manages more than 10 modernization efforts to maintain viability of our nation's ICBM fleet. This 15-year program, which began in December 1997, is currently valued at \$4.5 billion with a total projected value of \$6 billion. Northrop Grumman manages a team consisting of four principal team-mates and more than 20 subcontractors."

ICBM, short for Intercontinental Ballistic Missiles, is the main element of the US land based strategic nuclear weapons. Following disarmament, the number of such weapons has been greatly reduced in later years. The USA will maintain i.a. 500 Minuteman III and 50 MX Peacekeeper missiles.²⁸ These are nuclear weapons systems that were developed in the 1960 and 1980s, respectively, and are now subjected to extensive program of upgrading in order to be kept operational for decades ahead. These upgrade programs include i.a. guidance systems, communications systems, engines and the launch sites themselves.

Northrop Grumman manages more than 10 modernisation programs for ICBM, i.a. PRP (Propulsion Renewal Program) for replacement / upgrade of rocket engines for Minuteman III.²⁹

The Council regards this type of upgrades and replacement of components to be equivalent to initial production of the components.

Northrop Grumman has in a letter to Norges Bank confirmed that the company is involved in development, production, assembly, and maintenance of nuclear weapons systems.

The Council recommends that **Northrop Grumman** be excluded from the Petroleum Fund's portfolio.

Boeing Company is, according to its own home page,³⁰ a supplier of various forms of maintenance and upgrade services for the Minuteman III ICBM:

«Boeing is a member on the Air Force's ICBM Prime Integration Team led by TRW Inc. The contract covers sustainment work for the United States' ICBM fleet. Boeing will provide leadership in guidance and control systems and liquid propulsion as well as on ground sub-systems. Additionally, Boeing will provide major support to the overall systems engineering and sustainment effort.

The value of Boeing's work package could reach \$824 million if the government exercises each of 14 annual options to continue the contract between now and the year 2012. The value of the entire ICBM Prime Team's contract could reach \$3.4 billion.

Boeing is already under contract directly to the government for the Minuteman III Guidance Replacement Program (GRP) - which will ultimately be incorporated into the ICBM Prime Integration contract. The GRP program will have a value well in excess of \$1 billion.»

One of the upgrades which are specifically mentioned is the GRP (Guidance Replacement Program) which is related to renewal of guidance systems for Minuteman III. GRP³¹ is reported to have a contract value of over one billion dollars. Boeing also delivers upgrades equipment for communication between ICBM launch sites and command centres.

The Council regards this type of upgrades and replacement of components to be equivalent to initial production of the components.

Boeing Company has not replied to the request from Norges Bank with question regarding the company's possible involvement in production of nuclear weapons components.

The Council recommends that **Boeing Company** be excluded from the Petroleum Fund's portfolio.

United Technologies Corp was approached by Norges Bank on the basis of the company's press release³² that it had acquired Rocketdyne Propulsion & Power from Boeing Company on August 3, 2005.

Rocketdyne conducts upgrading and testing of thrusters for the USA's MX Peacekeeper ICBMs. These missiles have no function other than to carry nuclear warheads.

On the homepage³³ of Pratt & Whitney, which is a wholly owned subsidiary of United Technologies, this activity is described as follows: *"The PK [i.e. Peacekeeper] missiles remain in operational service with fifty missiles emplaced in silos at Warren Air Force Base. Rocketdyne continues to provide the Air Force with Sustaining Engineering and Aging & Surveillance Test support. Follow-on Operational Test & Evaluation (FOT&E) flights continue to occur at one flight per year."* The council considers this to be testing and upgrading of key components for nuclear weapons.

The Council regards this type of upgrading, testing and replacement of components to be equivalent to initial production of the components.

United Technologies has not replied to the request from Norges Bank with question regarding the company's possible involvement in production of nuclear weapons components.

The Council recommends that **United Technologies Corp.** be excluded from the Petroleum Fund's portfolio.

This recommendation was given to the Ministry of Finance on 19 September 2005 by the Advisory Council on Ethics for the Government Petroleum Fund.

Gro Nystuen Andreas Føllesdal Anne Lill Gade Ola Mestad Bjørn Østbø
(Chair)

Footnotes

- ¹ <http://odin.dep.no/fin/english/topics/p10001617/p10001682/006071-220009/dok-bn.html>
- ² Treaty on the Non-Proliferation of Nuclear Weapons, <http://disarmament2.un.org/wmd/npt/npttext.html>
- ³ Ref. the so called principle of proportionality, which is e.g. reflected in Article 35 of the first additional protocol to the Geneva Conventions.
- ⁴ <http://odin.dep.no/fin/english/topics/p10001617/p10001682/006071-220009/dok-bn.html>
- ⁵ Federation of American Scientists (www.fas.org)
- ⁶ <http://news.bbc.co.uk/2/hi/americas/3126141.stm>
- ⁷ <http://www.cbsnews.com/stories/2003/08/06/national/main566869.shtml>
- ⁸ http://www.fas.org/irp/imint/doe_ornl_k25_2.htm
- ⁹ http://www.ctbto.org/treaty/treaty_text.pdf
- ¹⁰ <http://odin.dep.no/fin/english/topics/p10001617/p10001682/006071-220009/dok-bn.html>
- ¹¹ <http://daccessdds.un.org/doc/UNDOC/GEN/No2/493/38/PDF/No249338.pdf?OpenElement>
- ¹² United Nations General Assembly, The issue of missiles in all its aspects, Report by the Secretary-General (A/57/229).
- ¹³ <http://www.mtcr.info/english/>
- ¹⁴ <http://www.nsg-online.org/>
- ¹⁵ <http://www.nsg-online.org/PDF/infcirc254r7p1-050223.pdf>
- ¹⁶ <http://www.nsg-online.org/PDF/infcirc254r6p2-050223.pdf>
- ¹⁷ <http://odin.dep.no/fin/english/topics/p10001617/p10001682/006071-220009/dok-bn.html>
- ¹⁸ <http://www.honeywell-tsi.com/programs/dtra.htm>
- ¹⁹ http://www.mbda.net/site/FO/scripts/siteFO_contenu.php?lang=EN&noeu_id=37
- ²⁰ <http://www.baesystems.com/internationalpartnerships/index.htm>
- ²¹ <http://www.finmeccanica.it/finmeccanica/default.htm>
- ²² http://www.mbda.net/site/FO/scripts/siteFO_contenu.php?noeu_id=77&lang=EN
- ²³ Database provided by Jane's Information Group. See www.janes.com
- ²⁴ <http://www.snecma-moteurs.com/?&lg=en>
- ²⁵ <http://www.sagem.com/>
- ²⁶ http://www.safran-group.com/article.php?id_article=903&lang=en
- ²⁷ <http://investor.northropgrumman.com/phoenix.zhtml?c=112386&p=IROL-nrtext&t=Regular&id=633147&>
- ²⁸ http://www.af.mil/factsheets/factsheet_print.asp?fsID=113&page=1
- ²⁹ <http://www.defenselink.mil/contracts/2005/ct20050714.html>
- ³⁰ <http://www.boeing.com/defense-space/ic/icbmsys/prime.html>
- ³¹ <http://www.boeing.com/news/frontiers/archive/2003/may/mainfeature.html>
- ³² http://www.pratt-whitney.com/pr_080305.asp
- ³³ http://www.pratt-whitney.com/prod_space_rdyne_pbps.asp

To the Ministry of Finance

Oslo 20 September 2005
(Published 13 October 2005)

Recommendation concerning whether the weapons systems Spider and Intelligent Munition System (IMS) might be contrary to international law

Introduction

We refer to the letter from the Ministry of Finance, dated 31 August this year, in which the Ministry asks the Advisory Council on Ethics to assess whether the two weapons systems *Spider* and *Intelligent Munition System (IMS)* would be considered illegal under the Convention on the prohibition of use, stockpiling, production and transfer of antipersonnel mines and on their destruction (The Convention). Two of the three companies that are implicated in the plans for these weapons systems have already been excluded from the Fund because of their involvement in the production of cluster weapons; General Dynamics and Alliant Techsystems (ATK). The third company, Textron, remains in the Funds' portfolio.

The basis for the request from the Ministry is section 4.3 of the Ethical Guidelines, which says that: *The Ministry of Finance may request the Council's advice on whether an investment can constitute a violation of Norway's obligations under international law.*

A given weapons system could be inconsistent with the Ethical Guidelines, even if it does not conflict with international law. The Advisory Council is already in the process of assessing whether the above mentioned weapons systems could be in violation of the Ethical Guidelines.¹ The Council might therefore issue recommendations on the relationship between these weapons systems and the Ethical Guidelines at a later time, irrespective of this recommendation which pertains to the international law issues.

Can investments constitute a breach of international law?

Investments that might be seen as *undermining* international law standards would normally not constitute violations of international law. Certain treaties, however, contain provisions on complicity that are so far reaching that this might be the case. Article 1 of the Convention says:

1. *Each State Party undertakes never under any circumstances:*
 - a) *To use anti-personnel mines;*
 - b) *To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;*
 - c) *To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.*
2. *Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.*

According to *litra c*, the States Parties may not “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention”. The question is whether investments by the Petroleum Fund will fall within the scope of this provision. The predecessor to the Advisory Council on Ethics, the Advisory Commission on International Law, answered this question in the affirmative. In their memo to the Ministry of Finance dated 11 March 2002, it was noted that: “Because the Mine Ban Convention goes far in prohibiting any form of assistance, encouragement or inducement to production in violation of the convention, it is presumed that even a modest investment could be regarded as a violation of the article 1 (1) (c) cf. (b).”

The Ministry of Finance based their later exclusion³ of the company Singapore Technologies on this argument. The Advisory Council therefore assumes that investments in companies that produce antipersonnel mines can constitute a violation of international law.

Definition of an antipersonnel landmine

The question at hand is whether the above mentioned weapons systems will fall within the scope of the international prohibition against antipersonnel landmines. In order to answer this question one must first determine the content of the definition of an antipersonnel mine, and second, whether the weapons systems in question have technical specifications that make them fall within this definition.

The definition of an antipersonnel mine is laid down in the Convention’s Article 2 (1):

“Anti-personnel mine’ means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.”

This provision makes it clear that mines that are designed to explode by human contact falls within the definition of antipersonnel mines. Mines can be detonated by persons stepping on them, tilting them, breaking a trip-wire, or exposure to different kinds of sensors. The Advisory Council finds that all weapons that are designed to explode because of a person’s inadvertent contact, falls within the definition of an antipersonnel mine, irrespective of whether they are classified as antipersonnel landmines.

The point with such weapons is to be able to engage the enemy without being in active combat with them or even being present in the area. The mine is activated by the victim, not by the person that emplaced it.

Are Spider or IMS illegal under the Convention?

The next question is whether these weapons systems would be subject to the international ban on antipersonnel land mines.

The weapons program *Intelligent Munitions Systems* (IMS) does not currently exist, but production by the companies Allient Techsystems, General Dynamics and Textron Systems is being planned.⁴ This is a weapons program that combines three different weapons systems, including the so-called “Antipersonnel Landmine-Alternative” (APL-A). It is, as a point of departure, designed not to fall within the definition of an antipersonnel landmine in Article 2 (1) of the Convention. The system consists of a number of explosive charges that may be detonated by an operator who has been alerted of the presence of a person (the victim) because of the person’s contact with a sensor. This system is called

“man-in-the-loop”, which indicates ^{that} it is an operator and not the victim (“target”) that activates the explosive charge. Production of this system is not planned until 2009 at the earliest.

Also the weapons system *Spider* is not yet in production. It is being developed by ATK and Textron Systems and is also being planned as a so-called APL-A system. Textron describes *Spider* as a *“suitable humanitarian alternative for anti-personnel landmines”* ⁵ The system will basically function in the same way as the APL-A part of IMS. *Spider* is planned for production in 2007.

A prototype of *Spider* was displayed at the arms exhibition, Defence Systems and Equipment International (DSEi), in London on Sept. 16th 2005. The Advisory Council’s secretariat met a representative of Textron Systems to get more details about the system. The main element of *Spider* is a circular platform, approx. 40 cm in diameter and 10 cm tall. Six launch tubes pointing at an angle upwards and outwards are attached to the platform. The launch tubes can fire different types of ammunition. The range is approx. six meters. The weapons system is flexible in that several units can be combined to cover a larger area. Other types of explosives, such as sector mines, may also be attached.

From each *Spider*, six trip wires, each six meters long, can be extended. When a trip wire is touched, a wireless signal is transmitted to an operator that may be situated 1000 meters away (or further if relays are used). A display shows the operator which trip wire has been touched. The operator may then choose to detonate the ammunition. More advanced sensors, such as infra red cameras, motion detectors and ground radars may also be employed, but in its most basic configuration, *Spider* uses only trip wires.

Textron pointed out that the idea behind the development of *Spider* has been to develop a system that is *“Ottawa-compliant”*, i.e. in compliance with the Convention. When *Spider* was presented at DSEi, it was stressed that the ammunition must be discharged by an operator.

According to the producers, both these weapons systems will be produced with the *“man-in-the-loop”* feature, so that the ammunition is detonated by an operator and not by the victim. A weapons system that can *only* operate in this manner falls outside the definition of an antipersonnel landmine.

It is being argued, however, by sources such as Human Rights Watch (HRW), that these weapons systems could be quipped with a so-called *“battlefield override feature”* ⁶ This means that the weapons system may be activated by its victims, and not by an operator who is first alerted and then discharges the ammunition manually. According to HRW, the US Ministry of Defence (Pentagon) is interested in equipping the weapon with such a feature. A HRW report quotes a Pentagon report in which it is stated: *“Other operating modes allow Spider munitions to function autonomously without the man-in-the-loop control (i.e. target activation)...”* ⁷ On a direct question from the secretariat, the representative from Textron confirmed that such an override feature would, from a technical point of view, be uncomplicated to add. Further more, Textron confirmed that they will produce the system according to their client’s specifications, and that this could also include the *“battlefield override”* feature.

There seems to be little doubt that if the *Spider* system and the APL-A part of the IMS system will be designed in such a manner that the ammunition may be victim activated,

this would be inconsistent with the prohibition in the Convention. However, if the systems are constructed in such a manner that they only can be activated by an operator, this will not be the case. As of today, no decision has been made on whether, or with what specifications, these weapons systems will be produced. HRW states in its report that “A decision whether to produce Spider will be taken in December 2005.” Textron Systems has confirmed this to the Council. The Council has also learned from HRW that the organisation is lobbying the US Congress to prevent Pentagon from ordering Spider with the “battlefield override” feature. As mentioned in its report, HRW anticipates that, in December 2005, it will be decided whether there is a basis for starting production. According to the same report, a decision regarding production of IMS will probably be taken in 2008.

Despite the fact that the US is not a party to the Convention, there has for several years been a domestic political debate on the country’s adaptation to its standards. In a report from the US House of Representatives from 2002 it is stated: “The conferees direct that the Army clearly define the requirements for a next generation intelligent minefields and ensure compliance with the Ottawa Convention, and report back to the House and Senate Appropriations Committees with detailed plans for such a system”⁸ It thus seems reasonable to assume that any political decision taken with regard to Spider will also apply to IMS and other APL-A systems.

Conclusion

The Advisory Council finds that all weapon systems that are designed in such a manner that explosive charges are detonated by the presence, proximity or contact of a person, will fall within the definition of an antipersonnel land mine as laid down in Article 2 of the Convention. This means that if the weapons systems in question are going to be equipped with “battlefield override” features, or in other ways designed to circumvent the “man-in-the-loop” feature, they will fall within the scope of the prohibition in the Convention.

Both production and *development* of antipersonnel mines is covered by the prohibition. The Advisory Council presumes that Spider and IMS, so far, have been developed as operator-activated systems. This *development* thus seems not to have been in violation of the Convention. The key issue is whether it will be decided that these weapons systems are to be modified in such a manner that they will be inconsistent with prohibition against antipersonnel mines.

If a decision is made to equip the weapons systems Spider or IMS with a “battlefield override” feature, or in other ways equip them in such a manner that they fall within the definition of an antipersonnel mine, the Advisory Council is going to recommend exclusion of Textron Systems.

This recommendation was given 20 September 2005 by the Advisory Council on Ethics for the Norwegian Government Petroleum Fund:

Gro Nystuen Andreas Føllesdal Anne Lill Gade Ola Mestad Bjørn Østbø
(Chair)

Footnotes

- ¹ The Council had a meeting with the head of the weapons section in Human Rights Watch about these weapons in June 2005.
- ² Convention on the prohibition of use, stockpiling, production and transfer of antipersonnel mines and on their destruction of September 18, 1997
- ³ In the spring of 2002.
- ⁴ www.hrw.org/backgrounder/arms/armso805/3.htm, www.gobalsecurity.org/military/systems/ground http://www.defenselink.mil/contracts/2003/co4162003_ct252-03.html
- ⁵ www.systems.textron.com
- ⁶ <http://hrw.org/backgrounder/arms/armso805/3.htm>
- ⁷ <http://hrw.org/backgrounder/arms/armso805/3.htm> page 2, footnote 36.
- ⁸ US House of Representatives, Report 107-732, see footnote 36 in HRW report (www.hrw.org/backgrounder/arms/armso805/3.htm)

To the Ministry of Finance

Oslo 14 November 2005
(Published 5 January 2006)

Recommendation on Total S.A.

1 Contents

2 Introduction

- 2.1 TOTAL's operations in Burma
- 2.2 Brief notes on Burma
- 2.3 The international community's condemnation of Burma

3 What the Advisory Council on Ethics has to consider

- 3.1 Further details on paragraph 4.4, second sentence, first alternative
- 3.2 More about the concept of complicity
- 3.3 Summary

4 The Allegations against Total

- 4.1 Allegations of complicity in human rights violations in connection with the construction of the Yadana pipeline (1995–1998)
 - 4.1.1 Use of military troops as security forces
 - 4.1.2 Knowledge of abuse committed by the security forces
 - 4.1.3 The Council's assessment
- 4.2 Allegations of complicity in human rights violations today
 - 4.2.1 Complicity through presence and revenue generation
 - 4.2.2 The Council's assessment
 - 4.2.3 Complicity through cooperation with MOGE and the Burmese authorities
 - 4.2.4 The Council's assessment
 - 4.2.5 Complicity through knowledge and passivity
 - 4.2.6 The Council's assessment

5 Conclusion

1 Introduction

On 13 April 2005, the Petroleum Fund's Advisory Council on Ethics received a letter from the Ministry of Finance requesting the Council to consider whether investments in Total, due to the company's operations in Burma, are contrary to the Petroleum Fund's ethical guidelines.

As of 31 December 2004, Norges Bank held shares worth NOK 5.7 billion in Total, equivalent to an ownership interest of 0.67 per cent. Norges Bank also holds bonds worth NOK 105.5 million in the company.

Total is accused of complicity in human rights violations in connection with the construction of the Yadana gas pipeline in the period 1995-1998. Total is also accused of complicity in Burma's ongoing human rights violations, one of the grounds being that Total's operations generate revenues for the regime. Allegations of human rights violations have been put forward by a number of national and international NGOs. ¹ Total denies complicity in human rights violations.²

The Council recognises that Burma is governed by a military regime which for many years has been responsible for very serious and systematic violations of human rights. Moreover, the Council considers it likely that these violations will continue in the foreseeable future. It is, however, beyond the Council's mandate to assess whether exclusion of companies could contribute to improving the political situation within a state.

The Council considers it likely that Total was aware that human rights violations were taking place in connection with the construction of the pipeline in the period 1995-1998, and that the company did little to prevent such violations. This, however, does not in itself provide a basis for exclusion from the Fund, as it is only the risk for present or future violations of the guidelines which can prompt exclusion. In order to establish the existence of a risk of complicity in present or future human rights violations, there must, under the guidelines, be a direct linkage between the company's activities and the relevant human rights violations. Moreover, the violations must be perpetrated to secure the company's interests, and the company must be aware of the violations and still refrain from taking steps to seek to prevent them. The Council does not consider these conditions to be met in the present case.

The Council concludes that the ethical guidelines do not provide a basis for determining that the Fund is currently contributing to Burma's human rights abuses through its ownership interest in Total, and does not recommend exclusion of the company.

2 Background

2.1 TOTAL's operations in Burma

Total SA (hereafter referred to as Total) started operations in Burma in 1992 when the company signed a production sharing contract with the Burmese public corporation Myanmar Oil and Gas Enterprise (MOGE) to develop the Yadana gas field and lay a pipeline to bring the gas ashore and onwards to the Thai border.³ Total established a subsidiary, Total Myanmar Exploration and Production, in that connection.

Total subsequently sold off interests in the project to Unocal (28 per cent of the shares), the Thai company PTT-EP (Petroleum Authority of Thailand Exploration & Production

(25 per cent), and further interests to MOGE (15 per cent). Total retains the largest stake of 31 per cent of the shares. The same consortium owns Moattama Transportation Company (MGTC) which was responsible for constructing the pipeline from the gas field to Thailand.

Total is among the largest foreign actors in Burma today. Total states that the company is also involved in oil and gas exploration in areas adjacent to the Yadana field together with, among others, Petronas (from Malaysia) and Daewoo (from Korea).

The Yadana field is a large gas field situated in the Andaman Sea off the south-west coast of Burma. The gas is transported by pipeline to Thailand. The pipeline runs undersea from the Yadana field to shore, thereafter 63 km across Burmese territory into Thailand. Work on the gas pipeline started with field surveys in 1994, infrastructure was built between 1995 and 1997 (including landing pads for helicopters, roads, buildings, etc), while the pipeline itself was laid in 1996 and 1997. Construction was completed in May 1998, and the pipeline came on stream in July 1998. Production was up to full speed in 2001. Total states that overall investments amount to USD 1.2 billion, including close to USD 1.2 billion for the pipeline.

In conjunction with the other participants in the consortium Total initiated a social development programme in the region in 1995, in tandem with the construction of the pipeline. The programme encompassed 13 villages closest to the pipeline route, but was extended to 23 villages in 2001 and now covers a population of some 45,000 in the pipeline area. The programme focuses on building up health services, education, local industry and commerce and micro credits, along with infrastructure development.⁵ The social development projects are funded by Moattama Gas Transportation Company (MGTC) which is owned by Total and the other consortium participants. According to Total it spent just under USD 13 million on the programme between 1995 and 2004.⁶

2.2 In brief about Burma

Burma is ruled by a military junta, the so-called *State Peace and Development Council* (SPDC). The regime is notorious for its violations of basic human rights and its suppression of all political opposition, including the country's largest opposition party, the NLD (National League for Democracy), which is headed by Aung San Suu Kyi. The regime maintains its power through oppressive measures such as strict censorship, suppression of individual rights and persecution of minorities. Among the human rights abuses of which the regime is accused are systematic and widespread resort to forced labour including in connection with infrastructure building, forced relocation of large population groups along with atrocities such as torture, rape, murder and use of child soldiers by the military forces. The regime appears to have dealt particularly harshly with the numerous ethnic minorities in Burma. A number of NGOs have reported on the regime's outrages against the population.⁷ The UN Commission on Human Rights and the International Labour Organization (ILO) has in several contexts reported on and condemned the regime's systematic violations of human rights⁸ and use of forced labour.⁹

Through a network of companies including both public corporations and private firms, the regime controls virtually all sections of the formal economy.¹⁰ The government has secured control over 12 key economic sectors, including mining and energy.¹¹ State-run companies are also major participants in the transport, trade and manufacturing sectors. Gas exports provide the main export revenues and account for 25–30 per cent, or an estimated USD 600 – 800 million, of the country's official exports.¹²

The regime has done little to develop the economy, and Burma ranks among the world's poorest countries. Due to isolation from the world at large and a dearth of economic policy incentives, few foreign countries have opted to invest in Burma, and many of those which have done so have withdrawn. The oil and gas sector is the only one to offer substantial growth potentials. Foreign companies, mostly Asian, now dominate this sector.

Chronological overview of key events related to this recommendation

- 1982 Gas deposit discovered in the Andaman Sea (later the Yadana field).
- 1988 Burmese authorities announce a tender for development of the gas field.
- June 1992 Total sign production sharing contract with MOGE.
- July 1992 Total sign agreement of intent with MOGE.
- 1991–1996 Military forces move into the projected route of the pipeline, establish military camps and clear the areas along the route. Reports of forced relocation, forced labour and atrocities against the local population committed by the military forces.
- 1995 Total start their social development programme in 13 villages in Burma.
- February 1995 Commercially viable finds at the Yadana field. The authorities in Burma and Thailand sign a 30-year contract for gas sales from the Yadana field.
- October 1995 Pipeline construction starts. Allegations of forced labour and other outrages committed by the security forces continue.
- 1998 Pipeline completed and comes on stream.
- 2000 Commercial production starts up at the Yadana field.
- 2001 Yadana field in full production.
- 2001 Total's social development programme extended to include 23 villages along the pipeline route.
- 2002 US court rules that Unocal could be sued by Burmese citizens for complicity in human rights abuses. (Unocal and Total are partners in Burma.)
- February 2005 – A number of NGOs, among them The Burma Campaign UK and FIDH in France, launch international campaigns against Total accusing it of complicity in human rights abuses.
- March 2005 Unocal reaches a compromise with the plaintiffs involving payment of damages.

2.3 The international community's condemnation of Burma

The international community has adamantly distanced itself from the Burmese military dictatorship. Many western countries have called for sanctions, although international agreement on such action has not been reached. Numerous countries and organisations have cut back their cooperation with Burma.

In 1997 the *USA* prohibited new investments in Burma, while allowing existing investments to run their course. In 2003 the US sanctions were broadened to include bans on imports and financial transactions.

In 1989 the *World Bank* and the *International Monetary Fund (IMF)* introduced sanctions against Burma. Burma has also repeatedly been condemned by the *ILO* for the country's systematic resort to forced labour.

In the past 15 years the *European Union* has introduced a number of sanctions against

Burma, including an arms embargo and a ban on investments by EU enterprises in specific Burmese public corporations.¹³ In the spring of 2004 the EU adopted a Common Position on Burma. This involves a combination of measures including a ban on entry visas to the EU for Burmese military officers and other political leaders, a freeze on the regime's assets in the EU, and a general call on European enterprises not to invest in Burma. Assistance to the public health system, measures to alleviate poverty, and emergency aid are maintained.

The EU's position can be perceived as a reaction to the failure of the sanctions policy to contribute to significant changes. Among the reasons cited for this failure are that sanctions have generally proven ineffective against totalitarian regimes and that sanctions are in any case unlikely to be effective as long as neighbouring states fail to support them. China, India and Thailand are all engaged in extensive collaboration with Burma.

Norwegian policy on Burma

Norway has endorsed the EU sanctions, and during his first period in office, the then prime minister Bondevik called on Norwegian industry to refrain from investing in Burma. Norway has been an important mainstay for the Burmese opposition through its support to the exile community and contributions to civil society in Burma. In his statement to the Storting in February this year, however, the minister of foreign affairs stated that "neither the sanctions approach nor the policy of engagement has led to changes in the regime's policies. We must therefore continually assess what means are most suitable for supporting democratisation in the country. Measures to promote dialogue will be essential in this connection."¹⁴ At a meeting with NGOs engaged in Burma the then state secretary Vidar Helgesen signalled greater emphasis on contact and constructive dialogue with the regime in combination with a systematic policy for change and continued support to the opposition.¹⁵

3 What the Advisory Council on Ethics has to consider

The Advisory Council has to consider whether the Petroleum Fund can be said to contribute to unethical actions in Burma through its ownership interest in Total. The Council's mandate is confined to concrete assessments of whether the company's conduct falls within or outside the scope of the guidelines.

The ethical guidelines paragraph 4.4, second sentence, first alternative states:

"The Council shall issue recommendations on the exclusion of one or more companies from the investment universe because of acts or omissions that constitute an unacceptable risk of contributing to: Serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other forms of child exploitation."

The Council will consider the question of excluding Total according to this rule. The other alternatives in paragraph 4.4 regarding violations of individual's rights in war or conflict, severe environmental degradation, gross corruption or violation of other ethical norms, are considered less relevant to the issue of Total's operations in Burma.

Assessing whether exclusion of one or more companies might contribute to a better political development in Burma would go beyond the Council's mandate. This is clear from the preparatory work which contains the following statement: *"The committee presumes that the majority of our foreign policy objectives will be better achieved with existing policy instruments than by imposing guiding principles on the Petroleum Fund's investment strategy."*¹⁶

3.1 Further details on paragraph 4.4, second sentence, first alternative

Human rights

Paragraph 4.4, second sentence, first alternative contains a general reference to *human rights*. NOU (Norwegian Official Report) 2003: 22 states: “Companies’ contributions to serious or systematic violation of human rights and labour rights should, in the Committee’s opinion, be encompassed by the proposed exclusion mechanism.”¹⁷ The Council thus takes as its point of departure that the reference to human rights pertains to internationally recognised human rights and labour rights. It is clear from the wording of this provision that the specific human rights violations listed in point 4.4 are examples of such violations and not an exhaustive list.

Serious and systematic violations

Not all human rights violations or breaches of international labour rights standards fall within the scope of the provision. Paragraph 4.4 states that human rights violations must be “serious or systematic”. The Graver Committee recommends “fairly restrictive criteria for deciding which companies should be subject to possible exclusion ...”.¹⁸ The Council assumes that a determination of whether human rights violations qualify as serious or systematic needs to be related to the specific case at hand. However, it seems clear that a limited number of violations could suffice if they are very serious, while the character of a violation need not be equally serious if it is perpetrated in a systematic manner.

Who can be held responsible?

Only states can violate human rights directly.¹⁹ Companies can, as indicated in paragraph 4.4, contribute to human rights violations committed by states. The Fund may in its turn contribute to companies’ complicity through its ownership. It is such complicity in a state’s human rights violations which is to be assessed under this provision.

The company’s acts or omissions

Paragraph 4.4 states that the Council may recommend exclusion of companies “because of acts or omissions that constitute an unacceptable risk of contributing to...”. This wording must be understood in such a way that it is the actions or omissions of the *company* in question that can provide a basis for exclusion, not those of the state concerned.

Unacceptable risk

The acts or omissions must constitute “an unacceptable risk of (the Fund) contributing to...”. This means that it is not necessary to prove that such contribution will take place – the presence of an unacceptable risk suffices. The term *unacceptable risk* is not specifically defined in the preparatory work. NOU (Norwegian Official Report) 2003: 22 states that “Criteria should therefore be established for determining the existence of unacceptable ethical risk. These criteria can be based on the international instruments that also apply to the Fund’s exercise of ownership interests. Only the most serious forms of violations of these standards should provide a basis for exclusion.”²⁰ In other words, the fact that a risk is deemed *unacceptable* is linked to the seriousness of the act.

The term *ris* is associated with the degree of probability that unethical actions will take place in the future. The NOU states that “the objective is to decide whether the company in the future will represent an unacceptable ethical risk for the Petroleum Fund.”²¹ The wording of paragraph 4.4 makes it clear that what is to be assessed is the likelihood of contributing to “present and future” actions or omissions. The Council accordingly assumes that actions or omissions that took place in the past will not, in themselves, provide a basis for exclusion of companies under this provision. However, earlier patterns of conduct might give

some indications as to what will happen ahead. Hence it is also relevant to examine companies' previous practice when future risk of complicity in violations is to be assessed.

3.2 More about the term complicity

The term *complicity* is used in many different contexts, *inter alia* both as legal and ethical categorisation of acts. The Council considers that the term complicity in paragraph 4.4 of the guidelines must be interpreted on the basis of the preparatory work and in light of perceptions of national and international law and practice.

The Fund's complicity in human rights violations

Paragraph 4.4 assumes that the *Fund* may contribute to unethical actions through *owning* shares in companies that are responsible for unethical actions or omissions. The question of whether the Petroleum Fund, through its ownership interest in Total, is implicated in human rights violations in Burma depends on how the term *complicity* is defined. Since human rights violations are at issue here, complicity must be assessed at several stages. It must be decided to which extent the *Fund* contributes to *Total's* possible complicity in human rights violations committed by the Burmese authorities.

Companies' complicity in human rights violations

NOU 2003: 22 deals with the issue of complicity in several places. The following appears under the heading "Complicity and delimitation of companies' liability":

*"In order (for an investor) to be complicit in an action, the action must be possible to anticipate for the investor. There must be some form of systematic or causal relationship between the company's operations and the actions in which the investor does not wish to be complicit. Investments in the company cannot be regarded as complicity in actions which one could not possibly expect or be aware of or circumstances over which the company has no significant control."*²²

The above describes, first, the *Fund's* complicity. The company's unethical conduct must be expected by the *investor*. Moreover, there must be a link between the *company's* operations and the unethical actions. It is explicitly stated that *circumstances beyond the company's control* cannot entail complicity on the part of the investor. This must indirectly also be taken to mean that the company itself cannot be considered to be complicit in ethical norm breaches that are beyond the company's control or which the company could not possibly expect or be aware of.

NOU 2003: 22 also addresses more specifically the issue of complicity in states where human rights violations take place:

"Particular problems arise in connection with companies operating in states where severe human rights violations occur. Such violations can also occur in connection with the companies' operations, for example through the use of security forces that commit abuses to protect the company's property and installations, deportation of people and environmental damage to facilitate the company's projects, or arrest and persecution of workers seeking to promote trade union rights. A company may be regarded as complicit to such actions only when those actions are taken in order to protect the company's property or investment and the company has not taken reasonable measures to prevent the abuses."

The Council's view is that the above paragraph describes responsibility for complicity for both the *Fund* and the company in question. In other words, it is only when the unethical actions are carried out in order to protect or to facilitate a company's activities,

and the company has failed to “take reasonable measures to prevent the abuses”, that the company, and thus also the Fund, can be held liable for complicity under the guidelines. If the company (and the Fund) is aware of unethical actions carried out in the company’s interest but choose to remain passive, this may be regarded as complicity.

NOU 2003: 22 thus appears to imply that companies cannot justify plain passivity if they could have taken steps to prevent unethical conduct. The requirement of taking “reasonable measures” is assumed to refer to circumstances over which the company has *control*. The question is whether the responsibility is limited to this. It would be natural to interpret “reasonable measures” as also applying to circumstances where the company has a *genuine possibility to exert influence*, even though it does not necessarily have *control*.

Under Norwegian criminal law the main rule is that *passive* complicity is not a criminal offence.²³ In certain criminal cases under international law it has been assumed that complicity can encompass passivity if the accused was *aware* that his passivity aided the main perpetrator’s commission of the criminal act.²⁴ International law was for example applied in a case under the *Aliens Tort Claims Act* (ATCA) in the USA. Here complicity in human rights violations in Burma was discussed in a procedural ruling.²⁵ The case was also of direct significance for Total, which collaborated closely with Unocal in Burma in the period in question. This ruling is consequently of great interest for the Council’s deliberations. The District Court deemed it unlikely that Unocal had been complicit in human rights abuses because the company’s actions/omissions did not constitute what the court termed “active participation” in breaches of international norms, despite their undoubted knowledge of the abuses perpetrated by the military. This view, however, was not shared by the Court of Appeals whose conclusion was that there existed sufficient evidence of complicity on the part of Unocal to warrant judicial consideration of the merits of the case.

The case was resolved by settlement and the merits of the case were therefore not considered, although the judges came close to presuming Unocal’s complicity in human rights violations in connection with the construction of the pipeline. This was based on Unocal allegedly having paid for the use of Burmese military forces to attend to pipeline security and construction of infrastructure along the pipeline route, and that they undoubtedly knew that these forces resorted to forced labour and were guilty of murder, rape and so forth.²⁶ The decision was partly based on testimony of witnesses and reports that persons in the company’s management, on several occasions, had acknowledged that they knew of abuses in connection with the construction project.

According to the grounds for the finding in the above-mentioned Unocal case, Total is presumed to have had the same knowledge of, and responsibility for, the human rights violations in connection with the pipeline construction as Unocal. The Council accepts this as a fact. There were procedural reasons why the complaint, which originally referred to Total, Unocal and MOGE alike, only was raised against Unocal.²⁷ Actions for damages have been brought against Total in Belgium and France in connection with their activities in Burma. No such action has been subject to final judgment.²⁸

3.3 Summary

Based on the preparatory work to the guidelines the Council accepts as a fact that the Fund, through its ownership interests in companies, can be said to contribute to companies’ complicity in states’ human rights violations. The guidelines are principally concerned with *existing* and *future* breaches of the ethical guidelines, although earlier

breaches might give an indication of future conduct. The point is that there must exist an unacceptable risk of breaches taking place in the future. Complicity includes actions carried out to protect or to facilitate the company's activities, and refers to circumstances which are under the company's control or circumstances which the company could have been in a position to countervail or to prevent. Based on the guidelines' preparatory work, the Council lists the following criteria which constitute decisive elements in an overall assessment of whether there exists an unacceptable risk of the Fund contributing to human rights violations:

- There must exist some kind of linkage between the company's operations and the existing breaches of the guidelines, which must be visible to the Fund.
- The breaches must have been carried out with a view to serving the company's interests or to facilitate conditions for the company.
- The company must either have contributed actively to the breaches, or had knowledge of the breaches, but without seeking to prevent them.
- The norm breaches must either be ongoing, or there must exist an unacceptable risk that norm breaches will occur in the future. Earlier norm breaches might indicate future patterns of conduct.

4 The allegations against Total

The allegations against Total can be divided into two main categories. The first category covers events in connection with the construction of the Yadana pipeline in the period 1995–1998. The second covers current events.

Allegations connected with the construction of the Yadana pipeline in the period 1995–1998

Total is accused of having hired, through MOGE, military units to provide security services during the construction of the Yadana pipeline. The specific content of the accusations connected with this construction is inter alia that:²⁹

- Total knew of the security forces' abuses against the local population in the pipeline area, but did not seek to prevent them. The abuses included:
 - Forced labour in connection with construction of military camps
 - Forced labour in connection with construction of infrastructure
 - Forced relocation/ deportation of villages
 - Arbitrary abuses by the security forces against the local population

Allegations connected with Total's present operations

Total is accused of contributing to the regime's human rights violations through its collaboration with the Burmese state (through MOGE). The substance of the accusations is as follows:

- Through its presence Total generate revenues for the Burmese state. Total is thereby helping to fund the regime's activities, including the latter's violations of human rights.
- Through its close collaboration with MOGE, Total is complicit in the regime's human rights violations.
- Total is complicit in human rights violations in as much as the same forces that presently attend to security within the pipeline area are committing abuses against the local population outside the pipeline area.

In order to shed light on the two above-mentioned categories of allegations against Total, the Council has obtained information from a number of sources, including various NGOs engaged in Burma, Total itself, academic circles, the United Nations, the ILO and

other international organisations, persons with particular knowledge of Burma including John Jackson, Anna Roberts and Mark Farmaner (The Burma Campaign UK), Vibeke Hermanrud and Marte Graff Jensen (The Norwegian Burma Committee), David Arnott (Online Burma/Myanmar Library), Luc Zandevliet (Collaborative Development Project), Professor Robert Taylor (University of Buckingham, UK), along with a number of persons who for various reason do not wish to be named.

The Council will consider these accusations in light of the four main criteria for complicity outlined above.

4.1 Accusations of complicity in human rights violations connected with the construction of the Yadana pipeline (1995–1998)

Under the guidelines the Council is required to assess the likelihood that companies' *previous unethical conduct* will continue in the future. Against this background the Council briefly discusses Total's possible complicity in human rights violations connected with the construction of the Yadana pipeline in the 1990s. These aspects are frequently highlighted as particularly reprehensible where Total's role in Burma is concerned.

The Council notes that there is considerable disagreement between NGOs and Total about what actually happened in the period from 1992 up to completion of the pipeline project, both as regards the role of the military, abuses against the civilian population and Total's responsibility.³⁰

4.1.1 Use of military troops as security forces

The Yadana pipeline was laid in an area populated by minorities who for several decades have been engaged in armed conflict with the military regime.³¹ Military forces are said to have moved into the area in the period 1990–1992 and started to establish military bases in the area where the pipeline was to be laid. The organisation Earth Rights International (ERI) reports that at least 16 battalions were stationed in or controlled the area between 1991 and 1996.

The militarization was intended to secure the area, and to secure full control over the local population, which was essential to enable the development to go ahead.³² According to the contract between Total and MOGE, MOGE was to assure security and that the area was available for the pipeline that was to be built.³³

There is no disagreement that the Burmese military saw to security and other services during construction of the pipeline. However, Total is accused of having paid the Burmese military, through MOGE, to deliver these services.³⁴ In the Unocal case the Court of Appeals sites internal memos from the companies and minutes of meetings, as well as Total's contract with MOGE which states: "*MOGE shall assist and expedite Contractor's execution of the Work Programme by providing at cost, facilities, supplies and personnel including, but not limited to, supplying at making available ..., security protection, and rights of way and easements as may be requested by Contractor and made available from the resources under MOGE's control.*"³⁵

Total denies that the company has at any time directly or indirectly hired Burmese military troops as security forces.³⁶

4.1.2 Knowledge of violations committed by the security forces

The regime in Burma has a long history of outrages against the population which have also been documented by a number of international organisations. The NGOs assert that Total must have known that laying the pipeline through an area populated by ethnic minorities would entail a security risk and consequently a high level of military arms

build-up in the area.³⁷ Given the reputation of the Burmese army, Total must also have been aware of the consequences this could entail in the form of forced labour and other abuses against the local population.³⁸

The abuses of which the security forces are accused include:

- Forced relocation of villages
- Forced labour in connection with construction of military camps and infrastructure
- Arbitrary abuses on the part of the security forces against the local population

Forced relocation of villages

Several villages were forcibly relocated on security grounds and to clear the way for the pipeline. The NGO reports assert that the majority were relocated in the period 1991–1993, several also after the contract with MOGE was signed.³⁹ According to a report from the International Federation of Human Rights Leagues (FIDH), a total of 30,000 people in the area were forcibly relocated.⁴⁰

Total claim that they had nothing to do with the forced relocation. Their perception was that the area was untouched when they entered in 1994.⁴¹

Forced labour in connection with construction of military camps and infrastructure

According to the NGOs FDHI and ERI, forced labour was employed on an extensive and systematic basis throughout the period 1992–1998 with the local population being forced to build military camps and infrastructure in connection with the pipeline route, including landing pads for helicopters, roads along the pipeline route for the project, buildings, and clearing the actual route of the pipeline.⁴²

In the previously mentioned ruling regarding Unocal, the court held that it could be proved that Total and Unocal both knew that the military were in fact employing forced labour in the Yadana project, and that the companies were aware of the abuses. The court also held that there were grounds for assuming that Total collaborated with the military on security in the area.⁴³

Total admit that they were aware of the regime's use of forced labour in general, but deny that the company has employed forced labour in connection with the work on the gas pipeline. Total also assert that they demanded at every opportunity that security forces should not resort to forced labour for the benefit of the gas pipeline project.⁴⁴ In those cases where Total became aware that the military employed forced labour, Total took care to provide financial compensation, even though the company bore no direct responsibility. Total also deny having provided any form of support to military operations, whether financial or in any other manner.⁴⁵

Other abuses

Other accusations of atrocities on the part of the security forces against the civilian population include violence, torture, summary executions of what the military regard as ethnic rebels, punishment and violence during forced labour, including against women and children.⁴⁶ Moreover, land appears to have been expropriated on a large scale in a number of named villages in the areas along the pipeline route in order to acquire area for the pipeline and for establishing military camps.⁴⁷ Total assert that they provided ample compensation in cases where land areas were expropriated for the pipeline, but according to the FIDH, among other organisations, the funds were as a rule confiscated by the security forces.⁴⁸

Total were aware that the security forces' presence could have negative consequences for the area's inhabitants, and assert that they did everything possible to prevent abuses by the military.⁴⁹ Total also refer to the social development programme that was implemented for 13 villages along the pipeline route which they claim helped to raise the inhabitants' living standard considerably.⁵⁰

4.1.3 The Council's assessment

The Council must assess the above based on whether the circumstances described are covered by paragraph 4.4 of the ethical guidelines, according to its interpretation as summarised in the four bullet points above in section 3.3.

There appears to be no doubt that Burma's security forces committed abuses against the local population in the area where the pipeline was laid in the period of its construction. It also seems fairly clear that there has been a link between some the reported human rights violations and Total's activity in connection with the construction of the pipeline. The military forces' use of forced labour in connection with security services and construction of infrastructure in connection with Total's operations also appears to be well documented. Moreover, it seems clear that parts of the activities of the Burmese authorities was a step in facilitating the operations, inter alia by ensuring security in the pipeline corridor in the construction period.

The previously mentioned decision from the USA built on the assumption that the Unocal oil company was probably aware of and accepted human rights violations in connection with the construction of the pipeline.⁵¹ Total's own role in this has not been established, but it is highly likely that Total had the same knowledge as Unocal. The two companies collaborated closely on this gas project in the period in question. As mentioned above, there were procedural reasons as to why only Unocal and not Total was the object of this lawsuit in the USA. It is unlikely that the court would have dealt differently with Total than with Unocal concerning the allegations of complicity. Hence it is likely that Total knew of the accusations of gross abuses perpetrated by the security forces. Moreover, it is likely that they were aware, for example, that forced labour was directly employed in connection with the construction of the pipeline. What action the companies took to prevent human rights violations in connection with the construction of the pipeline in this period is disputed and unclear.

According to the guidelines, companies should not be excluded on the basis of previous actions. The rationale for excluding companies is to avoid complicity in unethical actions now and in the future. Hence the question is to which degree Total's previous patterns of conduct can be expected to continue at present and in future.

Several factors indicate that Total's own focus on the human rights situation for those affected by the work along the pipeline route has changed since the construction period. The company now has a visible public profile focusing on human rights and social responsibility. Their commitment to improving living conditions for the inhabitants within the pipeline area indicates a will to prevent governmental abuses in those areas where they exert influence. The question is whether this human rights focus is credible, since the actual construction of the pipeline is complete. The period during which forced labour is presumed to have taken place coincided with the construction period. It might be asserted that it is simpler to maintain good standards at the present stage in as much as ongoing operations are limited to maintenance etc.

It is difficult to make any certain statement about future patterns of conduct. In the case at hand the Council nonetheless presumes that in future construction projects Total is hardly likely to put itself in a situation in which it is associated with the use of forced labour. Any financial gain accruing to Total thanks to forced labour is assumed to be far outweighed by the negative light in which the accusations have placed the company. The Council considers it unlikely that Total will go ahead with projects in the future without ensuring that the company does not find itself in a situation akin to the one that arose in the period 1995-1998. Hence the Council is of the view that there is not an unacceptable risk that Total will repeat its previous pattern of action in the future.

The Council accordingly concludes that there is no basis for excluding Total on grounds of complicity in human rights violations committed by the Burmese authorities in the period 1995-1998.

4.2 Accusations of complicity in human rights violations today

As to Total's present operations in Burma, the company is accused of, through its collaboration with the Burmese state, being complicit in the regime's human rights violations. The accusations can be summarised as follows:

- Through its presence Total is generating revenues for the Burmese state. By this means Total is helping to fund the regime.
- Through its close collaboration with MOGE, Total is complicit in the regime's human rights violations.
- Total is complicit in human rights violations in as much as the same forces that presently attend to security within the pipeline area are committing abuses against the local population outside the pipeline area.

4.2.1 Complicity through being present and generating revenue

The Yadana project is without doubt generating substantial revenues for the regime in Burma. Total does not disclose what it pays in taxes and duties to the Burmese state, and in recent years the Burmese authorities have not provided information on royalties, tax revenues or sales revenues they earn on gas produced at the Yadana field.

Estimates of the authorities' earnings on gas production from the Yadana field vary from USD 200 to USD 450 million per year.⁵² In addition to MOGE's revenues from gas sales there are royalties and taxes payable to MOGE by the consortium participants. Terms established in the contract suggest that signature bonuses and production bonuses to MOGE between production start-up and the present time amount to somewhere in the region of USD 40 million.⁵³ There are also royalties from Total's sales of gas and corporate taxes.⁵⁴ In 1996 Total put this at about USD 200 million at full production at the Yadana field.⁵⁵ The Council has been unable to establish what this figure amounts to today.

4.2.2 The Council's assessment

The question is whether Total is complicit in the regime's human rights violations exclusively through its presence and generation of tax revenues for the regime. The guidelines require the company's conduct to be assessed in concrete terms. The Council considers that presence cannot in itself provide a basis for exclusion under the four criteria which according to the preparatory work must be met.

An affirmative answer to this question would moreover raise questions about whether the human rights situation of other regimes is sufficiently bad to warrant the same considerations. This entails an assessment of states, which the guidelines do not require the Council to embark on.

The Council accordingly concludes that there is no basis for excluding Total on grounds of the company's presence and generation of tax revenues in Burma.

4.2.3 Complicity through cooperation with MOGE and the Burmese authorities

Myanmar Oil and Gas enterprise (MOGE) is a 100 per cent state-run corporation owned by the Energy Ministry. MOGE is responsible for oil and gas extraction and gas supply, including construction of gas pipelines, and is the regime's tool for control over production of the country's oil and gas resources.

Foreign companies wishing to engage in petroleum extraction in Burma need to establish collaboration on production sharing with MOGE, which is the only state corporation entitled to enter into such contracts in the petroleum sector. Total has signed such a contract with MOGE.

Apart from the official web pages, little information on MOGE is available. It has not been possible to ascertain the degree of the company's influence over the security forces. Interviews conducted by the secretariat on behalf of the Council suggest that any party wishing to influence the security forces has to do so via the Energy Ministry which in turn takes the matter up with the Defence Ministry. Some observers have been uncertain as to what authority the Energy Ministry itself wields in such matters.

MOGE is Total's partner in the Yadana project. According to the NGOs this in fact adds up to a collaboration with the regime since MOGE is a 100 per cent state corporation owned and controlled by the military regime. At the same time this is the only possible avenue for cooperation open to an international oil company wishing to engage in petroleum extraction in Burma.

4.2.4 The Council's assessment

The actual basis for the collaboration between MOGE and Total – the Joint Venture Agreement – is not publicly available, but is known to the Council. The presumption is that most of Total's business in Burma has to be approved by MOGE, and thus indirectly also by the military regime. The question is whether a partner in a Joint Venture is responsible for the other participants' actions. This will depend on what influence, if any, the individual partner exerts on the others. In the present case, in which all companies operating in Burma routinely have to enter into Joint Venture agreements with the regime, it is unlikely that the companies wield any significant influence on the state. Where Total is concerned, investments in the gas field and the pipeline have already been made. Hence it would be economically advantageous for the Burmese state if Total withdrew from Burma, enabling all revenues from the field to accrue to the state.

A further question is whether the collaboration between Total and MOGE might also provide a basis for exclusion under the four criteria listed above under section 3.3.

It is not easy to see any form of direct linkage between the company's operations today and the human rights violations committed by the regime. There is little to suggest that the human rights violations taking place in Burma are perpetrated with a view to securing Total's interests or that they serve to facilitate the company's projects. According to the information underlying the Unocal case, such a linkage may have been present in period of the pipeline's construction. It does not however appear to be the case today. It would probably be more advantageous for Total if the regime did not violate human rights to such an extent.

The degree to which Total is in a position to influence the regime as regards human rights violations taking place in areas outside the pipeline route is disputed. The same goes for the degree to which they make use of any such influence. The Council cannot see that the guidelines' preparatory work require an assessment of a company's possible obligation, to take action in areas beyond their control.⁵⁶

The Council accordingly concludes that Total cannot be excluded because of its collaboration with MOGE.

4.2.5 Complicity through knowledge and passivity

Available information on present conditions in the pipeline corridor suggests that abuses against the civilian population in the areas included in Total's social development programme are insignificant. Some observers have surmised that different rules apply to the area along the pipeline route and outside this area, and that Total's insistence that forced labour and other abuses should not take place in this area appears to have won through.⁵⁷

MOGE have a representative in the area of the pipeline route whose job is to ensure contact between Total and the local authorities, including the military.⁵⁸ Any undesired events are investigated by a team from Total. Where necessary, direct contact is made with the Energy Ministry which in turn contacts the Defence Ministry as the responsible ministry. The Defence Ministry is responsible for taking the matter up with the local commander.⁵⁹

According to interviews conducted by the organisation CDA, the local population assert that the army's behaviour is more disciplined inside the pipeline area than outside it. The CDA assume that this is because Total have made certain that unacceptable behaviour is rectified, and that the local commander has been ordered to see to it that troops conduct themselves in an acceptable manner.⁶⁰

This is not to say that abuses are non-existent. In 2004 Earth Rights International reported cases of abuse in the pipeline area. Inhabitants are said to have been ordered to pay a levy in return for not having to provide services, watch duty and food supplies to the soldiers.⁶¹ The Burma Campaign UK also reports sporadic abuses in the pipeline area.⁶² None the less the main impression appears to be that systematic abuses are not taking place in the pipeline area, and that Total have procedures in place for dealing with such abuses when they arise and have established routines for preventing abuses from taking place.⁶³

Several NGOs, among them The Burma Campaign UK, are concerned that even though abuses against the local population are not taking place within the pipeline area, serious abuses and instances of forced labour are still in evidence outside the pipeline area and elsewhere in the country. This has been documented by the ILO and international and national human rights groups. According to The Burma Campaign UK the same battalions that ensure security within the pipeline area are responsible for abuses perpetrated outside the area (in addition to other battalions).⁶⁴

Total claim that no forms of forced labour are in evidence in the area in which Total operate, and that they regularly raise their concern over the regime's use of forced labour with the authorities.⁶⁵

4.2.6 The Council's assessment

In order for passivity to be censurable there must exist an obligation or encouragement to take positive action. As mentioned earlier, the preparatory work is clear on this point when it comes to companies' operations in states where human rights violations take place: "Complicity on the part of the company can be invoked only if direct action is taken to protect the company's property or investment and if the company has not taken reasonable measures to prevent the abuse."⁶⁶

Hence, in order to ascertain the Fund's complicity there must be a linkage between the company's operations and the human rights violations in Burma. The Council expects the human rights violations in Burma to continue, cf. the UN Commission on Human Rights' resolution from 2005 expressing deep concern over: "the ongoing and systematic violation of human rights, including civil, political, economic, social and cultural rights of the people of Myanmar, in particular discrimination and violations suffered by persons belonging to ethnic minorities, women and children, ... harassment of members of the National League for Democracy ..., forced relocation, ... forced labour, including child labour, ... denial of freedom of assembly, association, expression and movement, ... wide disrespect for the rule of law and lack of independence of the judiciary"⁶⁷

There is no obvious direct linkage between these serious violations of human rights and Total's operations today. There appears to be general agreement, also within NGO circles, that human rights violations are not a significant feature in the pipeline area today. The Council is unable to see any direct linkage between Total's present operations and the human rights violations taking place elsewhere in Burma. Nor is the Council able to see that the human rights violations in Burma, which are largely perpetrated by the military and security forces, are designed to protect the company's interests or to facilitate the company's projects.

It seems obvious that Total must have ample knowledge of the abysmal human rights situation in Burma. Moreover, it is highly likely that the security forces responsible for security in the pipeline area on behalf of the state authorities perpetrate acts which would necessarily be classified as human rights violations in areas outside the pipeline area. It has therefore been asserted that Total should be held responsible for complicity in the security forces' abuses in areas outside the pipeline corridor.

The Unocal ruling was based on the notion that the company's knowledge of the security forces' abuses could entail complicity. However, a crucial difference in relation to Total's possible complicity in abuses taking place today is that Unocal's awareness concerned abuses carried out in direct connection with the construction of the company's pipeline. The ruling states: "*Unocal's weak protestations notwithstanding, there is little doubt that the record contains substantial evidence creating a material question of facts as to whether forced labor was used in connection with the construction of the pipeline.*"⁶⁸ It goes on to state that "*Unocal knew, or should have known, that forced labour was being utilised and that the Joint Venturers benefitted from the practice...*"⁶⁹

Thus it was not merely knowledge of human rights violations in general that led to the presumption that Unocal might be guilty of complicity; it was a knowledge that the abuses were perpetrated in direct connection with the construction of the company's own pipeline, and that the abuses were therefore in the company's own interest. Nor is it possible, based on the Unocal ruling, to institute any obligation for companies to actively prevent violations of human rights in states in which they are operating. Any such

obligation is confined to measures to prevent abuses carried out to protect the company or facilitate its projects. In this respect the complicity assessments underlying the Unocal decision have little value as comparison to Total's situation in Burma today.

The Council accordingly finds that Total cannot be said to be complicit in Burma's human rights abuses outside areas in which they are assumed to wield influence.

5 Conclusion

Having assessed the content of the accusations against Total SA in light of paragraph 4.4 in the ethical guidelines, the Petroleum Fund's Advisory Council on Ethics will not recommend the company's exclusion from the Petroleum Fund on grounds of the company's operations in Burma.

Gro Nystuen Andreas Føllesdal Anne Lill Gade Ola Mestad Bjørn Østbø
(Chair)

Footnotes

- ¹ them Earth Rights International (<http://www.earthrights.org/>), The Burma Campaign UK (www.burmacampaign.org.uk), La Fédération des droits de l'Homme (www.fidh.org), The Norwegian Burma Committee (www.burma.no).
- ² Total's web pages, www.total.com.
- ³ www.total.com.
- ⁴ www.total.com.
- ⁵ Total 2004: Sharing our energies. Corporate Social Responsibility Report, available at www.total.com
- ⁶ www.total.com
- ⁷ Among the many are Human Rights Watch, Amnesty International, Earth Rights International, the Burma Campaign UK.
- ⁸ See for example resolutions from the UN Commission on Human Rights: Situation of human rights in Myanmar. 61st Commission on Human Rights, UN doc.:E/CN.4/RES/2005/10 and E/CN.4/RES/2005/L.29.
- ⁹ See for example International Labour Conference 2005: Provisional Record 22, Ninety-third Session, Geneva, 2005; available at www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/pr-22.pdf.
- ¹⁰ Robertson Jr, Philip S 2003: Sanctions are working in Burma. Article in "The Irrawaddy", available at www.irrawaddy.org/com/2003/com31.html.
- ¹¹ "The State-Owned Economic Enterprise Law" from 1989 secures state control over the following key areas: a) extraction of teak and sale of the same in the country and abroad; b) cultivation and conservation of forest plantation with the exception of village-owned firewood plantations cultivated by the villagers for their personal use; (c) exploration, extraction and sale of petroleum and natural gas and production of products of the same; (d) exploration and extraction of pearls, jade and precious stones and export of the same; (e) breeding and production of fish and prawns in fisheries which have been reserved for research by the Government; (f) Postal and Telecommunications Service; (g) Air Transport Service and Railway Transport Service; (h) Banking Service and Insurance Service; (i) Broadcasting Service and Television Service; (j) exploration and extraction of metals and export of the same; (k) Electricity Generating Services other than those permitted by law to private and co-operative electricity generating services; (l) manufacture of products relating to security and defence which the Government has, from time to time, prescribed by notification. Available at www.mpt.net.mm/mpt_jointinv.html.
- ¹² Economist Intelligence Unit: Burma Country profile 2004.
- ¹³ An overview of EU policy in this area can be found at http://europa.eu.int/comm/external_relations/myanmar/intro/
- ¹⁴ Statement to the Storting on Foreign Policy, 15 February 2005, available at http://odin.dep.no/ud/norsk/aktuelt/taler/minister_a/032171-090340/dok-bn.html.
- ¹⁵ Summary of state secretary Vidar Helgesen's meeting with the Burma organisations on 10 May 2005 (in the secretariat's archive).
- ¹⁶ NOU 2003: 22, page 91.
- ¹⁷ NOU 2003: 22, page 166.
- ¹⁸ NOU 2003: 22, page 34.
- ¹⁹ Human rights are legally binding rules regulating the relationship between the state and the individual and are designed to ensure that everyone within the jurisdiction of a state is guaranteed all political, civil, economic, social and cultural rights by that state. States are the only subjects of legal duties under the international human rights conventions, and are thus, as the general rule, the only parties able to guarantee and hence also violate the human rights of individuals.

- ²⁰ NOU 2003: 22, page 35.
- ²¹ NOU 2003: 22, page 35.
- ²² NOU 2003: 22, page 164-165.
- ²³ See i.a. Andenæs, *Alminnelig strafferett (General Criminal Law)*, 5th edition 2004, Matningsdal and Rieber-Mohn, page 329.
- ²⁴ See i.a. Cassesse, *International Criminal Law*, 2003, page 165 et seq.
- ²⁵ *Doe I vs. Unocal Corp.* (United States Court of Appeals for the Ninth Circuit, Nos.00-56603, 00-57197, D.C. No.CV-96-06959-RSWL). The ruling permitted judicial consideration, under the Alien Tort Claims Act, of UNOCAL's alleged complicity in the Burmese authorities' human rights abuses in connection with the construction of a gas pipeline. However, the facts of the case were not reviewed since a compromise was subsequently reached. Available at [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/.3D534390583B882F88256C380004FE18/\\$file/0056603.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/.3D534390583B882F88256C380004FE18/$file/0056603.pdf?openelement)
- ²⁶ See for example *Doe I vs. Unocal Corp.*, para 14.
- ²⁷ *Doe I v. Unocal Corp.*, D, 14205, states: "The District Court later denied the Doe-plaintiffs' motion for class certification and dismissed their claims against Total for lack of personal jurisdiction.."
- ²⁸ One action brought against Total was recently denied in Belgium on procedural grounds.
- ²⁹ See for example *The Burma Campaign 2005: Total Oil: Fuelling the oppression in Burma*, available at www.burmacampaign.org.uk.
- ³⁰ The organisation Earth Rights International and Southeast Asian Information Network issued a report entitled *Total Denial* in 1996 describing systematic atrocities against inhabitants along the pipeline route, ahead of and during the first phase of construction. The organisations claim to have illegally entered Burma where they carried out hundreds of interviews with people living along the route and the adjacent areas, as well as at refugee camps in Thailand. The same organisations followed this up with a new report in 2000, *Total Denial Continues*. La Fédération des droits de l'Homme (FIDH) from France published a similar report in 1996: *La Birmanie, Total et les droits de l'Homme: dissection d'un chantier (Burma, Total and Human Rights: dissection of a project)*. Together with a number of other French NGOs, they have continued the campaign against Total and published in July 2005 a report entitled *Total pollutes democracy – Stop TOTALitarianism in Burma*. Prior to this *The Burma Campaign UK* had issued a report entitled *TOTALitarian Oil; Total Oil: fuelling the oppression in Burma*. Total has made known its version of the project in *Total in Myanmar – a Sustained Commitment*. In addition they have allowed independent organisations to visit the pipeline route to carry out interviews with the population in the area, after construction was completed. Four such field studies have been carried out by the organisation *The Collaborative for Development Action (CDA)* which has so far reported on four of these visits.
- ³¹ *Earth Rights International 2000: Total Denial Continues*, p. 16-17, available at <http://www.earthrights.org/>.
- ³² *Earth Rights International 2000: Total Denial Continues*, p.39, 43.
- ³³ *Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area between Mynamar Oil and Gas Enterprise and Total Myanmar Exploration and Production (PSC)*, (in the secretariat's archive).
- ³⁴ *DOE I vs Unocal Corp.* states for example: "There is also evidence sufficient to raise a genuine issue of material fact whether the Project hired the Myanmar Military, through Myanmar Oil, to provide these services, and whether Unocal knew about this.", Point B, 14195.
- ³⁵ *Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area between Mynama Oil and Gas Enterprise and Total Myanmar Exploration and Production* § 17.1 (c) Rights and Obligations of Moge and Contractor.
- ³⁶ *Total 2002: Press release dated 8 May 2002*, available at www.total.com/en/finance/f_ press_releases

- ³⁷ Earth Rights International 2000: Total Denial Continues, p. 17.
- ³⁸ Earth Rights International 2000: Total Denial Continues, p. 69.
- ³⁹ The contract was signed in 1992. See also Earth Rights International 1996: Total Denial, Earth Rights International 2000: Total Denial Continues, International Federation of Human Rights Leagues 1996: Burma, Total and Human Rights: Dissection of a project. Situation Report.
- ⁴⁰ La Fédération des droits de l'Homme 1996: Burma, Total and Human Rights: Dissection of a project. Situation Report, p. 23.
- ⁴¹ Total 2003: Total in Myanmar, p. 6, 16.
- ⁴² Earth Rights International 2000: Total Denial Continues, p.84-87, La Fédération des droits de l'Homme 2005: Total Pollutes Democracy, p. 26.
- ⁴³ Doe vs. Unocal Corp., 11, 14221.
- ⁴⁴ Total 2003: Total in Myanmar. A sustained commitment, p. 17.
- ⁴⁵ Total 2003: Total in Myanmar. A sustained commitment, p. 16.
- ⁴⁶ Earth Rights International 2000: Total Denial Continues s.100-121, La Fédération des droits de l'Homme 2005: Total pollutes democracy, p. 28.
- ⁴⁷ International Federation of Human Rights Leagues 1996: Burma, Total and Human Rights: Dissection of a project. Situation Report.1996, p. 26.
- ⁴⁸ See footnote 47.
- ⁴⁹ Total 2003: Total in Myanmar. A sustained commitment, p. 17.
- ⁵⁰ See footnote 49, p. 21-27.
- ⁵¹ Doe I vs. Unocal Corp., para 11 – 15, 14220 – 14228.
- ⁵² La Fédération des droits de l'Homme 2005: Total pollutes democracy, p. 19.
- ⁵³ Production Sharing Contract between MOGE and Total (in the secretariat's archive).
- ⁵⁴ See footnote 52.
- ⁵⁵ Newspaper article in The Nation, 19.10.96, available at <http://www.geocities.com/jdfahn/Yadana--total.html>.
- ⁵⁶ The preliminary works include the following statement: "investments in the company cannot be regarded as complicity in actions which it could not possibly expect or be aware of or circumstances over which neither the company nor an investor has significant control.", NOU 2003: 22, page 164-165.
- ⁵⁷ CDA 2003: Corporate Engagement Project, Field Visit Report. Second Visit. Yadana - Gas Transportation Project, p.4, available at www.cdianc.org. Interviews conducted by the secretariat.
- ⁵⁸ CDA 2002: Field visit: October 18-30, 2002. Yadana – Gas Transportation Project p. 5, available at www.cdianc.org
- ⁵⁹ Interviews conducted by the secretariat.
- ⁶⁰ See footnote 57.
- ⁶¹ Available at <http://earthrights.org/burma/fltrends.shtml>
- ⁶² Interviews conducted by the secretariat.
- ⁶³ CDA 2003: Corporate Engagement Project, Field Visit Report. Second visit. Yadana – Gas Transportation Project, p. 15, Interviews conducted by the secretariat.
- ⁶⁴ Interviews conducted by the secretariat.
- ⁶⁵ Total's response to the Burma Campaign, available at http://burma.total.com/en/news/p_5_1.htm
- ⁶⁶ NOU 2003: 22, page 36.
- ⁶⁷ Situation of human rights in Myanmar, UN Doc.E/CN.4/2005-10, 11 April 2005.
- ⁶⁸ Doe I vs. Unocal Corp., 14220, para 10.
- ⁶⁹ Doe I vs. Unocal Corp., 14220, para 13.



Ethical Guidelines for the Government Pension Fund – Global

Ethical Guidelines

Government Pension Fund – Global

Issued 22 December 2005 pursuant to regulation on the Management of the Government Pension Fund – Global, former regulation on the Management of the Government Petroleum Fund issued 19 November 2004.

1 Basis

The ethical guidelines for the Government Pension Fund – Global are based on two premises:

- The Government Pension Fund – Global is an instrument for ensuring that a reasonable portion of the country's petroleum wealth benefits future generations. The financial wealth must be managed so as to generate a sound return in the long term, which is contingent on sustainable development in the economic, environmental and social sense. The financial interests of the Fund shall be strengthened by using the Fund's ownership interests to promote such sustainable development.
- The Government Pension Fund – Global should not make investments which constitute an unacceptable risk that the Fund may contribute to unethical acts or omissions, such as violations of fundamental humanitarian principles, serious violations of human rights, gross corruption or severe environmental damages.

2 Mechanisms

The ethical basis for the Government Pension Fund – Global shall be promoted through the following three measures:

- Exercise of ownership rights in order to promote long-term financial returns based on the UN Global Compact and the OECD Guidelines for Corporate Governance and for Multinational Enterprises.
- Negative screening of companies from the investment universe that either themselves, or through entities they control, produce weapons that through normal use may violate fundamental humanitarian principles.
 - Exclusion of companies from the investment universe where there is considered to be an unacceptable risk of contributing to:
 - 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
 - Serious violations of individual rights in situations of war or conflict
 - Severe environmental damages
 - Gross corruption
 - Other particularly serious violations of fundamental ethical norms.

3 The exercise of ownership rights

3.1 The overall objective of Norges Bank's exercise of ownership rights for the Government Pension Fund – Global is to safeguard the Fund's financial interests. The exercise of ownership rights shall be based on a long-term horizon for the Fund's investments and broad investment diversification in the markets that are included in the investment universe. The exercise of ownership rights shall mainly be based on the UN's Global Compact and the OECD Guidelines for Corporate Governance and for Multinational Enterprises. Norges Bank's internal guidelines for the exercise of ownership rights shall stipulate how these principles are integrated in the ownership strategy.

3.2 Norges Bank shall report on its exercise of ownership rights in connection with its ordinary annual reporting. An account shall be provided of how the Bank has acted as owner representative – including a description of the work to promote special interests relating to the long-term horizon and diversification of investments in accordance with Section 3.1.

3.3 Norges Bank may delegate the exercise of ownership rights pursuant to these guidelines to external managers.

4 Negative screening and exclusion

4.1 The Ministry of Finance shall, based on recommendations of the Council on Ethics for the Government Pension Fund – Global, make decisions on negative screening and exclusion of companies from the investment universe.

The recommendations and decisions shall be made public. The Ministry may, in certain cases, postpone the time of public disclosure if this is deemed necessary in order to ensure a financially sound implementation of the exclusion of the company concerned.

4.2 The Council on Ethics for the Government Pension Fund – Global shall consist of five members. The Council shall have its own secretariat. The Council shall submit an annual report on its activities to the Ministry of Finance.

4.3 Upon request of the Ministry of Finance, the Council issues recommendations on whether an investment may constitute a violation of Norway's obligations under international law.

4.4 The Council shall issue recommendations on negative screening of one or several companies on the basis of production of weapons that through their normal use may violate fundamental humanitarian principles. The Council shall issue recommendations on the exclusion of one or several companies from the investment universe because of acts or omissions that constitute an unacceptable risk of the Fund contributing to:

- Serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other forms of child exploitation
- Serious violations of individual rights in situations of war or conflict
- Severe environmental damages
- Gross corruption
- Other particularly serious violations of fundamental ethical norms

The Council shall raise issues under this provision on its own initiative or at the request of the Ministry of Finance.

4.5 The Council shall gather all necessary information at its own discretion and shall ensure that the matter is documented as fully as possible before making a recommendation regarding negative screening or exclusion from the investment universe. The Council may request Norges Bank to provide information as to how specific companies are dealt with in the exercise of ownership rights. Enquiries to such companies shall be channelled through Norges Bank. If the Council is considering recommending exclusion of a company, the company in question shall receive the draft recommendation and the reasons for it, for comment.

- 4.6** The Council shall review on a regular basis whether the reasons for exclusion still apply and may against the background of new information recommend that the Ministry of Finance revoke a decision to exclude a company.
- 4.7** Norges Bank shall receive immediate notification of the decisions made by the Ministry of Finance in connection with the Council's recommendations. The Ministry of Finance may request that Norges Bank inform the companies concerned of the decisions taken by the Ministry and the reasons for the decision.