



Annual report 2014

Council on Ethics for the Government Pension Fund Global



Annual report 2014 | Council on Ethics
for the Government Pension Fund Global
(Unofficial english translation)

This report was issued by the Council on Ethics which completed its term of office on 31 December 2014.

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Introduction

The work of the Council on Ethics

1 Introduction

The Council on Ethics for the Government Pension Fund Global (GPFG) is an independent council appointed by the Norwegian Ministry of Finance and makes recommendations to exclude companies from the fund or put companies under observation. The Council makes its recommendation following a specific assessment of a company's operations based on the guidelines determined by the Ministry of Finance. The Council has five members and a secretariat with a staff of eight.

2 New Council, new organisation and revised guidelines

At the beginning of 2015, the Ministry of Finance issued revised guidelines for observation and exclusion from the fund and five new members were appointed to the Council on Ethics. This annual report has been prepared by the outgoing Council.

The criteria for observation and exclusion from the fund remain the same. The Council on Ethics previously advised the Ministry of Finance. Under the revised guidelines the Council will advise Norway's central bank, Norges Bank, which will decide whether or not to exclude companies or place them under formal observation¹. One of the objectives of changing the guidelines is to achieve better coordination of the work on exclusions and active ownership.

In December 2014, an expert group appointed by the Ministry of Finance published a report on the fund's investments in fossil energy. The Group's mandate was to consider whether *"the exclusion of coal and petroleum companies is a more effective strategy for addressing climate change than the exercise of ownership and exertion of influence."*² The expert group proposed, among other things, that corporate activity which is harmful to the climate should be explicitly included in the guidelines for observation and exclusion.³ The Ministry of Finance will deal with the expert group's proposal in the annual report to the Norwegian parliament on the management of the fund that is presented in the spring of 2015. The Council on Ethics is invited to comment on consultation documents. Once parliament has considered the issue and the Ministry of Finance has determined any new guidelines, conduct relating to climate change may be included as a new criterion for observations and exclusions.

In its comments on the Strategy Council's report last year, the Council on Ethics recommended that the Ministry of Finance should determine a goal and strategy for how the fund is to take climate changes into account. According to current guidelines, climate effects are not an independent ground for exclusion but have nonetheless been given some weight in the Council's overall assessments, for example if a company's practice conflicts with regulations or measures aimed at preventing climate change. These may be emissions that exceed permits or deforestation as a result of practices that are not in accordance with agreements or licence conditions. If the guidelines are amended in

accordance with the expert group's proposal, it may be possible for the Council to assess companies based solely on their contribution to climate change.

3 Overview of activities in 2014

The Council on Ethics' task is to find companies that should be excluded from the fund or put under observation, irrespective of the company's size, the fund's ownership stake or the country where the company is registered. Companies are identified through systematic reviews of problem areas, reports received from special-interest groups and news monitoring. The Council uses an external firm of consultants that carries out daily online searches in several languages to find news items about companies in the portfolio. The Council also uses an external firm of consultants to monitor companies whose activities may contravene the weapons and tobacco criteria.

The Council on Ethics obtains information from research environments, international, regional and national organisations and several other environments, and often uses consultants to assess concrete suspicions of breaches of the guidelines. The companies in the portfolio are also themselves important sources of information. As a minimum, a company is allowed to state its views on a draft recommendation before it is made and there is often a more in-depth dialogue – verbal and written – with the companies during the actual analysis process, particularly with companies where the conclusion is not that the company should be excluded but that the case should be dismissed.

Table 1 below summarises the Council on Ethics' assessments of companies in 2014 compared with the figures for 2012 and 2013.

Table 1. Overview of the Council on Ethics' activities

Year	2012	2013	2014
Limited companies in the GPFG at year-end (approximately)	7,500	8,500	9,000
Total number of excluded companies at year-end	56	60	60
The companies on the official observation list at year-end	2	1 ^a	1
Number of recommendations issued	11	11	12
Companies excluded during the year	1	9	3 ^b
Companies included again during the year	0	5	3 ^b
Companies contacted by the Council	64	43	39
Companies with which the Council has had meetings	9	18	18
New cases considered by the Council (approximately)	60	30	30
Total number of companies examined during the year (approximately)	230	180	150
Total number of company studies concluded during the year (approximately)	110	70	85
Council meetings	10	9	9
Secretariat members	8	9	8
Budget (NOK million)	12	12.5	13.5

a) In addition, the Ministry of Finance has decided that the Council is to provide a new recommendation on Anglo Gold Ashanti in 2018 after Norges Bank has had a dialogue with the company for five years.

b) The exclusion of one company from the fund in 2014 and re-inclusion of two companies are due to the restructuring of the Vedanta Group in which two previously excluded companies were incorporated into a third company that was therefore excluded. The other two companies that were excluded (Africa Israel and Danya Cebus) are referred to in last year's annual report.

The Council on Ethics made 12 recommendations in 2014. Of these, eight related to exclusions, one related to the revocation of an exclusion, one related to the termination of a non-public observation and two related to the reversal of recommendations on which the Ministry of Finance had not yet made a decision. A long time has sometimes elapsed between a recommendation being made and the Ministry of Finance's decision. During the intervening period, the circumstances on which the recommendation to exclude the company is based may change. This was the reason for the Council reversing in 2014 two recommendations made in 2010 and 2012.

In 2014, the Council on Ethics contacted 39 companies and held meetings with 18 of these. The Council contacts companies that, following initial assessments, it wishes to study in greater detail. The Council starts off by writing a letter to the company asking specific questions and often requesting documentation that can provide a basis for assessing the company's activities, such as a project's environmental impact assessment, a factory's emission data or reports on inspections of subcontractors. Many companies send such documentation and show how they are trying to prevent environmental damage or human rights violations in their operations. When a company does not share information, this comprises a risk factor.

Most meetings with companies take place after the Council on Ethics has sent a draft of its recommendation to the company and asked for the company's comments. Recently, some companies have also requested meetings with the Council because they have operations that they know, based on the Council's previous practice, that the Council will assess. In some cases, such a dialogue can lead to the companies implementing measures to limit the negative consequences of their operations.

The table shows that the Council on Ethics considered slightly fewer cases in 2014 than in the year before. This is because the Council has terminated its previous years' work on sector studies while new projects have not included quite so many companies. The Council's goal is not to examine as many companies as possible, it is to find companies that should be excluded from the fund. In some cases, it is best to examine many companies in the portfolio that have similar operations, while in other cases it may be better to work on individual cases that are discovered through news monitoring.

Since 2010, the Council on Ethics has reviewed the GPF's investments in companies that are involved in several types of operations which may cause serious environmental problems. The work on these sector studies is described on page 31 of this annual report. The Council's review of companies that are involved in particularly environmentally harmful fishing is described separately on page 33.

During the past few years, the Council on Ethics' goal has been to follow up industries where the risk of labour rights violations is reported to be particularly high. This work is referred to in greater detail on page 29.

The Council on Ethics' work on corruption cases is based on an approach to risk in which the Council reviews countries and sectors that international rankings show are particularly vulnerable to corruption. So far, the Council has concentrated on the building and construction industry, the oil and gas sector and the defence industry in selected countries. This work is described on page 37.

4 Published recommendations

Since the last annual report, 13 recommendations have been published, dealing with a total of 11 companies, cf table 2.

Table 2. Overview of the recommendations published since the last annual report

Company	Recommendation issued	Recommendation published	Ministry of Finance's decision	Criterion
Repsol S.A./Reliance Industries	1 Dec 2010 3 April 2014	17 Sept 2014	Noted	Human rights
Randgold Resources	24 June 2011 13 Jan 2014	10 Dec 2014	Observation terminated	War and conflict
SOCO International	17 Oct 2012 11 Sept. 2014	28 Oct 2014	Noted	Environmental damage
Noble Group	26 June 2013	26 Jan 2015	No decision	Environmental damage
China Ocean Resources	8 Nov 2013	26 Jan 2015	No decision	Environmental damage
Dongfeng Motorgroup	31 Jan 2014	10 Dec 2014	Exclusion revoked	Military material for Myanmar
Tahoe Resources	8 April 2014	26 Jan 2015	No decision	Human rights
Innophos	26 Sept 2014	26 Jan 2015	No decision	Other ethical norms
China Railway Group	10 Oct 2014	26 Jan 2015	No decision	Corruption
NTPC	03 Dec 2014	26 Jan 2015	No decision	Environmental damage

Two of these recommendations reversed previous recommendations before the Ministry of Finance had made a decision. The first concerned the companies Repsol S.A. and Reliance Industries Ltd., which were partners in a joint venture exploring for oil in the Peruvian part of the Amazon, in an area that is alleged to overlap a region inhabited by Amazonian Indians living in voluntary isolation. In its recommendation dated December 2010, the Council on Ethics stated that the exploration activity would increase the risk of these isolated Indians coming into contact with third parties, with potentially very serious consequences for the lives, health and way of life of these Indians. In February 2014, Repsol informed the Council that it had agreed to sell its share of the joint venture and at the same time confirmed that all field operations in the block had been terminated. The Council therefore reversed its recommendation to exclude the companies.

The second case concerned SOCO International Plc., which was exploring for petroleum in Virunga National Park and World Heritage Site in the Democratic Republic of the Congo (DRC). The Council on Ethics recommended excluding the company in October 2012. In 2014, the company undertook not to carry out petroleum activities in World Heritage Sites in the future. The Council therefore reversed its recommendation to exclude the company.

Six recommendations concerned companies that Norges Bank sold its stake in after the Council on Ethics made its recommendation but without the Ministry of Finance making a decision to exclude the companies. According to the guidelines that applied until 31 December, an exclusion recommendation could be made as long as the company was in the investment universe, i.e. as long as there was an *opportunity to* invest in the company.

The change in the guidelines at the year-end means that an exclusion recommendation may only be made if a company is in the portfolio at the time in question, i.e. is a company in which the fund actually owns shares or bonds. As long as a company is not in the portfolio, a recommendation to exclude the company will not be issued. For this reason, these recommendations are published without any decision having been made to exclude the companies. This is in accordance with the transitional provision (section 12) of the new guidelines for observation and exclusion from the Government Pension Fund Global.

The first of these cases concerned Noble Group Ltd., which the Council on Ethics recommended excluding in 2013 due to the risk of serious environmental damage caused by the establishment of palm oil plantations in Indonesia. The second concerned China Ocean Resources, which the Council recommended excluding in 2013 due to the risk of the company taking part in illegal, unreported and unregulated fishing and the hunting of threatened species. The third concerned Tahoe Resources Inc., which the Council recommended excluding in 2014 due to the unacceptable risk of contribution to human rights violations. The company's opening of a goldmine in Guatemala triggered a number of acts of violence. The recommendation deals with both the consultation process in the areas around the mine and the company's responsibility for the acts of violence. The fourth case concerned Innophos Holdings Inc., which buys phosphate extracted in the Western Sahara from OCP, a Moroccan state-owned company. The fifth case concerned China Railway Group Ltd., which the Council recommended excluding based on the corruption criterion. The last case concerned NTPC Ltd., which is in the process of establishing a coal-fired power station in Bangladesh near to a World Heritage Site.

The Ministry of Finance changed the guidelines in January 2014 so that companies which sell military materials to Myanmar are no longer to be excluded from the fund. The Council on Ethics then recommended revoking the exclusion of Dongfeng Motor Group Co. Ltd., which had been excluded since 2008, and the Ministry decided to follow this recommendation.

The annual report also contains a recommendation to put Randgold Resources under observation. In 2009, Randgold bought a share in a licence to develop a new goldmine in the Orientale province in the north-east corner of the DRC and 15,000 people had to be relocated as a result of the mining operations. The Council on Ethics recommended placing the company under observation in 2011 in light of the volatile situation in north-east Congo. In the Council's other recommendations based on the war and conflict criterion, the companies' contribution to breaches of international law has formed the basis for recommending exclusion, such as the companies that are excluded due to construction activity in the West Bank. However, the recommendation regarding Randgold pointed out that the guidelines' wording and preparatory work allows the basis of the assessment to be wider than breaches of international law. In this recommendation, emphasis was placed on whether the company would act "in a way that may comprise serious infringements of individuals' rights", irrespective of whether there had been any breach of international law.

In 2012, the Ministry of Finance decided to comply with the recommendation but without publishing its decision, as it was entitled to do pursuant to section 3 subsection 2 of the guidelines. The Council on Ethics monitored the company closely for two years and concluded that there was no reason to continue the observation. The Council's view was that

the company had carried out the relocation in accordance with internationally recognised principles and that complaints about the mining operations had been handled satisfactorily.

The annual report also contains a letter from the Council on Ethics to the Ministry of Finance about the company Alstom SA, which the Ministry put on the observation list for up to four years in 2011. In 2010, the Council recommended excluding the company due to the future risk of gross corruption, but the Ministry of Finance decided that the company was to be put under observation. The Council must report annually on the company's developments as long as the company is on the list. The Council's observation in 2014 showed that the company is continuing to make efforts to improve its compliance system but that it is also still being investigated for corruption in several countries and that parts of the company remain excluded from taking part in projects financed by the World Bank.

5 Experience gained from the Council's 10 years in operation

In a separate article on page 21 of this annual report, the Council on Ethics summarises its experiences after 10 years in operation.

The exclusion of companies from the fund has reduced the risk of the fund being invested in companies whose operations contribute to serious norm violations, which is the scheme's purpose. The Council on Ethics believes that the recommendations have also contributed to the development of international norms. An important prerequisite for this has been that the recommendations are based on facts, are well reasoned and are made public. The Council also believes that some companies have changed their behaviour in order to avoid being excluded from the fund. Before a recommendation is made, the Council has quite extensive contact with the company being assessed. During this process, many companies provide information on measures they are going to implement which may mean there are no longer any grounds for exclusion.

However, the fact that 60 companies have nonetheless been excluded from the fund indicates that exclusion is a necessary tool. To prevent the fund from being linked to companies with operations characterised by some very serious norm violations, the only solution may be to sever the connection with the company.

Ola Mestad
Chair
(Signature)

Dag Olav Hessen
(Signature)

Ylva Lindberg
(Signature)

Marianne Olsson
(Signature)

Bente Rathe
(Signature)

Notes

- 1 <http://etikkradet.no/en/guidelines>
- 2 Mandate: <https://www.regjeringen.no/en/whatsnew/Ministries/fin/press-releases/2014/Expert-group-on-investments-in-coal-and-petroleum-companies/Mandate-for-the-Expert-Group-on-investments-in-coal-and-petroleum-companies-and-climate-gas-emissions/id754225/>
- 3 http://www.regjeringen.no/pages/116606488/expertgroup_report.pdf.

Members of the Council and of the Secretariat

The Council on Ethics



Ola Mestad (Chair), Dr. juris and Professor at the Centre for European Law, University of Oslo

Ylva Lindberg, BA, Managing director of SIGLA.

Dag Olav Hessen, Dr. philos, Professor at the Institute of Biology, University of Oslo.

Bente Rathe, Master in Business Administration.

Marianne Olsson, Attorney and partner at the lawfirm Mageli ANS.

The Secretariat

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

The Secretariat has the following employees:

Eli Lund, Executive Head of Secretariat, (Economist)

Magnus Bain (Cand. jur)

Erik Forberg (Cand.scient)

Pia Rudolfsson Goyer (Cand. jur)

Hilde Jervan (Cand. agric.)

Irmela van der Bijl Mysen (Cand. jur)

Aslak Skancke (Graduate Engineer)

Lone Fedders Dybdal (Secretary)

Recommendations and letters in this annual report

1.12.2010, Repsol S.A. and Reliance Industries

25.5.2012 and The Council on Ethics recommended the exclusion of the companies Repsol YPF (now Repsol S.A.) and Reliance due to an unacceptable risk of the

3.4.2014 companies contributing to serious or systematic human rights violations. The companies were partners in a joint venture which was conducting oil exploration activities in Block 39 in the Peruvian Amazon. Repsol was the operator of the joint venture. Block 39 is located in an area which is thought to overlap the territories of indigenous peoples living in voluntary isolation. In the Council's view, the exploration activity undertaken by Repsol and Reliance Industries would increase the risk that any indigenous peoples living in voluntary isolation within the block would come into contact with outsiders, resulting in potentially serious consequences for these peoples' life, health and way of living.

At the request of the Ministry of Finance, the Council on Ethics updated its recommendation two and a half years later, and again recommended exclusion.

At the beginning of 2014, Repsol informed the Council on Ethics that it had entered into an agreement to sell its share in the joint venture, and confirmed that all field operations in the block had ceased. The Council concluded that the basis for the exclusion recommendation had lapsed, and revoked the recommendation.

The Council's recommendation no longer to exclude the companies was submitted to the Ministry of Finance before the Ministry had made a decision in the case. The Ministry has noted the Council's most recent recommendation.
(Published 17 September 2014)

24.6.2011, Randgold Resources Ltd.

4.03.2013 The Council on Ethics recommended the observation of Randgold Resources
and Ltd. based on the company's gold mining project in the Democratic Republic
13.1.2014 of the Congo (DRC).

Randgold was in the process of establishing a gold mine in a part of DRC marked by conflict. The project required the relocation of around 15,000 persons out of the project area. In its assessment, the Council on Ethics emphasised the risk that the project might generate further conflict and the risk of a considerable deterioration in the living conditions of the affected local population as a result of the company's activities. Particular weight was given to the company's ability to ensure the safety of the population both during and after relocation

This annual report contains several documents relating to this case: the recommendation to place the company under observation, the report on the first observation period and the recommendation to end observation.

(Published 10 December 2014)

17.10.2012 SOCO International plc.

and The exclusion of SOCO International plc. was recommended in 2012 due to
11.09.2014 an unacceptable risk of the company, through its petroleum activities, being responsible for severe environmental damage in Virunga national park, which among other things is a UN (UNESCO) world natural heritage site.

In June 2014, SOCO concluded an agreement with WWF on the suspension of further petroleum activity in Virunga for as long as the national park has world heritage status. In a letter to the Council on Ethics dated July 2014, the company confirmed that its activities in Virunga had stopped. Accordingly, in September 2014, the Council recommended that SOCO should not be excluded.

The Council's recommendation not to exclude the company was submitted to the Ministry of Finance before the Ministry had made a decision in the case. The Ministry has noted the Council's most recent recommendation.

(Published 28 October 2014)

26.06.2013 Noble Group Ltd.

The exclusion of Noble Group Ltd. (Noble) was recommended due to an unacceptable risk of the company being responsible for severe environmental damage through the conversion of tropical rainforest into oil-palm plantations. The Council on Ethics assessed the environmental impact associated with Noble's two licence areas totalling almost 700 km² in the provinces of Papua and West Papua on New Guinea, Indonesia. The decisive factors in the Council's assessment were the lack of data on the biological values likely to be lost as a result of conversion, the fact that the licence areas overlap with areas of unusually rich, unique biodiversity and the fact that the company's measures were unlikely to be sufficient to reduce severe environmental damage.

The Ministry of Finance has not made a decision in the case. Since the company is no longer included in the GPFG's portfolio, the recommendation has been published.

(Published 26 January 2015)

8.11.2013 China Ocean Resources

The exclusion of the fisheries company China Ocean Resources was recommended in 2013 due to an unacceptable risk of the company contributing to severe environmental damage. The recommendation was based on the company's apparent systematic participation in illegal fishing and its targeted catching of endangered species.

This is the Council on Ethics' first recommendation concerning fisheries activities it has deemed severely harmful to the environment, including participation in illegal, unregulated and unreported fishing and catching of globally endangered species in international waters.

The Ministry of Finance has not made a decision in the case. Since the company is no longer included in the GPFG's portfolio, the recommendation has been published.

(Published 26 January 2015)

31.01.2014 Recommendation to revoke the exclusion of Dongfeng Motor Group Co. Ltd.

The Company Dongfeng Motor Group Co. Ltd. was excluded from the GPFG in 2009 because it was supplying military materiel to the authorities in Myanmar. In January 2014, the Ministry of Finance decided that such activities should no longer constitute grounds for exclusion from the GPFG. The Council on Ethics recommended that the exclusion of the company therefore be revoked.

(Published 10 December 2014)

8.04.2014 Tahoe Resources Inc.

The Council on Ethics recommended the exclusion of the company Tahoe Resources Inc. due to an unacceptable risk of the company contributing to serious human rights violations through its mining activities in Guatemala.

The company's establishment of a gold mine in Guatemala triggered various acts of violence. The recommendation considered both the consultation process in areas surrounding the mine and the company's responsibility for the violence. In view of the UN High Commissioner's reports on the serious situation and the company's replies to the Council, it was difficult for the Council to conclude that the company's systems and strategies were suited to uncovering, preventing and compensating for human rights violations in connection with the operation.

The Ministry of Finance has not made a decision in the case. Since the company is no longer included in the GPFG's portfolio, the recommendation has been published.

(Published 26 January 2015)

26.09.2014 Innophos Holdings Inc.

The Council on Ethics recommended the exclusion of the company Innophos Holdings Inc. due to an unacceptable risk of the company contributing to particularly serious violations of fundamental ethical norms through the purchase of phosphate from Western Sahara.

The state-owned Moroccan company OCP extracts phosphate minerals from Western Sahara and sells it to companies such as Innophos. Morocco controls most of the territory of Western Sahara, but does not have legal sovereign right over the area's natural resources. The Council assumes that Moroccan mineral extraction in the area may be acceptable if it is conducted in accordance with the wishes and interests of the local population, but this requirement cannot be said to be fulfilled here, and, further, that the activity contributes to maintaining a situation of unresolved international legal status of the area. Within this context, the Council has considered it grossly unethical by the company to purchase on long-term contract phosphate minerals which OCP has extracted in Western Sahara.

The Ministry of Finance has not made a decision in the case. Since the company is no longer included in the GPFG's portfolio, the recommendation has been published.

(Published 26 January 2015)

14.10.2014 China Railway Group Ltd.

The Council on Ethics recommended the exclusion of China Railway Group Ltd. due to an unacceptable risk that the company has been involved in gross corruption. According to information obtained by the Council there is a high degree of probability that CRG and a subsidiary paid bribes to government officials for contracts regarding construction of railways and housing projects. In its assessment, the Council assumes that the recent and comprehensive governmental anti-corruption efforts in China could play an important role in the prevention of corruption in Chinese companies. However, it was decisive that CRG neither responded to the corruption allegations uncovered in the company nor did it seem to have implemented adequate measures internally to prevent corruption in the future.

(Published 26 January 2015)

03.12.2014 National Thermal Power Company Ltd.

The Council on Ethics recommended the exclusion of National Thermal Power Company, India (NTPC) due to an unacceptable risk that the construction and planned management of a 1320 MW coal fuelled power plant in Bangladesh will severely damage the environment. The power plant is situated close to the protected area Sundarbans, the world's largest mangrove forest, which is also the area with the world's highest abundance of Bengal tiger and which has unique conservation values. All transport to and from the power plant is planned to take place on vessels going through the protected area which is also a Ramsar area, and very close to the World Heritage site of Sundarbans.

The Council on Ethics cannot see that it is possible to construct and run the projected power plant at this location without constituting a high risk of inflicting severe environmental damage, even if comprehensive actions are taken to reduce this risk. According to our information, the company has not done a sufficient analysis and evaluation of the risks and the related actions needed to protect the environment. In total, there is a significantly elevated risk for unwanted and highly damaging incidents in a unique and extremely vulnerable environment. UNESCO has criticized the project heavily, and is concerned about the possible negative impacts on the world heritage site. This has been an important input to the Council's considerations.

(Published 26 January 2015)

Companies the Ministry of Finance has excluded from the Government Pension Fund Global at year-end 2014

Cluster Weapons

- General Dynamics Corp.
- Hanwha Corp.
- Poongsan Corp.
- Raytheon Co.
- Textron Inc.

Nuclear Weapons

- Airbus Group Finance B.V. (earlier EADS Finance B.V.)
- Airbus Group N.V. (earlier EADS Co.)
- Alliant Techsystems Inc.
- Babcock & Wilcox Co.
- Boeing Co.
- GenCorp Inc.
- Honeywell International Corp.
- Jacobs Engineering Group Inc.
- Lockheed Martin Corp.
- Northrop Grumman Corp.
- Safran SA
- Serco Group Plc.

Anti -Personnel Landmines

- Singapore Technologies Engineering Ltd.

Tobacco

- Alliance One International Inc.
- Altria Group Inc.
- British American Tobacco Bhd.
- British American Tobacco Plc.
- Grupo Carso SAB de CV
- Gudang Garam Tbk. pt.
- Huabao International Holdings Ltd.
- Imperial Tobacco Group Plc.
- ITC Ltd.
- Japan Tobacco Inc.
- KT&G Corp.

- Lorillard Inc.
- Philip Morris Int. Inc.
- Philip Morris Cr. AS
- Reynolds American Inc.
- Schwitzer-Mauduit International Inc.
- Souza Cruz SA
- Swedish Match AB
- Universal Corp. VA
- Vector Group Ltd.
- Shanghai Industrial Holdings Ltd.

Human Rights

- Wal-Mart Stores Inc.
- Wal-Mart de Mexico SA de CV
- Zuari Agro Chemicals Ltd.

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

- Africa Israel Investments Ltd.
- Danya Cebus Ltd.
- Shinkun & Binui Ltd.

Environmental Damage

- Barrick Gold Corp.
- Freeport McMoRan Copper & Gold Inc.
- Vedanta Resources Plc.
- Sesa Sterlite
- Rio Tinto Plc. and
- Rio Tinto Ltd.
- MMC Norilsk Nickel
- Samling Global Ltd.
- Lingui Development Ltd.
- Ta Ann Holdings Bhd.
- Volcan Compañia Minera SAA
- WTK Holdings Bhd.
- Zijin Mining Group Co. Ltd.

Other particularly serious violations of fundamental ethical norms

- Elbit Systems Ltd.
- Potash Corp. of Saskatchewan

Companies under official observation at year-end 2014

Gross corruption

- Alstom SA

The Council on Ethics' work during the past 10 years

1 Introduction

The Council on Ethics was established by Royal decree on 19 November 2004. With effect from 1 January 2015, the Ministry of Finance has changed the rules governing appointments to the Council and the processing of recommendations regarding observation and exclusion from the fund. In addition, all the Council members have now been replaced at the same time, so it is a suitable time to look back on some of the experience gained, and trends during, the past 10 years.

A more detailed overview of the Council on Ethics' activities is provided in the individual annual reports, which also contain all the published recommendations as well as some documents and articles on certain topics. In addition, the book entitled *Human Rights, Corporate Complicity and Disinvestment*, edited by Gro Nystuen, Andreas Føllesdal and Ola Mestad and published by Cambridge University Press in 2011, contains more extensive analyses of various issues relating to the Council's work and practice.

The Council on Ethics' main task is, and always has been, to recommend the observation or exclusion from the fund of companies that, through their operations, contravene the ethical guidelines stipulated for the fund. During the 10 year-period between the creation of the guidelines and the year-end, the Ministry of Finance has made the final decision on exclusion's. As from 1 January 2015, it will be Norges Bank that decides on the exclusion of companies.

2 The normative framework

The ethical guidelines established in 2004 were relatively innovative and unusual for a state investment fund – i.e. a sovereign wealth fund, which is the economic term for what is now called the Government Pension Fund Global and was then called the Government Petroleum Fund. Now, such guidelines have become a matter of course for many pension funds, although still not for very many sovereign wealth funds.

During the past 10 years, considerable international developments have taken place in the work on ethical guidelines for investments. These developments must be seen in connection with the more general changes in the way of thinking about companies' social responsibilities.

One area in which the fund was one of the first movers was the exclusion of companies that produce cluster munitions several years before an international agreement prohibiting Norway from having such weapons came into existence. Other funds rapidly followed.

In 2006, the UN established an interest group for investors that works to implement six principles for responsible investments in management and investment operations (UN-PRI). These principles are based on the assumption that factors linked to corporate

governance, the environment and social conditions can affect the financial return, so that investors should take such factors into account. According to PRI, its members together manage considerable amounts¹.

During the past year, it has also been discussed whether the UN guiding principles on business and human rights (the Ruggie Principles), which were adopted in 2011, provide instructions not only on how companies are to act in order to avoid contributing to human rights violations but also on how investors should act.

The integration of environmental and social considerations into investment operations has changed from being an investment choice for a small group of investors into a more integral part of asset management. However, it is striking that although many investors state that they take ethical or environmental or social considerations into account, it is difficult to ascertain how this takes place and the effects that this has. Few investors seem to exclude companies from their portfolio due to such considerations. And even fewer provide detailed reasons for doing so.

3 Exclusions during the past 10 years

When the Council on Ethics started its work in 2004, the fund owned shares in around 3,000 companies. In 2014, this number had increased to more than 9,000. At the year-end, 60 companies had been excluded from the fund. The ethical guidelines stipulate that only serious norm violations provide grounds for exclusion. There must be a clear connection between the norm violations and the company in the fund, and there must be an unacceptable risk of the norm violations continuing. In light of this, only a few listed companies should be expected to meet the criteria for being excluded from the fund.

Companies may be excluded from the fund based on two main groups of criteria: either what the companies produce (product criteria) or the companies' conduct (conduct criteria). Initially, the product criteria only covered the production of weapons that, through normal use, contravene fundamental humanitarian principles, while the production of tobacco and sale of weapons to some states were added later on based on parliamentary discussions on the guidelines.

The conduct criteria mean that a company can be excluded on five different grounds: if there is an unacceptable risk that the company is contributing to, or is responsible for, serious or systematic human rights violations, serious violations of the rights of individuals in war or conflict situations, severe environmental damage, gross corruption or other particularly serious violations of fundamental ethical norms.

These exclusion criteria have remained the same throughout the period, but several adjustments have been made to the guidelines along the way and have improved the Council on Ethics' work methods and decision-making basis. The most important of these was that the Council was in 2009 allowed to contact companies directly instead of having to correspond with them through Norway's central bank, Norges Bank. This has both improved the decision-making basis and paved the way for dialogue between the Council and companies. In addition, the Council was in 2010 given a mandate to recommend putting companies under formal

observation if there is doubt about whether the conditions for exclusion have been met or about future developments. This allowed a more dynamic approach to the companies in which the opportunity to change the company's conduct was assigned greater weight.

At first, the Council on Ethics tried to find companies that should be excluded according to all the different criteria in the guidelines. The first recommendations made by the Council concerned weapons, both because these cases appeared to be relatively clear and because the guidelines stipulate an absolute order to avoid such investments.

It soon became clear that the situation was very different with regard to the various criteria. This is the topic of the next section.

The Council on Ethics also fulfilled a need to assess individual companies that there was considerable pressure from civil society to exclude. The Council's 2005 assessment of the Total oil company, which had built a pipeline through Burma, was in response to a direct question from the Ministry of Finance. The Council recommended not excluding the company for two reasons: the pipeline had already been built, so the risk of the company contributing to future norm violations had been reduced, and the company had improved its procedures for preventing human rights violations in connection with the pipeline. The Council has only recommended *not* excluding companies if directly asked by the Ministry. Nonetheless, we believe that the Total recommendation was of great importance, both because there was great public interest in the case and because it shed light on the Council's interpretation of the guidelines. That made it possible to adjust the guidelines if the principal found that the guidelines were not being practised as intended.

4 Challenges involved in using the various criteria

The process of finding and assessing companies that should be excluded pursuant to the product criteria, i.e. especially manufacturers of certain types of weapons and tobacco, is easier than the process pursuant to the conduct criteria. Many consultants provide relevant screening services, so that the process of identifying relevant companies is quite efficient. The Council on Ethics' most demanding tasks are to define what is to be counted as a key component of a nuclear weapon or suchlike and to assess elements in weapons systems that have two purposes – both an acceptable and an unacceptable one. In addition, a lot of work may be involved in confirming the information received from companies. In the weapons industry, companies often do not reply to enquiries.

Both obtaining and assessing information are more complicated in relation to the conduct criteria than in relation to the product criteria. The Council on Ethics uses electronic news-monitoring systems which find news items about companies related to incidents which may contravene the fund's guidelines. In addition, the Council subscribes to a database that assesses companies on the basis of their systems for taking environmental, human rights and corporate governance considerations into account. Such services provide assistance but do not give any complete basis for either ensuring that all relevant cases are noticed or assessing whether companies that are involved in the specific incidents should be excluded from the fund. Naturally, news items more often contain news than

information on systematically poor standards. News items also often concern well-known companies and brands, even if the company's connection with the incident is quite indirect. The Council has therefore also implemented systematic reviews of various sectors that are perceived as being particularly vulnerable. Lastly, the Council also receives tips and information about individual companies, for example from special-interest organisations.

According to the guidelines, acts or omissions that have taken place in the past do not in themselves provide grounds for exclusion. However, former patterns of conduct can indicate what may happen in the future. The Council on Ethics therefore looks into a company's former practice when assessing the future risk of conduct in contravention of the guidelines. The information on the case is often conflicting and may be relatively inaccessible. In addition, it is often unclear how much a company can be regarded as contributing to a norm violation for which it itself is not directly responsible. For this reason, the Council uses consultants to a great extent, both to find out what has actually happened and to discover whether individual incidents are representative of the company.

Thereafter, the Council on Ethics assesses the future risk based on both the company's own measures to prevent new violations and measures that the authorities may have implemented. The company's stated strategy is often very different to what the company is actually seen to do. The Council examines a considerable volume of source material before recommending the exclusion of a company. In most cases, the Council also has a dialogue with the company that may be quite extensive. In general, enquiries from the Council are taken seriously and many companies are willing to enter into a relatively open discussion of the issues raised. This especially applies if the case has reached the stage where the company has received a draft recommendation to exclude it from the fund.

Serious environmental damage forms the basis for around half of the Council on Ethics' recommendations to exclude a company or put it under observation based on the conduct criteria. Environmental damage may at the same time also comprise a human rights violation, for example a violation of the right to life and health. In more than half of the environmental recommendations, the health effects of the company's emissions are an important reason for the Council recommending exclusion or observation.

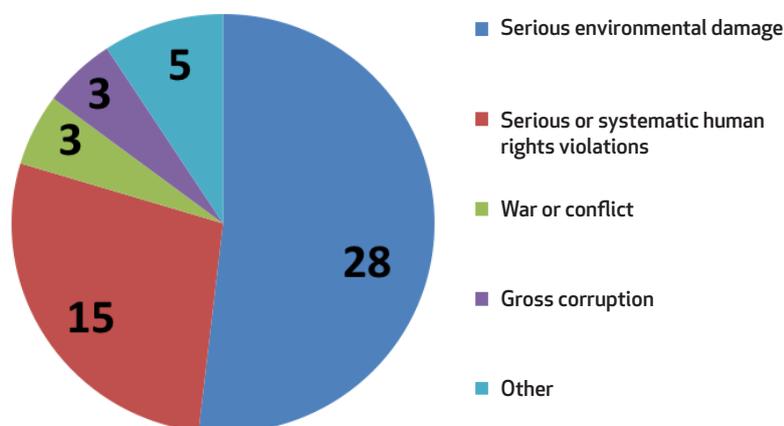


Figure 1: the number of companies that the Council on Ethics has made a recommendation regarding based on the conduct criteria

As regards the selection of environmental cases, more cases have been assessed as a result of systematic reviews of problematic sectors than as a result of news items. In environmental cases, the most difficult part of the work is often to obtain facts. Few companies are willing to provide specific information on the environmental effects of their operations. Many perceive this to be confidential information that they do not want to share. That means the local population often knows very little about how a company's operations affect the environment and resources, even though this affects their health and quality of life.

So far, climate effects have not been part of the Council's assessment mandate but they may become so if the recently published recommendation by the Skancke Committee concerning "*Fossil-fuel Investments in the Norwegian Government Pension Fund*" is followed. In such case, this may provide a broader basis for the Council's work, especially on individual cases within the energy sector.

Human rights cases face many of the same challenges regarding access to information. Here it is also often more difficult to determine whether companies in the fund contribute to the human rights violations. For example, few listed companies use child labour directly in their operations, although child labour may occur in their supply chain. The supply chain may be long and the question is often how far the company's responsibility stretches.

The UN guiding principles on business and human rights, which were adopted in 2011, are a good starting point for assessing a company's contribution to human rights violations because they state what a company should do to avoid contributing to such violations. Nevertheless, the assessments in individual cases are demanding, not least because it must be asserted that a human rights violation has taken place and that there is an unacceptable risk of the company contributing to such violations in the future.

The Council on Ethics tries to assess several companies at the same time because news items may relate to companies quite randomly. For example, violations of workers' rights may be common in a specific type of company and therefore apply to many companies in the portfolio, even though only a few companies are referred to publicly and thus picked up by the news-monitoring service.

As regards corruption, the assessment of future risk is particularly challenging for the Council on Ethics. Corruption is a criminal offence in most countries, so it takes place in secret. The documented cases of corruption that trigger the Council's assessments are usually revealed when they are formally investigated and have frequently taken place many years ago. Often, if a case is investigated, and in all cases when it is later adjudicated on in the court system or sanctioned in any other way, companies announce measures to reduce the risk of new cases of corruption. In both the cases in which the Ministry of Finance has made a decision – relating to Germany's Siemens and France's Alstom – the Council recommended exclusion but the Ministry nonetheless chose to place the companies under formal observation.

Most countries order companies to have systems in place to prevent corruption. Despite this, there are many corruption cases involving major listed companies each year. The challenge facing the Council in its work on corruption cases is to assess whether the company's compliance systems are good enough to prevent future corruption and whether they are actually implemented throughout the company or primarily created to meet formal requirements regarding such systems.

Although wars and conflicts are taking place in several places in the world, listed companies' operations in areas of conflict have shown to be relatively limited. Under the war and conflict criterion, companies have up to now only been excluded on the basis of contributing to violations of international law on the West Bank (Palestine). In addition, based on this criterion, the Council on Ethics has recommended the observation of one company that extracted minerals in the Democratic Republic of the Congo where mineral extraction had frequently contributed to conflict. In this case, both obtaining the facts and assessing the future risk proved to be very difficult.

A related question applies to companies' mineral-resource extraction in the non-self-governed territory of Western Sahara. The Council assesses this issue under the generic term "other particularly serious violations of fundamental ethical norms" since the area has a different international-law status than the West Bank. The Council has recommended the exclusion of a company exploring for oil on the continental shelf outside the Western Sahara and of companies that buy phosphate extracted in Western Sahara.

5 Consequences of exclusion

The exclusion of companies from the fund has reduced the risk of the fund being invested in companies that contribute to serious norm violations, which is the scheme's purpose. The Council on Ethics believes that the recommendations have also contributed to the development of international norms. It is the Council's impression that financial institutions, special-interest organisations and other bodies trust the information in the Council's recommendations and are confident that the Council raises issues that are relevant. Several investors, both in Norway and internationally, follow the Council's recommendations, either by excluding the same companies or by using the recommendations as the starting point for their own ownership processes. In addition, special-interest organisations use the recommendations in their work in order to influence companies. The recommendations are also discussed in literature on and research into companies' social responsibilities. The media's choice of recommendations to focus on is often governed by campaigns linked to certain types of companies and operations.

An important prerequisite for the Council's contribution to the development of norms has been that the recommendations are based on facts, are well reasoned and are made public. The Council on Ethics has put a great deal of effort into obtaining information on companies' activities and ensuring that the information given in the recommendations is correct.

The Council believes that, in some cases, companies alter their conduct in order to avoid being excluded from the fund. Before a recommendation is made, the Council normally has quite extensive contact with the company being assessed. During this process, many companies provide information on measures they are going to implement that may make the existing basis for exclusion disappear. Some companies that are excluded from the fund have in the past few years asked what they must do in order to no longer be excluded, while others which are not excluded have asked how the Council would

consider certain types of operations without the Council having contacted these companies. This strengthens our impression that companies are influenced by exclusions when these are based on criteria on which there is broad agreement and extensive reasons are given for the assessments.

The Council on Ethics' dialogue with companies is only intended to obtain information in order to decide whether the company should be put under observation or excluded from the fund. The Council does not, therefore, advise the companies to carry out acts or state any solutions to problems, but it points out specific norm violations that may lead to exclusion from the fund. The company's opportunity to avoid exclusion depends on the factors that may form the basis for exclusion. In some cases, it is the actual business idea that is incompatible with the guidelines for observation and exclusion. The only way that these companies can avoid exclusion is to terminate these operations. Other companies can continue with their operations but must implement measures so that the norm violation ceases.

Approximately 20 companies have altered their conduct significantly in areas that the Council on Ethics has questioned and contacted the companies about. However, since 21 companies have nevertheless been excluded from the fund based on the conduct criteria, it may be concluded that it is not very easy to influence a company's conduct. For exactly this reason, exclusion is a necessary tool for the fund. If the fund does not want to be linked to companies whose operations involve some particularly serious norm violations, the only solution may be to sever the connection with the company.

6 The relationship between active ownership and exclusion

As early as in White Paper No. 20 (2008-2009), the Ministry of Finance stated its ambition to have a chain of tools that encompassed active ownership and where exclusion was the last resort if the conduct did not change. Due to the sharing of responsibilities between the Council on Ethics, Ministry of Finance and Norges Bank, this has been difficult to achieve. The Ministry wanted the Council to place emphasis on the opportunity to influence companies and to be able to base its assessments on information obtained from Norges Bank's dialogue with individual companies.² In practice, there has only been one example of such coordination of the tools and that was before the Ministry stated its ambition.

This case concerned child labour. In 2006, the Council on Ethics recommended excluding Monsanto Co. based on surveys conducted on behalf of the Council concerning the extent of child labour in the production of hybrid cotton seeds for the company in India. This was a special type of child labour that was extremely harmful to the children's health due to the extensive use of pesticides. The Council had assessed several companies in the same sector and was in possession of data indicating that child labour was extensively used by all the companies in the fund that made such products. At the suggestion of Norges Bank, the Ministry of Finance decided that active ownership should be tried for a limited period instead of exclusion. In a new assessment in 2008, the Council stated that the basis for excluding Monsanto was basically present but that the Council nonetheless did not

recommend excluding the company provided the efforts to end the worst forms of child labour led to results. The bank kept a dialogue for several years, not only with the company that the Council had already recommended excluding but also with all the portfolio companies of a certain size that had similar operations. At the same time, the Council continued to assess the extent of child labour in the fund's companies that produced hybrid seeds in India and recommended excluding companies that still had an unacceptably large percentage of child labour in their supplier chain. The Council also periodically checked whether the extent of child labour had been reduced in companies covered by this initiative. This proved to be the case. The bank has now terminated its initiative, but the Council is continuing to follow it up, most recently during the latest cultivation season.

The fact that there are no more examples of collaboration between Norges Bank and the Council on Ethics is probably partly because Norges Bank and the Council have focused on different companies and issues. The bank has interpreted its mandate as being that it is only to carry out general active ownership and only in relation to certain types of issues. The bank has now been given explicit responsibility for ensuring that the fund is not invested in companies whose operations contravene the exclusion criteria and this provides better conditions for good interaction between exclusion and active ownership.

7 Future challenges and opportunities

Probably no other corresponding institution in the world works so extensively to assess whether the activities of listed companies are ethically unacceptable as the Council on Ethics does. One of the future challenges facing the Council on Ethics is that the increase in the number of portfolio companies - especially in emerging markets - will mean that more resources are required in order to obtain information. The secretariat also needs increased competence in order to understand certain demanding markets.

The Norwegian parliament has decided that the material conditions for observation and exclusion from the fund are to be maintained. The Council on Ethics believes there are strong reasons for this. In addition, it has been decided that the Council is to continue as an independent council, in line with the Council's recommendation in its comments on the report by the GPFG Strategy Council. At the same time, the task of making decisions on observations and exclusions has been transferred from the Ministry of Finance to Norges Bank. This is also in line with the Council's comments. This may allow recommendations on observations and exclusions to be dealt with much more quickly than has at times been the case in the previous system, and must be welcomed.

Now that the responsibility for exclusion has been transferred to Norges Bank, it should also be easier to achieve a continuous chain of tools. This simply depends on the expedient organisation of the work and allocation of resources.

Notes

- 1 http://www.unpri.org/viewer/?file=wp-content/uploads/2014_report_on_progress.pdf.
- 2 White Paper (Report to the Storting (St. meld.) no. 20 (2008-2009), p. 133.

The Council on Ethics' work on human rights

The human rights criterion in the ethical guidelines states that the Council on Ethics shall recommend the exclusion of a company when there is an unacceptable risk that the company may contribute to or itself be responsible for serious or systematic human rights violations. It is uncommon for serious human rights violations to be proven in the operations of listed companies, but many investigations show that the most serious violations often occur in the supply chain. The Council considers it important not only to uncover breaches of standards, but also to assess to what degree companies in which the Fund is invested contribute to human rights violations among their suppliers.

In 2014, the Council on Ethics assessed several companies accused of contributing to human rights violations in the areas of natural resource management, agriculture, food production and textiles manufacture. The discussion in this report concentrates on the work done with respect to workers' rights. These efforts have focused particularly on food producers in Asia who use fish as a raw material, as well as clothing manufacturers who purchase cotton, yarn, fabrics or clothing. These industries have long supply chains in which violations often occur two or three links further up the chain. Thus far, the Council has focused on the most serious violations, i.e. forced labour and the worst forms of child labour. In both industries, migrant workers are particularly vulnerable to exploitation. They can often be tricked into a work situation entirely different from what they were promised. It is not uncommon for such workers to be deprived of their identity papers, to have no employment contract, to be paid irregularly, and to be pressured into working extreme amounts of overtime. Moreover, the work involved is often hazardous, and workers' freedom of movement is restricted.

In the Council on Ethics' view, companies bear greater responsibility for the supply chain as a whole in cases where violations of such severity are discovered than when breaches are less serious. This is consistent with the UN guiding principles, which state that companies are responsible for conditions among their sub-contractors, and that they must use their influence to secure improvements. The principles also state that companies must investigate their supply chains to identify where the greatest risks of serious violations arise. The more serious the breaches, the stricter the requirement to implement measures to prevent violations.

The Council on Ethics applies the guiding principles when assessing a company's responsibility for human rights violations in its supply chain. It is important that companies survey their sub-contractors and assess where the risk of breaches is greatest. When violations are common in a particular country or industry, the Council follows the principle that companies cannot evade responsibility by claiming a lack of information or that it has a policy requiring its sub-contractors to prevent such breaches. Companies must implement their own measures to uncover and prevent future breaches. The Council evaluates how measures are implemented and whether they appear adequate, and gives primary emphasis to their effect.

Companies that are dominant purchasers from a company that violates workers' rights are considered to have a great responsibility to take reasonable steps to prevent

such breaches. At the same time, companies cannot automatically be exempt from responsibility if they spread their purchases across a wide range of suppliers and conclude agreements on an *ad hoc*, delivery-by-delivery, basis. In the textiles industry, best practice appears to be that companies evaluate working conditions among potential suppliers and their sub-contractors before signing contracts, that they conclude long-term, predictable agreements, that they check compliance with guidelines, and that they collaborate with their suppliers to improve working conditions over time.

In several cases, the Council on Ethics has found that companies associated with human rights violations have implemented measures to prevent future breaches. Human rights violations often carry a serious reputational risk for companies, and taking preventive steps is easier than in the case of severe environmental damage, for example.

The Council on Ethics' work in the field of human rights is challenging in terms of both selecting companies for investigation and assessing the extent of companies' responsibility for their supply chains. Work on surveying human rights violations in textile industry supply chains will continue in 2015, in the form of both public information analysis and field visits.

Studies on environmental issues

The Council on Ethics has developed a comprehensive understanding of and expertise in environmental issues over the past few years by conducting sector-specific studies. These studies have formed the basis for recommendations to exclude or observe several companies. A more detailed description of the sectoral environmental studies can be found in the annual report for 2012.

In 2014, the Council on Ethics continued its study of *illegal logging and other particularly harmful forms of logging*, and is now about to conclude this work. During these enquiries, the Council has assessed more than 40 companies in the portfolio. Norges Bank's divestment from 23 palm-oil companies in 2012 reduced the need for further review of these companies. In addition, work on approximately 15 companies has come to an end, for various reasons. In some cases, Norges Bank sold its shares in the company while the review was ongoing, in other instances a closer investigation showed that the plantation company was not associated with the company in which the Government Pension Fund Global was invested. In the case of some companies, the Council has deemed the cultivation of plantations acceptable, for example because the plantations are not expanding at the expense of good forest and there appears to be no loss of important biodiversity. Two of the companies have confirmed that, having received a draft recommendation advising exclusion, they are in the process of divesting from plantation activities. The Council will therefore not proceed with these matters. Several of the company reviews are still ongoing. To date, the Council has submitted eight recommendations to exclude companies due to the risk of severe environmental damage from logging and the conversion of tropical forest into plantations. The annual report for 2013 contains a more detailed account of the Council's work in this area.

The Council on Ethics has also looked more closely at *protected areas of special value*. Protected areas face many different threats, ranging from the extraction of minerals and petroleum production to dams and power stations which impact on protected areas through their operations and associated infrastructure development. The Council has concentrated especially on natural areas designated as UNESCO world heritage sites. The Council has submitted three exclusion recommendations based on the risk of world heritage sites being damaged by commercial activities. Two of these recommendations have now been published, and relate to SOCO's activities in Virunga in the DRC and NTPC's coal-fired power plant in the Sundarbans in Bangladesh. Several company reviews are still ongoing.

The Council on Ethics' work on *illegal fishing and other fishing activities causing particular damage to the environment* is discussed in greater detail later in the annual report.

The Council on Ethics has concluded its broad studies of *highly destructive dam projects*, but will continue to look into individual companies in this category. One of the challenges faced in relation to dam construction is time. The design phase is often very long, and it is quite common for the most controversial projects to be subjected to extensive changes during the design phase. Moreover, some projects may not be granted licences. In practice, the work of the Council is therefore limited to the actual construction phase,

making it difficult to obtain adequate and accurate information within the often relatively short construction timetable. Despite the lack of time, such projects often feature very complex problems, including forced relocation, forced labour and environmental damage. While the Council acknowledges that some projects and issues are more suited to the exercise of ownership, it will continue to assess individual companies and specific projects.

The Council on Ethics has finalised its study of uranium mines. Initially, the investigation focused on five companies. The Fund has since divested from two of these. The remaining companies have mines on almost all continents, and extract uranium using a variety of technologies. As it is generally difficult to obtain relevant information from the companies, the Council has primarily relied on external sources in its inquiries. There have also been few reports of serious incidents in the mines of the companies concerned during the last few years. Nevertheless, the Council will continue to monitor these companies, particularly with regard to mines in countries with weak public administrations.

Environmental damage from fishing

Over the past 20-30 years, fishing has become a global industry, with large companies involved in both catching the fish and its transport and processing. These companies operate in all of the world's oceans, depending on where fishery resources are found and where fishing is profitable. In order to make the most of the fishing vessels' capacity, fish are often trans-shipped at sea from the fishing boats to dedicated cargo vessels (known as *reefers* or *fish carriers*). These bring the catch ashore, in many cases to continents other than where the fish was caught. This procedure enables the fishing boats to engage in almost continuous fishing, merely interrupted by repairs and maintenance activities. There is considerable evidence indicating that some of the trans-shipped fish is not reported to the authorities. Because cargo vessels often take onboard catches from more than one vessel, trans-shipment makes it difficult to trace where the fish was caught. As a result, there is greater risk of quota overfishing, and of unregulated fish stocks becoming substantially depleted or extinct.

In 2011, the Council on Ethics decided to survey companies in the Government Pension Fund Global engaged in fishing activities. The objective was to identify companies that might potentially be involved in fishing activities that are especially detrimental to the environment. In this context, the term "fishing activities" encompasses the entire value chain: catch and transport to purchase, sale and further processing. Specifically, the Council's survey covered companies that own fishing vessels or vessels that trans-ship or transport catches from the fishing grounds to ports, as well as port operators and fish buyers, for instance processing businesses. To begin with, the Council identified about 10 companies to be investigated more closely. These companies are engaged in catching, buying and/or processing fish. As discussed in this annual report, the Council has recommended the exclusion of one of these companies thus far, China Ocean Resources. Norges Bank has sold its shares in the company since the recommendation was made without a formal decision to exclude the company by the Ministry of Finance.

Fishing that is especially harmful to the environment – factors emphasised by the Council on Ethics

The impact of fishing on the environment, and whether it causes severe environmental damage, is a complex issue involving numerous factors: which species are caught, how much fish is caught, how it is caught, where it is caught and how fishery resources are managed. There is no doubt that certain types of fishing and fishing methods can result in severe environmental damage. The Council on Ethics has decided to focus on participation in illegal, unregulated and unreported fishing (IUU fishing) initially, and on the catching of globally endangered species. Other types of fishing activity that cause great environmental harm, such as overfishing of fish stocks, may also be considered as a basis for exclusion.

IUU fishing is a significant cause of overfishing, and one of the greatest threats to the

world's fish stocks and marine ecosystems. The UN's food and agriculture organisation (FAO) has provided a definition of IUU fishing in its *Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing*. The term is internationally recognised and means, in brief:¹

- Illegal fishing: fishing conducted in contravention of national laws, international obligations and adopted rules.
- Unreported fishing: fishing activities that have not been reported, or have been misreported to the relevant authority or fisheries management organisation.
- Unregulated fishing: fishing activities in areas or for fish stocks which are not regulated or not subject to management responsibilities.

IUU fishing is a global problem of considerable size. In particular, commercial unreported and unregulated fishing impair prospects of sustainable management of fishing resources. Unregulated fishing need not be illegal (e.g. in areas where there is no management regime), but can lead to overexploitation of stocks and hinder the building up of fish stocks and marine ecosystems. IUU fishing most commonly occurs in countries and regions characterised by weak government and where nation states fail to meet their international obligations. IUU fishing is especially likely to have a severe social impact on coastal areas in poor countries, as the reduction of coastal fishing resources decreases the local population's livelihood.

There is considerable commitment at the national level and internationally to fight IUU fishing, for example through a variety of UN agencies – including the UN Environmental Programme (UNEP) and the UN Food and Agriculture Organisation (FAO) and its *Committee on Fisheries* (COFI) – the EU and international fisheries management.

The Council on Ethics has concluded that if it can be established that a company in the Government Pension Fund Global is engaged in illegal and unreported fishing activities, this may itself constitute grounds for exclusion. The decision as to whether unregulated fishing forms grounds for exclusion depends on several factors, including whether the company's activities are impeding the sustainable management of a fish stock and whether it evades requirements applying to other companies engaged in fishing activities by flying a flag of convenience. In all cases involving IUU fishing, the Council will emphasise whether the violations are serious or systematic.

As regards globally endangered species, the Council on Ethics largely adopts the assessments of the *International Union for the Conservation of Nature* (IUCN). IUCN is an internationally recognised organisation with the objective of conserving nature and biodiversity. IUCN performs stock assessments for a number of the world's species, and draws up a list of globally endangered species. If a company engages in systematic fishing of vulnerable and endangered species, this may constitute grounds for exclusion.

Some companies do not wish to supply the Council on Ethics with information, and the basis for assessing these companies is thus limited. In these instances, the Council will attach importance to the risk of the company contributing to severe environmental damage through its fishing activities. The Council considers that such risk is enhanced by deficiencies in companies' transparency.

Methods

Fishing is an industry marked by a low degree of transparency. Establishing which vessels a company owns, or where a company has purchased fish requires thorough investigation and solid industry knowledge. Frequent re-registration of vessels, flag changes and complex company structures complicate investigations. In some cases, companies appear to make such changes with a view to complicating any tracing of their fishing activities. At company level, fishing without a licence or failing to report catches may help bring down costs, thus increasing the company's profits.

It is possible to document that companies engage in IUU fishing if the identity of the vessels is known, and when they can be tracked using their *Automatic Identification System* (AIS). AIS is an automatic tracking system used by vessels and vessel traffic control centres to identify and locate vessels. The system is satellite-based, and provides information on vessel position, direction and speed over time and in real time. The tracking data provides information both on where the vessel is located, and its movements. Movement patterns indicate whether the vessel is engaged in fishing or trans-shipping or merely sailing through a maritime zone.

Regional Fisheries Management Organizations (RFMOs) are responsible for managing migratory fish stocks in the open sea. The membership of each RFMO is composed of the states with fishing interests in the region in question. RFMOs have the authority to regulate fishing within their management region, and are also obliged to establish and keep a register of the fishing vessels approved for fishing in the area governed by the convention. The RFMOs' secretariats have a database of approved fishing vessels registered with the RFMO by the respective member states. The database is a tool that helps control that all fishing vessels in the area governed by the convention are engaged in legal fishing activities. The database is publicly accessible, thus permitting third parties to verify whether a fishing vessel is fishing legally in the convention area, assuming that its identity is known.

The companies vary in their willingness to provide information on their own fishing or fish purchases. In cases where companies fail to give information, the Council on Ethics conducts its own investigations, including with the help of consultants. Given that access to information on vessels and their catches may be restricted, such investigations can be both time-consuming and resource-intensive.

Experiences

The work done so far has shown that companies buying fish and seafood have considerable knowledge about their purchases. Several of the companies assessed by the Council on Ethics have detailed data on every single purchase, including the boats that caught the fish, where the fish was caught, where and on to which boats the catch was trans-shipped, and where it was landed. As a rule, this forms part of the company's quality assurance. In other words, the company has the data it needs to be able to control and implement measures against any involvement in IUU fishing, assuming that the company gives priority to this.

The Council on Ethics has been in contact with several seafood companies that have had problems with IUU fishing in their supply chain. One of these was sent a draft recommendation on exclusion because the Council believed that the company was purchasing fish from vessels that systematically engaged in extensive illegal and unreported fishing. Moreover, the company itself owned vessels that had been fined for illegal fishing. Over a period of approximately one year, the Council engaged in a dialogue with the company. During this period, the company introduced new systems and procedures to prevent it from buying IUU fish. The company has also increased the number of employees working on catch verification. Among other things, checks are made to ensure that the information provided by the vessels is correct, and any uncertainty in relation to sub-suppliers is followed up. The company now requires trans-shipment at sea to be documented by an approved observer on the reefer. The Council responded to these measures by reviewing the company's latest catch and purchase data. No significant errors or deficiencies were found in the purchases, indicating that the measures have been effective. The grounds for excluding the company were therefore no longer present, showing that it is possible to influence companies to implement swiftly changes in the desired direction, provided that the dialogue with the company is concrete and based on facts.

Although few investors appear to be addressing the problem of environmentally harmful fishing activities, more should do so. IUU fishing is a substantial environmental problem, as well as a threat to global food security. At the company level, engaging in IUU fishing may entail responsibility for or complicity in criminal activities. It is important that investors request information from the companies, not only on their policy and strategies, but also on the concrete measures the companies have implemented to avoid being involved in IUU fishing.

Notes

- 1 For a full definition of IUU fishing, see <http://www.fao.org/docrep/003/y1224e/y1224e00.HTM>.

The Council on Ethics' work on corruption cases

It is part of the Council on Ethics' mandate to recommend that companies be placed under observation or recommended for exclusion from the Government Pension Fund Global's portfolio if there is an unacceptable risk that the companies are involved in gross corruption.

The Council on Ethics has made arrangements to provide for external monitoring of the Government Pension Fund Global's portfolio, and thus regularly receives information on corrupt practices involving companies in which the Government Pension Fund Global has invested. In light of the fact that the Fund has equity and fixed income investments in more than 9,000 companies in a total of 82 countries, the number of corruption incidents the Council learns of from its external monitoring consultant is relatively low. One of the reasons is probably that detecting corruption is difficult, particularly in countries with limited transparency where corruption may be assumed to be common.

In 2013, the Council on Ethics commenced a more systematic review of countries and sectors in order to identify companies involved in corruption. The Council started by looking at those countries and sectors where international indexes indicate a particularly high risk of corruption. The studies done by the Council so far, some of which are ongoing, related to companies with activities in the building and construction industry, the oil and gas sector, and the defence industry. This approach provides a good starting point for the identification of corruption cases, as well as solid background knowledge on industry practices in a variety of countries. This is useful information with a view to assessing which companies are the worst offenders.

In individual cases, the Council on Ethics first considers whether there is any information indicating that the company has committed acts constituting gross corruption. Such information may take the form of corruption accusations presented in the media or reports from credible organisations, or knowledge of formal investigations and final corruption verdicts against a company. Final verdicts only rarely feature in the cases assessed by the Council. This is because corrupt practices take place in secret, and because when they are detected, the process of completing a formal investigation and arriving at a final verdict takes a long time. The Council gathers information from a variety of sources. In the first instance, the Council relies on news stories and reports published by experts and different organisations. When the Council receives information that a company is accused of gross corruption, it thoroughly investigates all accusations, for example by contacting relevant public bodies and experts and engaging consultants. Investigations carried out by consultants often involve talks with present and former staff, journalists who have closely followed cases, and relevant bodies in the country where the company has been accused. The consultants used by the Council are specialists in their fields, and have a large network in a range of industries and different countries.

In its concrete assessment of what constitutes "gross corruption", the Council on Ethics emphasises the amounts involved and whether there are repeated accusations against the company that may indicate systematic corrupt practices. The Council then evaluates whether there is an unacceptable risk that gross corruption will continue. Both

of these conditions must be fulfilled for the Council to recommend exclusion under the corruption criterion.

Factors emphasised by the Council

Given that the Council on Ethics is forward-looking in its work, the assessment of the future risk of corruption determines whether a recommendation should be made to exclude a company from the Fund, or not. In this assessment, the company's internal measures to prevent corruption play an important role. These measures are expressed in the company's anti-corruption programme, which is usually an important part of its internal compliance system. The objective of the company's anti-corruption programme is to prevent, detect and penalise any violations of internal rules or external laws and regulations. The company's internal anti-corruption programme is therefore indicative of the risk of violations continuing in the future.

The Council on Ethics has not established any general standard for how anti-corruption programmes should be designed to ensure that companies avoid being recommended for exclusion from the Fund. This is because the Government Pension Fund Global holds equities and fixed income bonds in a large number of companies of different sizes and operating in different business areas, and in a variety of countries. The Council does not consider a common standard for all companies to be appropriate, as such an approach might affect the various companies unevenly. In considering whether a specific company's anti-corruption procedures are adequate to prevent future violations, the Council performs a concrete, individual assessment.

However, based on the continuing emergence of international corporate anti-corruption standards, it is possible to deduce a few general principles for what measures a company should take to set up and implement a robust anti-corruption programme. The principal features of international norms for companies' anti-corruption systems are that the company's business ethics express zero tolerance for corruption, and that the company conducts a targeted risk survey and assessment with a view to preventing future norm violations wherever possible.

If solid anti-corruption systems are to be set up and implemented in the company, a thorough survey and assessment of corruption risk is essential. The company's size, local and regional conditions, and the sector in which the company operates are among the most important risk factors that must be considered. As a minimum requirement, the company must have robust preventive procedures in those areas where it is at greatest risk of corruption. In large companies, risks should be surveyed and anti-corruption measures assessed at regular intervals, and business areas that are at particular risk should be continuously monitored. Risk surveys also encompass the design of the company's internal procedures, staff education and training, and third-party assessment (due diligence).

The company's business ethics are frequently reflected in its internal guidelines, typically in a *Code of Conduct*. In such guidelines or codes, management communicates the company's anti-corruption philosophy and norms to its staff and external parties. This is

where the company presents its ethics culture, its “*tone from the top*”. In order to ensure that norms are implemented all staff must be trained, and in many cases executive staff and others who are especially likely to be exposed to corruption risk must be given special training. An unambiguous process for reporting violations must be created, and the company’s response to any individuals who violate internal guidelines must be set out clearly.

A whistleblowing channel must be created, which staff can use to submit anonymous reports of possible violations without risking retaliatory measures. Non-compliances must be logged, reported and addressed. Anti-corruption procedures should be overseen by an independent body and be regularly evaluated and refined on the basis of not only internal experience but also external factors such as new legislation.¹

Many companies have now set up internal anti-corruption procedures. In assessing future risk of corruption, however, the Council on Ethics gives decisive weight to how the procedures are implemented in the company’s activities, how they are monitored, and how they are further developed and refined. Each company has to establish that its measures are adequate to prevent future corrupt practices by the company or its representatives.

Notes

- 1 There are several sources for good guidelines on how to draw up and implement anti-corruption programmes in companies. These include the UN’s anti-corruption portal TRACK (*Tools and Resources for Anti-Corruption Knowledge*), available at <http://www.track.unodc.org/Pages/home.aspx>, Global Compact: *A guide for anti-corruption risk assessment* (2013), available at <https://www.unglobalcompact.org/resources/411>, and the OECD’s *Good Practice Guidance on Internal Controls, Ethics and Compliance* (2010), available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>. Transparency International (TI) has listed a number of general recommendations for how to start work on setting up compliance systems. These can be found in the publication *Business Principles for Countering Bribery*. TI’s recommendations can also be used as a benchmark for systems already in existence. TI initially launched its recommendations in 2003, and has since revised them twice: first in 2009 and, most recently, in 2013. The recommendations are available at http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery. In addition, general anti-corruption principles are set out in *The OECD Guidelines for Multinational Enterprises*, <http://www.oecd.org/daf/inv/mne/48004323.pdf>. The *UK Bribery Act* and the *Foreign Corruption Prevention Act (FCPA)* have also influenced international standards to prevent corrupt practices in companies. In 2011, the UK Ministry of Justice published guidance on arrangements companies should make in order to avoid criminal liability under the UK Bribery Act. This is available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. In 2012, the US Department of Justice and the US Securities and Exchange Commission (SEC) published guidelines on arrangements companies should make in order to avoid criminal liability under the FCPA. These guidelines are known as *A Resource Guide to the U.S Foreign Corrupt Practices Act*, and are available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>. This guidance document also refers to other relevant guidelines, such as *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*, published by the Department of Commerce, International Trade Administration, and available at http://ita.doc.gov/goodgovernance/business_ethics/manual.asp. A number of other bodies have published international anti-corruption standards. These include the United Nations Global Compact (*The Ten Principles*), the Asia-Pacific Economic Council (*Anti-Corruption Code of Conduct for Business*), the International Chamber of Commerce (*ICC Rules on Combating Corruption*), the World Bank (*Integrity Compliance Guidelines*), and the World Economic Forum (*Partnering Against Corruption-Principles for Countering Bribery*). See also the document authored by Trond Eirik Schea, director of the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim), “*Selskapsstyring og antikorrupsjon*” [Corporate governance and anti-corruption], 2014, available at <http://nordiskjurist.org/wp-content/uploads/2014/07/referent24.pdf>.



The recommendations and letters on exclusion and observation

To the Ministry of Finance

1 December 2010

Recommendation to exclude Repsol YPF and Reliance Industries Ltd. from the investment universe of the Government Pension Fund Global

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1 Introduction

The Council on Ethics for the Norwegian Government Pension Fund Global (the Fund) has assessed whether the Fund's ownership in the Spanish company Repsol YPF and in the Indian company Reliance Industries Limited entails a risk of contributing to serious or systematic human rights violations in breach of the Fund's Ethical Guidelines. Repsol and Reliance Industries are partners in a joint venture that carries out oil-exploration activities in Block 39 in the Peruvian Amazon. Repsol is the operator of the joint venture.

As of 30 September 2010, the Fund owned shares in Repsol with a market value of NOK 2.962 billion. The Fund's shares in Reliance Industries had a market value of NOK 775.7 million.

Block 39 is located in an area which is thought to overlap the territories of indigenous peoples living in voluntary isolation. These peoples, also called uncontacted indigenous peoples, are extremely vulnerable to any form of contact with outsiders because they have not developed immunity to common infections or viruses such as influenza, diarrhea or chickenpox. Contact with outsiders will inevitably lead to the introduction of such diseases. There is no scientific disagreement about the fatal consequences that this would have. Past experience from other cases where indigenous people in voluntary isolation have been contacted shows that one third to one half of a tribe will probably perish during the first five years following initial contact. In the worst case, the whole tribe may become extinct.

The question of whether there are uncontacted indigenous peoples living in Block 39 is controversial, but signs of their existence have been known for some time. Indigenous peoples' organisations have carried out anthropological studies accounting for around 70 observations of uncontacted indigenous people in the area throughout a period of 50-60 years. Various court decisions have stated that the evidence of their existence is not reliable enough to stop the oil exploration activities in the block. Peru's Ministry of Energy and Mines relies on the court decisions but nevertheless requires that the companies have contingency plans in case isolated indigenous peoples exist in the block. Repsol and Reliance do not consider it likely that isolated uncontacted indigenous peoples live in the block. The Peruvian ombudsman has requested that investigations be carried out with the aim of verifying whether or not uncontacted indigenous peoples are present in the block, but this has not been done. The Council notes that none of the parties involved dismiss the possibility that there may be uncontacted indigenous peoples in block 39. The uncertainty of their existence follows from the absence of independent, thorough and scientific studies. The Council finds it noteworthy that neither the government nor the companies in question have taken the initiative to carry out studies of this kind.

The Council considers the proximity of Block 39 to the Ecuadorian border important. Ecuador has established an intangible zone for uncontacted indigenous peoples in an area stretching to the Peruvian border and block 39. Uncontacted indigenous peoples have been observed not far from the Peruvian border as recently as in August this year. There is no doubt that isolated indigenous peoples cross the borders of the intangible zone in Ecuador. Since the border with Peru is not a physical barrier and these indigenous peoples are nomads, it is likely that they also cross the Peruvian border.

Based on an overall assessment of the information available, the Council concludes that there is a probability that indigenous peoples live in voluntary isolation in block 39.

The core principle in the protection of peoples living in voluntary isolation is the principle of no-contact, which implies that these groups should be protected from outside intrusion into their territories. This principle is applied by both the Ecuadorian and Brazilian governments, and is stressed in the Peruvian Ministry of Health's guidelines on the protection of uncontacted peoples. In light of the fatal and long-term consequences any contact with the outside world may cause, provoking it may, in the Council's view, be tantamount to serious violations of human rights.

There can be no doubt, in the Council's opinion, that the exploration activity undertaken by Repsol and Reliance Industries in Block 39 increases the risk that any indigenous peoples who may be living in voluntary isolation within the block will come into contact with outsiders. The Council emphasizes that exploration activities in particular seem to involve an exceptionally high risk to these indigenous peoples because large numbers of workers relocate within large areas in the block.

Repsol's own impact assessments show that the company is aware that uncontacted indigenous peoples may be present in the area. Nevertheless, both companies consider this probability to be very small. Among other things, the companies make reference to a decision by the Supreme Court of Peru evaluating whether oil-exploration activities in block 39 and 67 may constitute an immediate threat to the basic rights of the indigenous peoples. The Court concluded that there was insufficient evidence of their existence and therefore no immediate threat, which would be a prerequisite in order to prohibit further activity in the area.

The companies also claim that their contingency plan, which has been approved by the authorities, will prevent human rights violations. The Council nevertheless considers it unlikely that the contingency plans adopted by the joint venture will be sufficient to avoid contact, since the biggest threat to the uncontacted peoples is the very presence of the work crews. The contingency plan primarily covers what to do if contact occurs. In the Council's view, it therefore seems virtually impossible to combine the concern for the uncontacted indigenous peoples' right to life and health with exploration activities insofar as these take place within the indigenous peoples' territories.

Exploration activities are ongoing in Block 39. Based on the material that the Council has had access to, it has not been possible to establish with certainty whether there has been any contact between the company workers and uncontacted indigenous peoples. If such contact does take place, the consequences will not be apparent until several years later. Since the damage by then may be considerable, the Council considers that continued ownership in Repsol and Reliance Industries constitutes an unacceptable risk of complicity in serious human rights violations. The Council therefore recommends that these companies be excluded from the Government Pension Fund Global.

2 Sources

The Council's report is based on numerous sources. These include studies and surveys of indigenous peoples living in voluntary isolation in the Napo-Tigre area, information from the companies, including their environmental impact assessments, court documents and documents from various Peruvian authorities, as well as the Peruvian Ombudsman's assessments and reports. The Council has also profited from its communication with international organisations, including the Inter-American Commission on Human Rights, the Brazilian National Indian Foundation (FUNAI), the Office of the United Nations High Commissioner for Human Rights and the ILO, as well as social anthropologists and NGOs who have dedicated many years of investigation to this subject.

The Council has also held meetings and communicated with Repsol on this matter throughout the course of the assessment. Individual sources are cited in the footnotes below except for individuals who have asked the Council not to disclose their identity.

3 What the Council has assessed

At a meeting held on 14 April 2008, the Council on Ethics decided to assess whether oil companies operating in areas overlapping with territories in the Amazon where indigenous peoples live in voluntary isolation may be in conflict with the ethical guidelines. Several organisations, including the Norwegian Rainforest Foundation, have raised this issue and requested that the Council exclude companies that operate in areas inhabited by indigenous peoples in voluntary isolation.

Repsol YPF and Reliance Industries Ltd. are partners in a joint venture carrying out oil-exploration activities in Peru's Block 39. The block is located in the northwestern part of the Peruvian Amazon, close to the border with Ecuador. Block 39 is said to overlap the habitat of uncontacted indigenous peoples living in voluntary isolation. Conoco Phillips Company was a member of the consortium until 31.12.2010. In October 2010, the company informed the Council that it had sold its share in the block, and Conoco Phillips is therefore not included in this recommendation. The Council is not aware what company has bought into the consortium.

The Council has assessed the risk of the companies contributing to ongoing or future human rights violations. In previous assessments of whether companies contribute to serious or systematic human rights violations,¹ the Council has emphasized that there should be a direct link between the company's operations and the relevant violations. Furthermore, the company must have actively contributed to – or been aware of – the violations but omitted to take steps to prevent them. Due to the forward-looking nature of the guidelines, the violations must be currently taking place or there must be an unacceptable risk that they will take place in the future. Companies' previous actions may give an indication as to how they will behave in the future.

The Council has not considered the environmental impacts of the companies' activities in the rainforest

The Council is aware that exploration activities in the Peruvian Amazon have increased significantly in recent years. More than 60 exploration concessions currently cover more than 490,000 km², or over 70 per cent of this region.² Several of these concessions overlap with natural reserves that originally were established in order to preserve biological diversity. In this part of Peru, there are still vast areas of inaccessible, intact tropical rainforest which is home to a unique diversity of animal and plant species. The western part of the Amazon is regarded as one of the most biologically-rich areas in the world. It is also likely to be able to withstand future climate changes.³ Experience shows that increased resource exploitation inevitably will lead to more fragmentation of the rainforest and damage to its ecosystem. The Council has not assessed what effects the companies' exploration or future oil production may have for the preservation of the rainforest, however, nor for the environment more broadly.

4 Concerning Repsol YPF and Reliance Industries and Block 39

4.1 ABOUT THE JOINT VENTURE

As previously mentioned, the Spanish company Repsol YPF⁴ and the Indian company Reliance Industries Ltd.⁵ are partners in a joint venture which holds the concession for oil and gas exploration in Block 39. Repsol, the operator, has been exploring the block since the mid-1990s and was awarded 55 per cent of the exploration license in 2001.⁶ Reliance Exploration and Production DMCC, a subsidiary of the India-based Reliance Industries Limited, holds a 10 per cent stake.⁷ Conoco Phillips sold its 35 per cent stake in the block during the autumn of 2010 and left the joint venture on 1 January 2011.

The joint venture has entered into a contract with Peru's state owned oil company PeruPetro S.A lasting 30 years for oil and 40 years for gas. The exploration phase stretches over 13 years, up to 2013. The companies are contractually committed to a work program which among other things determines the scope of seismic activity and the drilling of test wells. The joint venture is governed by a joint operation agreement, as is common in joint ventures. Joint operations are supervised and authorized by an Operating Committee where each of the partners has three representatives. Decisions require the affirmative vote of two parties and 65 per cent of the shares, except in the case of activities that are required in order to fulfill the obligations of the work program.⁸

4.2 BLOCK 39

Block 39 covers 8,868 km² and is located in what is considered to be one of the most biodiverse regions in the world. A number of endangered species have been found within the concession area. ⁹ A part of the Pocacuro Nature Reserve, which was created in 2005, is included in Block 39 and represents 40 per cent of the total area.¹⁰ Access to the block is challenging and is only possible by riverboat or helicopter.

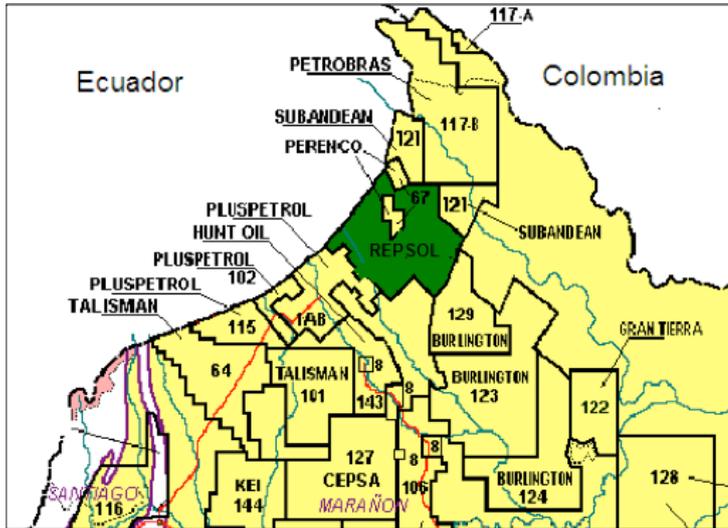


Figure 1: Location of Block 39¹¹

An isolated portion of Block 67 lies within Block 39. Perenco is a British-French joint-venture exploration and production company (see figure 2 below)¹² which took over the operation of Block 67 through its acquisition of Barrett Resources in 2008. Due to the block’s location within Block 39, the Council finds it pertinent to include information about Block 67 in this recommendation.

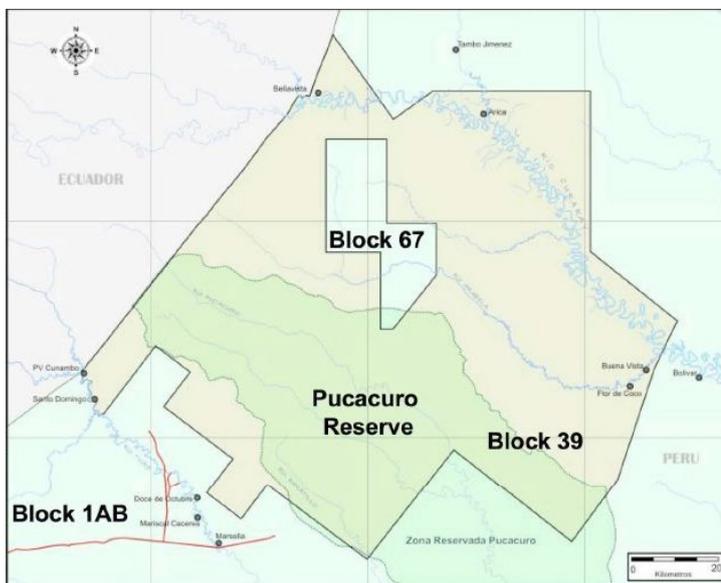


Figure 2: Block 39 with the Pucacuro Reserve and Block 67¹³

Activities in Block 39

The consortium carries out seismic surveys and test drilling in Block 39.

Repsol's Environmental Impact Assessments for seismic surveys and the drilling of exploratory wells were both approved in November 2007. According to these reports, 45 lines had to be cleared for seismic surveying amounting to 1,000 km (see figure 3). The lines have a width of approximately 1.5 m.¹⁴ In addition to this, 250 heliports, 1,250 drop zones, 250 camps for workers and other related infrastructure were to be built. The project would employ 475 people, and was stipulated to last for 10 months. Furthermore, 12 test drillings would be carried out. Repsol has reported that the actual extent of the activities has been reduced and that 590 km of seismic lines and two test wells have been registered, of which only one has been drilled.¹⁵ According to Repsol, the seismic lines have been reforested.

On 27 May 2010, Repsol's application for the clearing of another 454 km of seismic lines and 152 heliports was approved.¹⁶

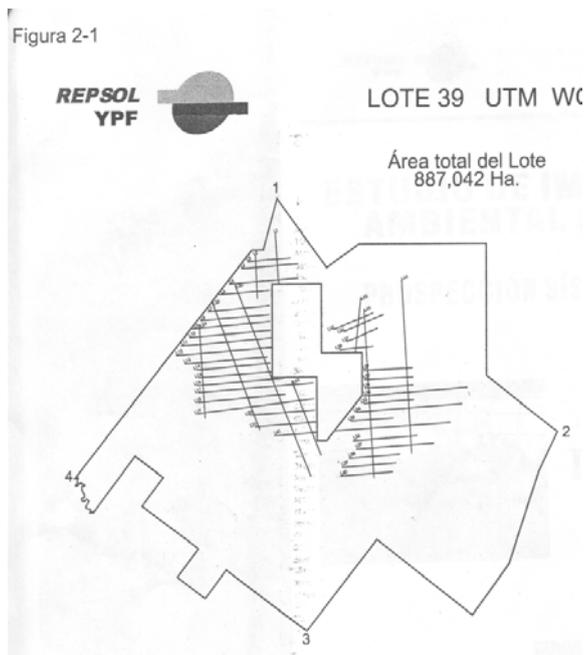


Figure 3: Seismic lines in Block 39. Block 67 is visible inside Block 39¹⁷

In October 2008, Repsol's management announced that it intended to start production in Block 39 in late 2012 or early 2013. In 2008, the company was expecting to invest USD 80 million in the block on top of previous investments in 2005 and 2007 totalling USD 90 million. By 2012 the long-term development investments are forecast to total USD 467 million.¹⁸ The Council assumes that these amounts reflect Repsol's share of the joint venture's investments.

5 Indigenous peoples in voluntary isolation in Block 39

According to Peruvian legislation, indigenous peoples living in isolation are defined as ‘indigenous people who have not developed social relations with other members of the national community’ and who have decided to live isolated from the rest of society.¹⁹ Indigenous peoples who live in voluntary isolation²⁰ have made a voluntary and conscious decision to live without any contact with the outside world. This decision is based on earlier encounters with society, often dating many years back, which proved catastrophic for the group because of violent conflict and/or high mortality resulting from disease introduced from the outside. A report on indigenous peoples living in isolation in Peru states among other things that ‘Isolation should not be seen, then, as a situation of having had “no contact” with society but a decision on the part of peoples to refuse to establish permanent relations with other social players as a way of ensuring their physical and cultural survival.’²¹ The decision to remain isolated can thus be the group’s survival strategy. For indigenous peoples living in isolation, the right to self-determination means showing absolute respect for their decision to remain in isolation.²² This principle is the foundation for the government’s policy in, for example, Brazil and Ecuador.

Some 100 groups of uncontacted indigenous peoples are thought to exist in South America, of which some 69 are found in Brazil, around 15 in Peru and 2 in Ecuador.²³ They are nomads who sustain themselves through hunting, fishing and by using the forest’s resources as well as growing food for their own consumption. Their relationship to – and intimate knowledge of – their environment enables them to be self-sufficient and maintain a sustainable way of life through generations. They are also extremely vulnerable however, and in many cases on the verge of extinction.²⁴

As the exploitation of resources in the Amazon has increased in scale, these indigenous peoples’ habitats have shrunk as has their access to food. When strangers such as oil workers or loggers enter their territories they flee deeper into the forest to avoid contact. According to an expert, this is increasingly a problem: ‘Indigenous groups avoiding contact are under greater pressure, with their “safe” territories becoming smaller and smaller. For decades voluntary isolated peoples have retreated further and further into headwater regions, where hunting and fishing resources and good agricultural land are scarcer, because these were the places free of outsiders, now even these are being made available for exploitation.’²⁵ It can also lead to their intruding upon other indigenous peoples’ territories, which in turn may cause conflict and the outbreak of diseases.

5.1 CONSEQUENCES OF CONTACT

All stages of the oil-extraction process, from seismic surveys to production, will affect the habitat and lifestyle of indigenous peoples, especially those in voluntary isolation. Operations take place across large areas deep in the Amazon jungle and include the construction of roads and helicopter platforms, the drilling of test wells, and the clearing of long strips of forest for seismic surveys requiring the use of explosives. The phase of seismic surveys is understood to be particularly damaging to uncontacted indigenous peoples as it involves the large-scale displacement of many people along seismic lines that

cross substantial parts of their likely habitat.²⁶

The introduction of diseases and violent confrontations with outsiders are the main threats to the survival of isolated indigenous peoples. Uncontacted indigenous peoples have not developed immunity to viruses or bacteria that cause common diseases such as influenza, chickenpox, the common cold, pneumonia or diarrhoea. Contact with outsiders will inevitably lead to the introduction of these illnesses, with fatal consequences for the tribe. It is estimated that between one third and one half of a tribe will die within the first five years following initial contact as a result of the introduction of common 'Western' diseases. In many cases the death rate is even higher, up to 80 per cent, and in certain cases whole tribes have been wiped out. It is estimated that 38 per cent of indigenous peoples in Brazil died as a result of introduced diseases between 1900 and 1957.²⁷ The possibly fatal consequences of contact with isolated indigenous peoples are well documented in scientific research showing similar consequences irrespective of country or tribe.²⁸ Health concerns were also raised by the Peruvian Ministry of Health²⁹ and the Peruvian Ombudsman in their assessment of the impact of the so-called Camisea project, where precisely the consequences for indigenous peoples living in voluntary isolation were under evaluation.³⁰

The negative consequences of a first contact are long-lasting. It takes generations for a recently-contacted population to develop a collective immune system against introduced diseases. This means that people continue to fall ill and die many years after the first contact is established. Another prevalent consequence seems to be that those who survive are traumatized. The tribe's social structure disintegrates, and the decimation of the group means that the tribe no longer is able to carry out traditional rituals and tasks. This may lead to hunger and malnutrition in the rest of the tribe, further weakening its resilience. Children are especially vulnerable when adults become too sick to go hunting, fishing or harvesting.

There is also a risk that violent conflict may erupt between intruders and uncontacted indigenous people. The causes of conflict may be numerous, for example if the presence of strangers threatens the indigenous peoples' ability to hunt, fish or harvest, or if settlements are threatened. Indigenous people may also enter work-camps to get knives and tools that are useful to them. Throughout history there have been reports of numerous violent conflicts, several of which have been fatal (see section 5.2.8).³¹ A concern that this may happen in Block 67 was also expressed in Perenco's environmental impact assessment (see section 5.2.3).

Consequences of contact	
Some typical examples of the consequences of contact with indigenous peoples in voluntary isolation in Peru are shown below:	
Indigenous group	Consequences
The Nanti	First contact by missionaries at the end of the 1960s. During the next 10 years there were repeated outbreaks of respiratory diseases and diarrhoea. The Peruvian Ministry of Health estimates that 30-60 per cent of the population died in those years. The death rate, caused by introduced pathogens, is still high – especially among children. Between 1997 and 2003, 55 children under 5 years of age died in a population of 255 in two villages. This is far higher than the tribe's normal infant mortality rate. ³²
The Nahua	First contact with outsiders occurred in 1984, initially as a result of Shell's oil exploration in the area (which led to the discovery of the Camisea field). Repeated contact through illegal logging thereafter. Anthropologists have since estimated a mortality rate of 40-60 per cent during the first years of contact. The population was reduced from 300-400 to 180 two years after contact had been established. ³³
The Cashinahua	Contact with the outside world was first established at the end of the 1940s. In 1951, two researchers contacted the tribe. They held meetings in eight villages with an estimated total population of 450-500. 'Within weeks of the Schultz and Chiara visit, an epidemic swept the tribe wiping out 75-80 percent of the adult population' ³⁴

5.2 THE QUESTION OF WHETHER UNCONTACTED PEOPLES ARE PRESENT IN BLOCK 39

Indications of the existence of uncontacted indigenous people in Block 39, between the Napo and Tigre Rivers, have been known for more than ten years. There are nevertheless differing views as to whether indigenous peoples actually live in voluntary isolation in Block 39 today. As discussed below, the Council has examined a considerable amount of material in order to gain an understanding of these views.

5.2.1 ANTHROPOLOGICAL STUDIES

Anthropological investigations and AIDSESEP's request for the creation of a territorial reserve

Two anthropological field studies carried out in 2003 and 2004 in the Napo Basin (*la Cuenca del Napo*) and the neighbouring Tigre river-system provide detailed testimonies of encounters with – and sightings of – uncontacted indigenous peoples in Block 39 as well as their traces, including footprints, trails and abandoned dwellings.³⁵

According to these reports there are several groups of isolated peoples living in this area. It is thought that these groups are related to the Arabela-, Iquito-, Taushiro-, Zápara and Waorani- peoples. There is also the possibility that a group of descendants of the Abijira- people, which until recently were considered to be extinct, may exist within the block.³⁶ The report concludes that these peoples move around an area covering the drainage basin of the middle and upper regions of the Curaray River, the rivers Arabela, Aushiri, Pucacuro, Tangarena, and the upper part of the Napo and Tigre rivers.³⁷

The results from both surveys were assembled in the document *Estudio Técnico. Delimitación territorial a favor de los pueblos indígenas en situación de aislamiento voluntario. Napo, Tigre, Curaray, Arabela, Nashiño, Pucacuro* for the Peruvian indigenous organization *Asociación Interétnica de Desarrollo de la Selva Peruana* (AIDSESEP) This

report formed the basis for AIDSESEP's application to the regional office of the Ministry of Agriculture in Loreto in July 2005, requesting the creation of a special reserve for uncontacted indigenous peoples. This proposed *Reserva Territorial Aislados Napo Tigre* would have overlapped Block 39.

The Peruvian indigenous organizations AIDSESEP and ORPIO conducted new surveys in the area from October to December 2008 in order to strengthen the factual basis for creating the reserve. The report cites 21 testimonies that describe sightings and traces of indigenous peoples living in voluntary isolation in the area. Eleven of these had previously been referred to in AIDSESEP'S *Estudio Técnico*, but others were new. The sightings span a period of 30-40 years. Six of the sightings are from 2005-2008.³⁸ The most recent observation is from a named worker from the company Global Geophysical Services (Repsol's contractor). He testifies to having sighted what is thought to be uncontacted Indians and their traces during the course of his work in the Curaray-Arabela area in Block 39³⁹

Sightings and traces of indigenous peoples living in voluntary isolation in Block 39
Drawing on testimonies for the period 1995-2008, the two aforementioned reports include the following references (from about 70 observations):
<ul style="list-style-type: none"> ■ Village residents in Buena Vista have made two separate sightings of naked indigenous people close to the so-called Pirana oil field. These were not recognised as locals and were therefore thought to be uncontacted people by the witnesses. ■ Footprints identified by Buena Vista villagers as not belonging to any of the villagers. ■ A logger observed a barefooted naked man with long hair in the vicinity of the Buena Vista village. ■ Loggers in block 67 discovered two crossed spears driven into the ground. This was interpreted as a warning sign left by uncontacted people. There were also reports of items having gone missing – apparently stolen – from the logging camp. ■ Loggers and fishermen living between the Dorada and Pirana oil fields have reported footprints and trails that cannot be attributed to local inhabitants. ■ Sightings of naked people bathing in a stream near the village of Buena Vista. ■ Evidence of habitation – including cooking utensils and equipment used for hunting – discovered by anthropologists in connection with a demographic study to be used in environmental impact assessments for Block 39.

Sightings in the two anthropological reports from 2003 and 2005 have been mapped in relation to the oil blocks in figure 4 below.

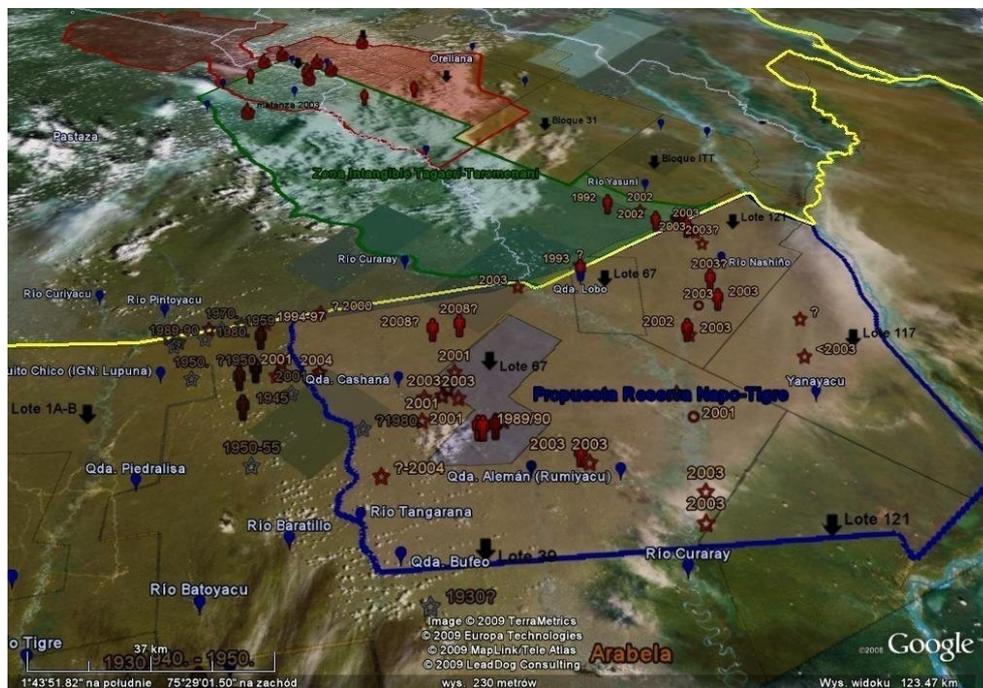


Figure 4: Observations and sightings of uncontacted peoples in the Napo Tigre area. Blocks 39 and 67 are shown.⁴⁰

The studies referred to above are controversial. One of the main critics of these studies, the anthropologist Carlos Mora Bernasconi, has particularly criticised the anthropologists' competence and methods, though he does not seem to reject that there may be indigenous peoples in voluntary isolation in Block 39.⁴¹ In 2009, another group of anthropologists evaluated the same study (*Estudio Técnico*) and concluded that the conclusions and methods in the study were scientifically valid.⁴²

The study carried out by the consultancy Daimi in block 67

In September 2008, the Peruvian consulting firm Daimi published a study concerning the possible existence of indigenous peoples in voluntary isolation in block 67. The study was commissioned by Perenco, the operator at block 67, and was carried out by a multidisciplinary team of experts including specialists from the government agency in charge of indigenous groups in Peru INDEPA (*Instituto Nacional de Desarrollo de Pueblos Andinos, Amazónicos y Afroperuanos*), the National University of the Peruvian Amazon in Iquitos, the National University of San Marcos in Lima, as well as Daimi's own consultants.⁴³

The report, which is partly based on field studies, concludes that there is no conclusive evidence of the existence of uncontacted indigenous peoples in the area under investigation and that no traces or occurrences similar to those found in Ecuador during the last 60 years have been registered.⁴⁴ The field study, however, appears to have been limited to the headwaters of the Arabela River.⁴⁵

There are reports that not all of the specialists who participated in the study agree with its conclusion. According to an article in the British newspaper *The Guardian* in July 2009,

the field investigations found physical evidence of the existence of uncontacted indigenous peoples, but this was allegedly not reflected in the report's conclusion.⁴⁶ Despite numerous attempts, the Council has not been able to contact the experts who spoke to the newspaper.

The Council has received information from another Peruvian anthropologist who was engaged by Daimi to write a summary of the study at an early stage. In his summary, he emphasized two aspects which should be studied further: the existence of signs that a group of uncontacted indigenous people belonging to the Tagaeri or Taromenane tribes had moved from Ecuador to Peru around 2002 following a conflict between indigenous tribes that had killed 30 members of their group; and testimonies by hunters who had found traditional poison containers (used for hunting wild animals) in the Pucacuro area, possibly indicating the presence of uncontacted peoples. These aspects were not included in the final summary of the report.⁴⁷

The Council has commissioned an evaluation of Daimi's report based on its methodology and findings. Daimi's study is related to AIDSESEP's report, and its aim is to confront the theories in AIDSESEP's report with the findings in Daimi's research. The study claims to encompass the same geographical area as the technical study, but field-studies are limited to a smaller area around the Arabela River, itself a minor part of the area suggested as a reserve.

Daimi's consultants used archaeological methodology, including excavations, to find cultural indications that uncontacted indigenous people live in this area (such as trails, settlements, agricultural areas and pottery remnants).⁴⁸ According to the study, the findings indicate that the area under assessment has previously been used by indigenous people but has been uninhabited for many years. The study therefore concludes that there are no longer uncontacted indigenous people in the area. Experts contacted by the Council who have evaluated the study question the use of archaeological methodology to evaluate the existence of uncontacted indigenous people, as this methodology is of little relevance considering their lifestyle. As with other uncontacted groups in Peru where information is available, any uncontacted groups living in this area will have experienced important changes to their living areas, their settlement patterns and their lifestyles as a result of external influences. The need for a high level of mobility and rapid displacement in order to avoid situations where contact with outsiders may take place implies that indigenous people can be expected to remain only a relatively short period of time in any given place. This implies that houses and huts will be erected in such a way as to be dismantled quickly and without a trace, while pottery may not necessarily be used. They will avoid making clearings in the forest and make a point of hiding their presence. Lifestyle changes of this kind are known from other isolated indigenous peoples in South America.⁴⁹ This may also imply that there probably will not be much for archaeological methodology to uncover, especially given the warm and humid climate in which organic material decomposes quickly.

In general, it would seem as though the consultants who carried out this study did not have the necessary knowledge and understanding of the particular challenges affecting uncontacted indigenous people, which have changed their way of life. This is particularly the case as concerns the fact that indigenous people are almost always fleeing from outsiders.⁵⁰ The methods used to sustain the report's conclusions do not seem adequate

to elucidate whether there really are uncontacted indigenous people in the area. Together with information suggesting that the report does not reflect a possible presence of uncontacted indigenous people, the conclusion that there are no uncontacted indigenous people in the area is not, in the Council's opinion, convincing.

5.2.2 OTHER OBSERVATIONS OF PEOPLES LIVING IN VOLUNTARY ISOLATION

Already in 2003, Repsol was made aware of the very likely existence of uncontacted groups in Block 39. In August that year, Repsol participated in a community workshop together with PeruPetro and representatives from the government and local authorities in the village of Santa Clotilde to promote the oil activities. Of the four working groups discussing different subjects, one was dedicated to uncontacted indigenous peoples (*Los No contactados*). In the conclusions of the group, in which local people participated, reference is made to two groups of uncontacted peoples – *Los Pananujuri* and *Los Patas Rojas*. Signs of a group of about 40 people, believed to be uncontacted, had been observed 2-3 weeks before the workshop. The working group recommended that Repsol make a plan in case of encounters with uncontacted indigenous peoples, and that forced contacts or searches be avoided. The group also recommended that the government initiate investigations carried out by anthropologists with experience on uncontacted peoples.⁵¹

The Council is aware that workers contracted by Repsol (through the company Global Geophysical Services) are said to have reported sightings of locals thought to be uncontacted indigenous peoples in Block 39, as well as their traces, as recently as July 2008. These sightings are said to have taken place between 15 and 20 km from the border with Ecuador as they crossed the seismic lines.⁵² Whether this refers to the same person as mentioned in Orprios' report (see 5.2.1), is unclear.

The Ministry of Energy followed up on this observation and conducted hearings and interviews with field workers, local residents and researchers from the American Smithsonian Institute who were working in the area. The report concludes that there are no indications that indigenous people in voluntary isolation live in the area. The report also appears to put more emphasis on assessing Repsol's anthropological contingency plan than on identifying the individuals who claimed to have sighted the uncontacted indigenous people in order to verify whether the observations actually had taken place.⁵³

Different sources have informed the Council that employees from the oil companies and their subcontractors have observed traces of uncontacted indigenous peoples, but that these have not been reported.⁵⁴ Because the extractive activities provide local jobs and wages, neither the workers nor the local populations have an incentive for reporting observations as these would entail the stopping of operations.

Repsol confirms that any observations of uncontacted indigenous peoples are to be reported, and that employees and subcontractors are instructed to do so. The company's contingency plan requires three witnesses to verify an observation before it is reported, which may lead to not all observations being registered.

5.2.3 ENVIRONMENTAL IMPACT ASSESSMENTS FOR BLOCK 39 AND BLOCK 67

Before companies can engage in exploration activities and drill test wells, they need to prepare an environmental impact assessment. This must include an assessment of the effects on indigenous peoples living in the area. Such studies have been conducted for both Block 39 and 67.

Two environmental impact assessments (EIAs) were submitted by Repsol to Peru's Ministry of Energy and Mines in 2007. Both were rejected on the grounds that they did not sufficiently take into account the possible effect of the company's operations on the health of uncontacted peoples living within Block 39.⁵⁵

The initial EIA for Repsol's seismic surveys was completed in April 2006.⁵⁶ In its evaluation of this EIA, Peru's *Instituto Nacional de Recursos Naturales* (INRENA)⁵⁷ states the following: 'The southern section of Block 39 overlaps the Pucacuro Reserved Zone as well as the proposed Tigre Napo Territorial Reserve for the native communities who live in the upper valleys of the Napo, Tigre and Pucacuro rivers.' INRENA goes on to state that there is a need to 'precisely quantify the impact of the environmental control measures which will be implemented, since the seismic project will affect the area where indigenous peoples in voluntary isolation are present (the upper valleys of the Napo, Tigre and Pucacuro Rivers).' Section 30 of the INRENA report goes on to recommend that the Ministry of Energy and Mines should consider taking into account the opinion of several leading environmental protection organizations 'because peoples in voluntary isolation are present in the area of the project, both inside and outside the Pucacuro Reserved Zone.'⁵⁸

In Repsol's second EIA, which was submitted in February 2007, the company makes reference to the existence of references indicating that uncontacted indigenous people live in the area: 'There are references pointing to the existence of uncontacted indigenous peoples (indigenous peoples living in voluntary isolation, as they are currently referred to). Reports from local residents and professionals allude to the presence of various groups of isolated indigenous peoples near the headwaters of the Curaray, Tigre and other rivers on the Ecuadorean side of the border. On the Peruvian side, the presence of two groups has been determined: the Feromenami and the Tagaeri.'⁵⁹ Any risk of contact with these groups requires following the procedures established in the Environmental Management Chapter of this EIA.⁶⁰

During the consultations process, both national and international NGOs asked the Ministry of Energy and Mines to reject the impact assessment and stop the activities in Block 39. The Ministry did not do so, but ordered Repsol to prepare a contingency plan to protect the indigenous peoples who may be living in voluntary isolation.⁶¹ In compliance with the order, Repsol submitted its contingency plan, '*Plan de Contigencia para pueblos indígenas en aislamiento voluntario y/o no contactados*' on 10 July 2007.⁶² The Ministry approved the environmental impact assessments for the seismic surveys and test drillings within a week of each other in November and December 2007.⁶³

In its reply to the Council, Repsol points out that there have always been indications of the existence of isolated indigenous groups in the area. The fact that these are referred

to in the EIA is not, according to Repsol, a confirmation of the existence of uncontacted people in the block, nor should their statements be interpreted in this manner.⁶⁴

In June 2010, the Ministry of Energy approved the environmental impact assessment for a new round of seismic surveys in the block.

It is relevant to include Block 67 in an assessment of the presence of uncontacted indigenous populations in block Block 39, within which Block 67 is located. The question of uncontacted indigenous people was also treated in the environmental impact assessment for Block 67, for which Barret was responsible at the time. Among other questions treated was the possibility of violent conflict arising with outsiders. The EIA warns of the risk that the company's workers may encounter people living in voluntary isolation, and of the consequent need to employ and educate indigenous workers who can act as translators.⁶⁵

5.2.4 PERUVIAN AUTHORITIES' APPROACH TO UNCONTACTED INDIGENOUS PEOPLES

Peruvian authorities recognize that uncontacted indigenous peoples exist. During the last 17 years, the authorities have established five reserves in the Amazon to protect indigenous peoples living in voluntary isolation. In 2007 Peru passed a specific law to protect uncontacted indigenous peoples.⁶⁶ Said law prohibits any activity within the reserves, with the exception of the exploitation of resources of national interest (including petroleum). In April 2009, the government adopted a regulation defining the development of Block 67 as being of national necessity and interest.⁶⁷ All existing territorial reserves overlap areas where oil and gas exploration or production are on-going.

Ministerio de Energía y Minas

In a position paper from the Ministry of Energy and Mines about uncontacted indigenous peoples in Blocks 39 and 67, the Ministry bases itself on a court ruling (described in further detail below) stating that there is no proof of indigenous peoples living in voluntary isolation in this area.⁶⁸ At the same time, the Ministry requires that companies prepare anthropological contingency plans in areas where there are indications that uncontacted peoples exist, including block 39. Thus the Ministry does not reject the possibility that there may be uncontacted indigenous peoples within the block.

Ministerio de Salud

The Peruvian Ministry of Health has established guidelines and instructions to prevent or reduce negative health impacts in the event that contact with isolated indigenous peoples occurs.⁶⁹ The Ministry states that a fundamental premise of the guidelines is the avoidance of all contact, adding that the general principle for any action which will affect these indigenous peoples must be to respect their right to a life in isolation, their way of life, and their right to freely decide how much contact they wish to have with the rest of society. The recognition of their existence commits the government to developing strategies designed to protect them.⁷⁰ According to the Ministry, the guidelines shall apply both in the established reserves for uncontacted indigenous peoples and in the areas that have been proposed as reserves, including the Napo-Tigre reserve in Blocks 39 and 67. The

Ministry therefore indicates that there may be indigenous peoples in voluntary isolation in these blocks and that they should be protected.⁷¹

5.2.5 THE OMBUDSMAN – DEFENSORÍA DEL PUEBLO

The Ombudsman in Peru is an independent institution established in 1993 to safeguard the population's constitutional and fundamental human rights.⁷² Against the backdrop of numerous requests from indigenous organizations in Peru for the protection of the rights of indigenous peoples in voluntary isolation, the Ombudsman conducted a survey of their situation at the beginning of the 2000s. The Ombudsman presented her investigation and assessment of the situation of indigenous peoples living in voluntary isolation in Peru in a report from 2005, including recommended measures to improve their protection.⁷³

As part of her research, the ombudsman conducted interviews in December 2002 with the inhabitants of two villages in block 39, Buena Vista and Flor de Coco. Local residents spoke of two isolated indigenous groups being present in the area – *Los Pananujuri* and *Los Aucas*. The former they believed to be related to the Arabelas, while the latter were referred to as Ecuadorians. The locals mentioned finding traces of these indigenous peoples, as well as abandoned settlements and visual contact.⁷⁴

The Ombudsman states that contact with isolated indigenous peoples is a cause of grave concern and that the presence of strangers poses a significant risk to the health and survival of these peoples. She points out that of all the stages of oil activities, the exploration phase is considered to carry the greatest risk for the uncontacted peoples because seismic surveys imply large work crews moving across wide areas, which can easily put them in contact with these groups.

According to the Ombudsman, awarding concessions to exploit natural resources in territories of isolated indigenous peoples is a violation of the right to life, health and property.⁷⁵ Moreover, she highlights the fact that uncontacted indigenous peoples' right to self-determination and their choice to live in isolation must be respected, and that mechanisms to avoid contact must be implemented. In her recommendations, the Ombudsman writes that uncontacted indigenous peoples should not only be given reserves and land rights but their possibilities of survival and isolation must also be ensured. On the basis of her own assessments, AIDSESEP's study and information in the companies' EIAs, the ombudsman recommends specifically that studies should be carried out to delimit and create a reserve for the isolated peoples who have their habitat between the rivers Arabela, Napo and Curaray,⁷⁶ which is the area covered by Blocks 39 and 67. These recommendations have not been carried out.⁷⁷

5.2.6 COURT DECISIONS

In 2007, the indigenous organisation AIDSESEP filed a lawsuit against Repsol, Conoco Phillips, Perenco and the Ministry of Energy and Mines in a local Peruvian court in Iquitos in order to stop the activities in blocks 39 and 67.⁷⁸ The case has since been through a further two courts, *La Sala civil de la Corte Superior de Justicia de Loreto* in Iquitos,⁷⁹ and the Supreme Court, which ruled in June 2010.⁸⁰

All of the courts have rejected AIDSESEP's demands. The central question the courts

have considered is whether the extractive activities in the block constitute an immediate threat against the constitutional rights of uncontacted people: the right to life, health, cultural integrity and property (living areas/territories).⁸¹ This is deemed a precondition in order to stop the exploration and establish a permanent reserve in the area. All of the rulings state that there is not sufficient or decisive proof of the existence of uncontacted indigenous people in Blocks 39 and 67, and that there consequently cannot be said to exist an immediate threat to the rights of indigenous peoples. Nevertheless, the first verdict states that: ‘This does not in any way imply that the oil companies and the State should not take preventive measures to avoid any kind of damage to the rights of un-contacted indigenous peoples in the event that these should exist and in case any contact with these should actually take place, but it does mean that in the current circumstances it is not possible to prohibit or suspend the hydrocarbon-related operations in plots 39 and 67, as the plaintiff requests.’⁸²

The Appellate Court decided that hydrocarbon-related operations do not in themselves breach the fundamental rights of uncontacted people. The Court meant that the companies’ contingency plans for possible contact with isolated indigenous people cannot be taken to imply that there are isolated indigenous people in the area, but rather should be viewed as a fulfilment of legal requirements. The Court also pointed out that this decision was in accordance with the recommendations in the Ombudsman’s report, which according to the Court had not recommended ceasing activities in areas with isolated indigenous peoples but rather that robust procedures be developed in order to stop the activity from harming indigenous peoples.⁸³

The Supreme Court explains that it has gone through an important number of studies, documents and explanations, including the Ombudsman’s report, in order to determine whether there exists an immediate threat to the indigenous people. In this regard, the Court states that it has had to work with ‘documents, decisions and/or investigations which present conflicting conclusions’.⁸⁴ The Court also explains that procedures in constitutional processes do not allow for a comprehensive gathering of new evidence.⁸⁵ These processes, the aim of which is to provide protection against impending damage, would be delayed by comprehensive evidence-gathering and would thereby be rendered ineffective in regards to their intention. The Court concludes that the investigations which have been carried out in the block the last few years do not give sufficient grounds to infer the existence or inexistence of indigenous people in the area. ‘This leads the Court to decide that [...] a *habeas corpus* process is not the adequate venue for controversial matters such as those being treated here because it lacks an evidentiary stage [...]’.⁸⁶

The Supreme Court also elaborates on the concept of immediate threat. In order for there to be a threat against a fundamental human right, the threat must be real and impending, ‘that is, the damage must be real, effective, tangible, concrete and inescapable, thereby excluding damages which cannot be objectively evaluated.’⁸⁷ Consequently, a real threat must be based on real events, and there must be an immediate threat of damage taking place in the immediate – rather than distant – future. The future damage must indisputably imply the breach of protected rights, it must be possible to perceive the damage precisely, and it must inevitably imply a concrete violation. The Court decided that the

documentation presented in the case to a greater degree concentrated on proving the existence of indigenous people and to a lesser degree discussed the dangers they are facing.⁸⁸

The court's minority, Judge Lando Arroyo, arrives at the same conclusion as the court's majority but elaborates on a number of points in his reasoning. Among other things he points out the state's responsibility to carry out studies of indigenous peoples in voluntary isolation: 'This does not, however, preclude the responsibility of the State through the institutions dedicated to the investigation of native forest communities, the INDEPA in particular, such that they allocate resources aimed at promoting scientific studies of those in voluntary isolation, their location, their living conditions, the territories which they occupy, their languages, culture and ways of life. It is the duty of the State within the framework of the effective protection of these peoples' rights... to carry out and promote investigations through private or public institutions in order to determine their real existence. This is part of the right that these peoples have to access the other rights they are recognised as having. In the absence of investigations making it possible to gain knowledge of their real existence and needs, any discourse concerning their rights will inevitably be moot and will lack a real intention from the part of the public authorities to attend to their needs'.⁸⁹

5.2.7 THE INTER-AMERICAN HUMAN RIGHTS COMMISSION (IAHRC)

In 2007 AIDSESEP contacted the Inter-American Human Rights Commission requesting that they instruct Peru to implement so-called 'precautionary measures' and stop all planned petroleum activities in the proposed Napo-Tigre reserve in order to protect the indigenous peoples in voluntary isolation. 'Precautionary measures' are an instrument the Commission can use 'to avoid serious and irreparable harm to human rights in urgent cases.' The year before, in May 2006, the Commission ordered Ecuador to introduce such measures to protect indigenous peoples in voluntary isolation in areas adjacent to Peru (see 5.2.8).⁹⁰

The Human Rights Commission asked Peru's authorities for more information, including 'the current status of the exploration and exploitation projects located in Blocks 39 and 67, and further, the impact that such activities could have on the life, personal integrity, territory, health, environment, and culture of indigenous people in voluntarily isolation. Likewise, the government must inform the OAS regarding measures adopted by the state or that would have to be adopted to guarantee protection of indigenous people.'⁹¹ The Commission also held various hearings in the case. It is not known if or when the Commission will make a decision on the case.

5.2.8 THE PROXIMITY TO THE INTANGIBLE ZONE IN ECUADOR

Close to the border with Peru, the Ecuadorian government has established the so-called Intangible Zone, a territorial reserve for indigenous peoples living in voluntary isolation. The reserve overlaps the southern part of the Yasuni National Park. It is thought that at least two isolated indigenous groups live in this area - the Tagaeri and the Taromenane, belonging to the Waorani-linguistic family. All resource extraction is prohibited in the reserve.

IAHRCs request for precautionary measures followed a series of killings in April 2006

where members of the uncontacted Taromenani group were reportedly shot by illegal loggers in the Yasuni National Park. The numbers have not been confirmed, and reports vary from 2 to 30 people. The attack was thought to be in retaliation for the killing of two loggers a few days before. These had been attacked with spears by Taromenanis following the constant invasion of illegal loggers into their territories.⁹²

In 2007 the Ecuadorian government demarcated the reserve in response to the IAHR's requests, adding a 10 kilometer buffer zone surrounding the reserve. Road building is prohibited in the buffer zone, but oil operations are permitted.⁹³

It is the Council's understanding that Ecuadorian authorities appear to be extremely careful about carrying out activities in areas where uncontacted indigenous peoples live. In an evaluation of whether old oil wellheads should be dismantled, the Ministry of the Environment concluded that it would not recommend doing so in the area because of the risk of contributing to 'ethnocide' (*el riesgo de incurrir en el delito de etnocidio*).⁹⁴ The principle of avoiding contact is enshrined in the Ecuadorian constitution of 2008, which states that the territories of uncontacted indigenous people are impregnable, inherited properties where all extractive industry is forbidden. The state is supposed to implement measures that guarantee their lives, their right to self-determination and their desire to remain isolated, as well as implement preventive measures. 'The violation of these rights will constitute the crime of ethnocide'.⁹⁵

Government authorities also formulated an action plan to protect uncontacted indigenous peoples. This plan was adopted in 2008. The responsibility for executing the plan was given to the Ecuadorian Ministry of Justice, Human Rights and Faith, and the plan is on its way to becoming implemented. The plan is based on the principle of avoiding all contact and lists seven aims, of which one is the promotion of bilateral agreements with Peruvian authorities. Measures include holding bilateral meetings to discuss the situation of uncontacted peoples in border regions and to evaluate both countries' experiences protecting them, as well as developing a common action plan to secure the indigenous peoples' existence.⁹⁶

The need for bilateral cooperation is also emphasized in a letter from the Ecuadorian Ministry of the Environment to the Ministry of Foreign Affairs of Ecuador following the arrest of Peruvian loggers in Ecuador in July 2009. According to the letter, Ecuador is carrying out activities aimed at conserving biodiversity and ensuring the survival of isolated peoples who live in the border area, but the lack of coordination with Peruvian authorities makes controlling human activity in the border area difficult.⁹⁷ The Council is aware that a collaboration between the Ecuadorian Ministry for Cultural Heritage and the Peruvian Ministry of the Environment was initiated in mid-2009. The forest, which was the responsibility of the Ministry of the Environment, was prioritized because Peruvian authorities did not recognize the existence of indigenous people living in isolation in the border regions. The dialogue stopped once President Garcia decided to remove the forest from among the responsibilities of the Ministry of the Environment.⁹⁸

The anthropological studies from 2003 and 2005, as well as other observations presented in this recommendation, indicate that uncontacted indigenous peoples have their living areas on both sides of the border. Clearly, this seems to be a concern also for

the Ecuadorian government, which considers cooperation with Peru necessary in order to protect these peoples. Also the UN rapporteur for indigenous peoples has pointed out that only international cooperation with Peru (and Colombia) can save the Tagaeris-Taromenanes from extinction.⁹⁹

Anthropologists contacted by the Council believe that conflicts with other indigenous groups¹⁰⁰ as well as the intrusion of outsiders into their territories may actually have caused groups of uncontacted people to move southwards (in the opposite direction of where the killings took place), towards Peru.¹⁰¹ As late as in August 2010, the Ecuadorian Ministry of the Environment registered testimonies from witnesses who had seen uncontacted indigenous peoples less than 80 km away from the Peruvian border.¹⁰² The area where the authorities refrained from removing old oil wellheads because they found settlements belonging to uncontacted indigenous peoples are even closer, a mere 50-60 km from the border. As the border in these remote areas is not a physical barrier, there is little to stop indigenous peoples from moving between the two countries.

5.3 THE ROLE OF THE MULTISECTORIAL COMMISSION IN PERU

The law for the protection of indigenous peoples in voluntary isolation in Peru and its regulations establish procedures and responsibilities for the identification of indigenous peoples and the establishment of territorial reserves.¹⁰³ The law was adopted in 2007.

In order for indigenous peoples in voluntary isolation to obtain recognition as such, a so-called supreme decree is required. This in turn must be based upon a study conducted by the Multisectorial Commission for the Protection of Indigenous Peoples in Voluntary Isolation and Initial Contact. The study must contain evidence of the existence of indigenous peoples in voluntary isolation, their identity and estimates as to their population's size and territories. It must also include environmental, legal and anthropological assessments and reflect the views of a number of ministries including the ministries of health, energy and mining. The study must be evaluated and approved by INDEPA. The approved study is the basis for a government decree recognising the uncontacted indigenous peoples in question. Once the government decree has been adopted, the work to create a territorial reserve can begin.¹⁰⁴

The Commission is chaired by a representative from INDEPA and includes a representative from each of the ministries of agriculture, health and education, as well as regional and local authorities and two representatives from faculties of anthropology from a private and a public university respectively. The Ombudsman has observer-status. INDEPA acts also as secretary to the commission. Indigenous peoples are not represented on the Commission.

The responsibility to investigate whether indigenous peoples in voluntary isolation exist in Peru thus lies with the Multisectorial Commission. To the Council's knowledge, the Commission so far has not conducted any studies to determine whether isolated indigenous groups exist in any part of Peru.

The Peruvian government has previously established five territorial reserves for indigenous peoples in voluntary isolation. The first was created in 1990 and the last one in 2002. All the reserves were created upon the initiative of indigenous organizations, including

FENAMAD (AIDSESEP's regional organization) and CEDIA (Centre for the Development of the Amazonian Indigenous Peoples). In collaboration with Peruvian authorities, these organizations prepared the studies and the technical basis for the establishment of the reserves (including the identification of the indigenous peoples and the demarcation of their territories). No new reserves have been created after the law on isolated indigenous peoples came into force in 2007.

AIDSESEP submitted its application for the creation of a reserve for uncontacted indigenous peoples in the Napo-Tigre area to the Ministry of Agriculture in Loreto in 2005, apparently following the same procedure as in previous cases. The authorities did not assess the application at that time, nor has it since been considered by the commission.

In June 2009, the secretary for the Multisectorial Commission carried out an evaluation of AIDSESEP's *Estudio Técnico*. The secretary sent the report back to AIDSESEP because the study had not followed the necessary formal and administrative procedures, nor did it satisfy the scientific requirements concerning methodology. The secretary concluded that the study did not provide grounds to determine whether or not uncontacted indigenous people live in the Napo-Tigre area.¹⁰⁵ The Ombudsman has informed the Council that neither the study nor the secretary's evaluation have been considered by the Commission.¹⁰⁶ Both the Ombudsman and AIDSESEP have complained about the administrative procedures followed and have asked that the Commission evaluate the case.¹⁰⁷ The Council has written to the Commission and asked for information about the case. In his response to the Council, INDEPA's director confirms the developments of the case and writes that it currently is not possible to confirm or refute the existence of indigenous people in voluntary isolation in the area Napo-Tigre-Curaray. He also states that 'our institution considers that it is very important to verify the realities on the ground, but limited economic resources hinder us from carrying out these activities.'¹⁰⁸

5.4 ADDITIONAL INFORMATION THAT IS RELEVANT FOR THE COUNCIL'S ASSESSMENT

The Council finds it pertinent to consider two additional factors of relevance for this case: The way in which the existence of uncontacted indigenous peoples is mapped and evaluated in Brazil (the country with most experience in this field), and the work of the Office of the UN High Commissioner for Human Rights producing guidelines for the protection of indigenous peoples in voluntary isolation and in initial contact in the Amazon and El Chaco.¹⁰⁹

Mapping uncontacted indigenous peoples in Brazil

The majority of uncontacted indigenous groups live in Brazil. The Brazilian Directorate for Indian Affairs, *Fundação Nacional do Índio* (FUNAI), under the Ministry of Justice, has extensive experience on the identification and protection of indigenous peoples in voluntary isolation.

FUNAI's department for isolated indigenous peoples, the so-called *Coordenação Geral de Índios Isolados*, is responsible for the identification of isolated peoples, for monitoring their situation in the jungle, and for implementing measures to protect them. FUNAI's regional units, so-called *Frentes De Proteção Etno-Ambiental*, have their own experts who

collect information and carry out field-studies. This is necessary in order to evaluate the existence of uncontacted indigenous peoples in a certain area. The Council has communicated with FUNAI and it is the Council's understanding that its investigations are based on the following course of action:

If there are indications of the existence of uncontacted groups in an area, further information is gathered including stories, testimonies and observations by local people, workers or other indigenous groups. This information is used to establish so-called reference areas (*Referências de Áreas de Presença de Índios Isolados e de Recente Contato*). There are currently 69 such areas in Brazil. In these areas, imminent threats against the isolated indigenous peoples are also identified and the need for protective measures is assessed.

Further investigations in the reference areas are carried out by FUNAI's experts at the regional units.¹¹⁰ They conduct field investigations, including overflights, to find traces of the uncontacted peoples such as settlements, tools, footprints or other signs of their existence. All research is based on the premise of 'no contact'. In addition to identifying the group, population size and the size of their living areas are estimated. Field investigations may last 2-5 years and be very resource-demanding.

If the field investigation confirms the existence of uncontacted indigenous peoples, territorial reserves are established. These reserves are intended to protect the isolated indigenous peoples; other activities are not permitted inside the reserve. There are currently six such reserves in Brazil.

The description above indicates that FUNAI's procedures for proving the existence of isolated indigenous peoples involve three phases: An initial collection of information and the creation of reference areas as well as a threat-assessment; field investigations; and, finally, the establishment of a territorial reserve. It also appears that the studies which have been carried out in Block 39 would most likely correspond to the first phase of this procedure. As such they would only be a starting point for further investigations to determine the existence of uncontacted peoples in the block.

Office of the UN High Commissioner for Human Rights - Draft guidelines on the protection of indigenous peoples in voluntary isolation and in initial contact

In December 2005, the UN General Assembly adopted the Programme of Action for the Second International Decade of the World's Indigenous People. This programme included two specific recommendations concerning indigenous peoples in voluntary isolation and in initial contact: establishing a global mechanism to monitor the situation of indigenous peoples in voluntary isolation and in danger of extinction and, at the national level, 'that a special protection framework for indigenous peoples in voluntary isolation should be adopted and that Governments should establish special policies for ensuring the protection of indigenous peoples with small populations and at risk of extinction'.¹¹¹

In 2007, the Office of the High Commissioner for Human Rights began developing guidelines for the protection of peoples in voluntary isolation and initial contact. The aim of the guidelines is to serve as a framework for the different actors working on this issue in South America. They are meant to be used as an 'instrument for better contextualizing

international law with a view to protecting these peoples, given their extreme vulnerability and high risk of extinction.’ Governments of seven countries in the Amazonas region (but not Peru) have participated in this work together with civil society, including indigenous peoples’ organizations, experts, and bilateral and multilateral agencies. In 2009, the draft guidelines were submitted to the Expert Mechanism on the Rights of Indigenous Peoples, and the guidelines are planned to be finalized in 2010.

The guidelines operate under the premise that contact with isolated indigenous peoples must be avoided. This also applies to investigations aimed at determining their existence and the territory they inhabit. ‘In no case should lack of contact be regarded as proof that such peoples are not present in a given area.’¹¹²

The guidelines also focus on the right to self-determination, which in this case means respect for these peoples’ decision to remain in isolation. This requires the government to implement measures ‘to prevent outsiders or their actions from entering into situations that could affect or influence, either accidentally or intentionally, persons belonging to indigenous groups in isolation.’¹¹³ According to the guidelines, any contact which is not initiated by the indigenous peoples themselves must be regarded as a violation of their human rights, and forced or unwanted contact should be subject to prosecution under national criminal laws. Moreover, ‘In this connection, bearing in mind the knowledge accumulated so far on the effects of forced contact, in certain circumstances such contact could be considered a form of the international crime of genocide.’ The guidelines also state that governments should apply the precautionary principle in their policies to protect isolated indigenous peoples and their human rights: ‘They require that all actions in relation to indigenous people in isolation and in initial contact take a preventive approach, in view of the catastrophic consequences of delaying action until after their human rights have already been violated.’¹¹⁴

Although these draft guidelines do not entail any legal obligations for governments or other actors, the Council still finds the content of the guidelines relevant to its considerations. The guidelines have been developed in a consultation process in collaboration with governments, experts and civil society in the Amazon region who are all well familiar with this complex topic. The guidelines provide a thorough background for why the protection of isolated peoples against unwanted or forced contact is necessary, as well as explaining the need for a preventive approach. In the Council’s view this may be particularly relevant in a situation where the existence of uncontacted peoples is likely but not proven.

6 The Council on Ethics’ contact with the companies

The Council has communicated with the partners of the joint venture on several occasions during the course of the investigation.

On 20 February 2009, the Council sent a letter to Repsol requesting information on the activities taking place in the block and the measures implemented to avoid contact with people living in voluntary isolation within the block. Repsol responded to the Council on 12 March 2009. Following further investigations, another letter was sent to Repsol

and its partners providing them with an opportunity to comment on the Council's draft recommendation. The Council received Repsol's response on 13 October. ConocoPhillips (at the time still a partner in the joint venture) responded on 12 October and Reliance Industries on 14 October 2009. Upon the companies' request, members of the Council and its Secretariat held meetings with ConocoPhillips on 12 December 2009 and Repsol on 14 January 2010.

Following the meetings with the companies, the Council decided to go through all of the material again. Based on this, and following the introduction of new information, the Council considered that there continued to be reasons to recommend exclusion. A new draft recommendation was sent to all the companies in the joint venture on 14 October 2010. Repsol and Reliance responded on 5 and 4 November 2010 respectively. ConocoPhillips informed the Council on 25 October that it had completed the sale of its portion of the block and that it would leave the joint venture on 31 December 2010. The Council then decided that the recommendation should not include ConocoPhillips.

The Companies' responses

The companies' main argument is that there is no proof that indigenous peoples in voluntary isolation exist in the block. This is highlighted in all the companies' letters. In its first reply to the Council, dated 12 March 2009, Repsol makes reference to the court rulings in 2008 (discussed here in section 5.2.6): 'Allegations of the presence of people living in isolation in this block have been presented by the Interethnic Association for the Development of the Peruvian Forest (AIDSEP) to the Civil Court of Maynas, and later to the Court of Loreto. Both courts have ruled that the alleged evidences do not demonstrate the existence of these communities; however, the court of Loreto demands some special measures to be taken just in case these communities could exist. We have incorporated these measures into an Anthropological Contingency Plan with clear description of functions, expertise and responsibility allocation, needed to put it into practice, and we have established specific measures to prevent any possible contacts and to minimize the risks would eventually any contact take place.'

Repsol also commented the Ombudsman's assumption concerning the existence of isolated indigenous people in Block 39: 'The report includes the Block 39 in a table along with recognized territorial reserves like the Kugapakori Nahua, and the Murunahua. They include the Arabela and Auca (Huaorani) people as if they were uncontacted indigenous groups in Perú. The fact is that Arabela live in Perú in daily contact in the villages of Buena Vista and Flor de Coco, and the Auca (Huaorani) live in Ecuador and we do not know any references on them living in Peruvian territory.'¹¹⁵

The lack of evidence is the main point in the companies' response to the Council of October 2009. The companies refer to the ruling of the courts (*Corte de Iquitos* and *Segundo Juzgado Civil de Maynas*) as well as the Multisectorial Commission's assessments. According to the companies, all of these conclude that there is insufficient evidence proving the existence of isolated peoples in Block 39.¹¹⁶ In addition, Repsol emphasizes that a worker's observation of an uncontacted indigenous person in 2008 could not be verified by the Ministry of Energy's investigation. Repsol also points out that staff from the

Smithsonian Institute in Washington carried out biodiversity studies along the seismic lines inside Block 39 on Repsol's behalf without having found any traces of uncontacted peoples.

Repsol believes that the company has done its best to clarify the possible existence of uncontacted indigenous peoples in the block. According to Repsol, recurring references to people who affirm having observed uncontacted peoples can be explained by 'observations or sightings generations ago, which still remain in the popular imagery.'¹¹⁷

Repsol has communicated to the Council that it does not reject the possibility that isolated indigenous peoples could live in – or transit through – the area. However, the company believes that such a possibility is extremely low and fully compatible with its operations in Block 39 and the full respect of human rights, something its contingency plan would ensure.¹¹⁸

In its response to the Council of 5 November 2010, Repsol criticizes the fact that the Council builds on a precautionary principle in its evaluation (see chapter 7): 'We respect the right of the Council to recommend exclusion based on that said "precautionary approach" but, in doing so, you will be sending public messages of Repsol to be related with human rights violations, and that will actively inflict Repsol an unfair and unjustified reputation loss.'

In its response of 4 November 2010, Reliance Industries also maintains that as long as there is no evidence of the existence of uncontacted indigenous people in the block, their human rights cannot be violated: 'Hence, it may be a misapprehension to consider that there exists an unacceptable risk of complicity in human rights violation as the self isolated indigenous communities do not exist in the Block area.' Reliance also rejects allegations of any kind of human rights violations, 'and in the event of there being any form of evidence to show the existence of self isolated indigenous people, Reliance shall, *suo moto* immediately take all necessary steps and measures to protect such people, respect their decision to live in isolation and preserve their integrity and culture.'

7 The Council's assessment

Repsol and Reliance Industries are partners in a joint venture which carries out oil-exploration activities in Block 39 in the Peruvian Amazon. The Council has assessed whether the joint venture's operations are in conflict with the guidelines for exclusion and observation's point 2.3 under the criterion for human rights violations.

Although Repsol is the operator, the Council finds that the partners in the joint venture are equally involved in the operations. The partners have the same number of representatives on the operating committee, and consequently exert considerable influence on the operations. Repsol is the majority owner of the block, but needs the support of one of the partners to make decisions. In the Council's view this entails that all partners in the joint venture are directly involved in the oil-exploration activities in Block 39.

Regarding the presence of peoples living in voluntary isolation in Block 39 The crux of this case is the uncertainty around whether indigenous peoples actually live in voluntary isolation in Block 39. The information available is partially conflicting and

its quality varies. Much of the evidence presented is testimonial in nature, something that may be perceived as less credible than first-hand observations. At the same time, it will always be a challenge to prove the existence of people who do not wish to be seen and who conceal their own presence. According to experts on uncontacted indigenous peoples, an initial assessment of the existence of such peoples must often be based on indications. Such indications may be footprints and other signs, such as abandoned settlements/encampments, chance encounters, accounts of attacks, stories of sightings told by other indigenous peoples in the same region and individuals who have left the isolated group. Collecting this kind of evidence also seems to be the first step taken by Brazilian authorities when they launch an investigation to determine the existence of uncontacted peoples in an area. In the Council's view, the anthropological studies that have been performed seem credible and indicate that uncontacted peoples have been present in the area where Block 39 is located. It also appears that the uncontacted peoples occasionally sighted in Block 39 and adjacent areas are probably nomadic or semi-nomadic, and transit through the area rather than remaining sedentary.

More recent observations have been reported but are controversial. Peru's Ministry of Energy and Mines has investigated one such observation, but in the Council's view the Ministry's investigation seemed to have had a somewhat different focus than verifying the veracity of the observations. The conclusion that there are no indications of uncontacted indigenous peoples in the area is therefore not convincing.

Several anthropologists with good knowledge of the situation in the Napo-Tigre area have informed the Council that there have been observations of traces of uncontacted peoples in recent years, but that not all of these have been reported. This appears to have been the case with the so-called Daimi report (see section 5.2.1), used as evidence of the absence of uncontacted peoples in block 67 *inter alia* in the court cases mentioned above (see section 5.2.6). There are also indications that workers and local people have observed signs of uncontacted indigenous people, but that these have not been reported to the companies. Because exploration activities provide local employment opportunities, there are few incentives for locals or workers to report on traces of uncontacted peoples insofar as this would entail the stopping of operations and the loss of salaries. Moreover, Repsol's contingency plan requires that three witnesses confirm an observation before it is reported.

When it comes to evaluating the existence of uncontacted indigenous people in the area, the Council is of the opinion that it is important to note the location of Block 39 on the north-western border with Ecuador. On the Ecuadorian side of the border, the authorities have established a territorial reserve to protect indigenous peoples living in voluntary isolation. This reserve borders with Peru, and observations of uncontacted indigenous people are found quite close to the border. According to anthropologists contacted by Council, it is likely that indigenous groups have moved south and over the Peruvian border as a result of attacks against uncontacted indigenous peoples in the northern part of the reserve in Ecuador. The Council emphasizes also the fact that Ecuadorian authorities have stated the necessity of cooperating with Peru to protect these indigenous groups because they live in the border regions. There is no doubt that uncontacted indigenous people cross the boundaries of the reserve in Ecuador. For example,

there are reports that uncontacted indigenous people have been observed in oil blocks in Ecuador outside the reserve.¹¹⁹ Given that the border with Peru is not a physical barrier and the fact that these indigenous groups are nomads, the Council considers it very probable that indigenous groups also can cross the Peruvian border.

The Council notes that Peru's authorities seem to have differing views on the possible existence of uncontacted indigenous peoples in Block 39. While the Ministry of Health indicates a possibility that there may be indigenous groups in voluntary isolation in these blocks, the Ministry of Energy and Mines maintains that there have been no sightings to confirm their existence during the last ten years. The Ministry of Energy and Mines nevertheless requires that companies operating in Block 39 have contingency plans in place in areas where there are indications of the existence of uncontacted indigenous groups. The Ministry of Energy and Mines also rejected Repsol's environmental impact assessment twice, among other things because insufficient consideration had been given to the possible presence of uncontacted indigenous peoples in the area. The Ombudsman stated that there were sufficient signs of indigenous peoples living in Block 39 already in 2006 and recommended carrying out more in-depth investigations into their possible existence. This recommendation has not been followed.

When stating that the existence of uncontacted peoples in the block is not proven, the partners of the joint venture refer to the rulings on the lawsuit that AIDSESEP brought against the companies and the Ministry of Energy and Mines. The central question which the courts assessed, however, was whether oil operations in the Blocks 39 and 67 constitute an imminent threat to uncontacted indigenous peoples' human rights. As regards this question, the court concluded that there lacked sufficient proof of these peoples' presence, and there was therefore no imminent threat which could legitimate illegalising activities in the area. Based on the Supreme Court's decision, the Council assumes that only severe and concrete incidents similar to the killings in Ecuador can be considered imminent threats. This has obviously not been the case in blocks 39 or 67. The Council nevertheless notes that the Supreme Court also found that the investigations carried out by the different parties have not been conclusive in either direction. In the Council's view, the Supreme Court's decision is more balanced than what the companies claim.

The companies also note in their responses to the Council the decision by the Multisectorial Commission to send AIDSESEP's *Estudio Técnico* back to the organisation because of methodological weaknesses and the absence of evidence confirming the existence of indigenous peoples in isolation in the Napo-Tigre area. The Council is nevertheless aware that the Commission itself has not assessed the case; the assessment and decision referred to by the companies were carried out by the Commission's secretary without the adherence of the Commission. The Commission has not evaluated AIDSESEP's study or followed up on the situation in the area through new investigations. This must be seen in light of the fact that according to the law, it is the Commission's mandate to carry out studies to determine the existence of uncontacted peoples.

As far as the Council can see, none of the many actors and investigators behind the material to which the Council has had access rejects the possibility that indigenous peoples may live in voluntary isolation in Block 39. There are, however, differing opinions as to

the probability of this being the case. Nearly 75 per cent of the Peruvian Amazon has been tendered as oil exploration concessions, of which the great majority overlap indigenous peoples' territories and in some cases also areas inhabited by uncontacted indigenous peoples. Promising oil discoveries have been made in both Block 39 and Block 67, and both the companies and the authorities view the oil activities as valuable. At the same time there is strong opposition against the government's oil policy, not least among indigenous organizations who see that indigenous territories and their ways of life can be threatened by the oil operations. This seems to have been an important element behind the NGOs' efforts to establish the Napo-Tigre reserve to protect the uncontacted indigenous peoples in the area. It is natural that these differing priorities also will affect the actors' understanding of the probability of uncontacted indigenous groups living in the area.

The question of the existence of uncontacted indigenous peoples in Block 39 is clearly controversial. In this regard the Council finds it noteworthy that neither the government nor the companies have initiated systematic scientific studies with the aim of verifying the existence of isolated indigenous peoples in this area. Thorough field studies such as those FUNAI carries out in Brazil are lacking in this case. The question of these peoples' existence cannot, therefore, be unequivocally answered. To the Council's knowledge, there are no indications that the government or the companies will initiate further investigations.

Allowing oil exploration activities to be carried out in an area where there are indications of uncontacted peoples is not, in the Council's opinion, in line with the recommendations outlined in the draft guidelines of the Office of the Human Rights Commissioner. These clearly recommend a precautionary approach until the situation is clarified because of the serious consequences that contact with uncontacted indigenous peoples would entail.

The Council's task is to assess the risk of future breaches of the Fund's guidelines. As part of this assessment the Council must adopt a position on whether it is probable that uncontacted indigenous peoples live in block 39. Based on an overall assessment of the available information, the Council concludes that there is a probability that uncontacted peoples are present in the block. The existing uncertainty emanates from the lack of necessary and thorough on-the-ground investigations aimed at determining the presence of these peoples. Insofar as necessary investigations have not been carried out, the Council on Ethics will let this count against those who gain from the question remaining unresolved.

The question of human rights violations

There does not seem to be any scientific disagreement about the fact that outsiders' contact with isolated indigenous groups leads to the introduction of new diseases and that this is a serious threat to their existence. History has shown that said contact has long-term and irreversible consequences for whole cultures, in addition to the suffering inflicted on families and individuals. The Council attaches importance to the fact that this seems to be the most important reason why for example the Peruvian Ministry of Health advises against any contact with isolated indigenous people. It seems also to be the reason why the Brazilian Directorate for Indian Affairs, FUNAI, changed its policy in order to protect – and avoid any contact with – indigenous people living in voluntary isolation. In light of the fatal and long-term consequences caused by any contact with the

outside world, the Council considers that provoking any such contact, which furthermore is unwanted on the part of the indigenous peoples, is tantamount to serious violations of human rights. This is in accordance with the assessment of the Office of the High Commissioner for Human Rights, which determined that forced or undesired contact with uncontacted indigenous peoples violates their human rights.

Complicity in serious or systematic human rights violations

According to the Ethical Guidelines, in order to ascertain any risk of complicity in serious or systematic human rights violations there must be a direct link between the company's operations and the relevant violations. The company must also have been aware of the violations but have omitted to take steps to prevent them; there must be an unacceptable risk either that the violations are presently taking place or will take place in the future.

In the Council's view, there can be no doubt that the exploration activity undertaken by Repsol and Reliance Industries in Block 39 contributes to increase the risk that indigenous peoples, who may be living in voluntary isolation within the block, will come into contact with outsiders. The Council notes in particular that the exploration phase seems to be particularly harmful to uncontacted peoples. There can thus be no doubt that there is a connection between the companies' operations and the risk of violations taking place.

Repsol believes that its contingency plans will prevent violations of human rights in the event of contact with uncontacted indigenous groups in the block. The Council is aware that the contingency plan is in accordance with the government's requirements. Even though the plan aims at protecting uncontacted indigenous people, a number of the measures will require establishing actual contact. This would be contrary to the principle that all contact must be avoided. According to the contingency plan, an investigation team should be sent to the area where signs of uncontacted indigenous people have been observed. In the event of sightings, the community relations supervisor should try to establish oral communication in order to gather information. These measures can be dangerous for the indigenous people and for the company's employees. The indigenous people will be exposed to bacteria and viruses which could have catastrophic results on the tribe, while violent conflict could arise.

The Council considers that the contingency plans adopted by Repsol will be insufficient to avoid contact since it is the presence of the work crews *per se* that poses the biggest threat to the uncontacted peoples. The Council attaches importance to the fact that Peru's health authorities state that all contact with indigenous peoples in voluntary isolation must be avoided and that the extraction of natural resources, including oil operations, is among the activities that can cause such contact to occur. In the Council's view, it seems to be virtually impossible to combine concern for the uncontacted indigenous peoples' life and health with oil exploration in block 39, insofar as this takes place within their territories.

The exploration activities in Block 39 are on-going. The Council has concluded that there is a probability that uncontacted indigenous people live in the block; there is consequently also a risk of contact being established between the company's workers and the indigenous people in voluntary isolation. Given that the ensuing damage could be extremely serious, the Council on Ethics considers that the GPF's continued ownership

over Repsol and Reliance Industries would amount to an unacceptable risk of contributing to severe violations of human rights. The Council recommends that these companies be excluded from the Government Pension Fund Global.

8 Recommendation

The Council on Ethics recommends the exclusion of Repsol YPF and Reliance Industries from the investment universe of the Government Pension Fund Global.

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

- 1 See for example the Council on Ethics' recommendation regarding Total, available at www.etikkradet.no.
- 2 Finer, Matt, Clinton N. Jenkins, Stuart L. Pimm, Brian Keane and Carl Ross 2008: Oil and gas projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples. In *PLoS one August 2008, volume 3, Issue 8, e2932*, available at <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0002932>.
- 3 See footnote 2.
- 4 Repsol YPF is an international, integrated oil and gas company with operations in more than 30 countries. Originally Repsol was a Spanish state-owned company. It was privatized in 1993 and in 1999 it acquired the Argentine oil company YPF, www.repsolypf.com.
- 5 Reliance Industries Limited (RIL) is India's largest private sector company with businesses in the energy and materials value chain. The company has oil and gas exploration assets in India, as well as in 12 other countries, including Peru. As mentioned, the company purchased a 10 per cent interest in block 39, see <http://www.ril.com>.
- 6 Smithsonian Institute and Repsol YPF PowerPoint Presentation *Conservation Partnership In Peru: A Biodiversity Action Plan for Sensitive Environment*, available at: http://intranet.iucn.org/webfiles/ftp/public/ForumEvents/E0834/Final%20Document/834_Guinae_P_Energy%20or%20Biodiversity%20-%20Both,%20please!.pdf.
- 7 Repsol YPF S.A Form 6 K Report of Foreign Issuer to the US Securities and Exchange Commission for month of September 2010, available at http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHTML1?ID=7453762&SessionID=HwUbHCgZHm9trP7.
- 8 Information provided by the companies.
- 9 See footnote 6.
- 10 See footnote 6.
- 11 http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site-en/importantinformation/block+maps/cont_blookmaps.
- 12 Perenco is a private company in which the Fund has no shares.
- 13 Smithsonian Institution and Repsol YPF PowerPoint Presentation *Conservation Partnerships In Peru: A Biodiversity Action Plan for a Sensitive Environment*.
- 14 Repsol YPF / GEMA 2007: *EIA SISMICA 2D (1 000 Km) LOTE 39, Cap. 2.0 - Descripción del Proyecto*.
- 15 Repsol's letter to the Council 13 October 2009.
- 16 Ministerio de Energia y Minas: *Resolucion Directoral No 193 - 2010 MEM/AAE, 27 Mayo 2010*.
- 17 Repsol YPF / GEMA 2007: *EIA SISMICA 2D (1 000 Km) LOTE 39, Cap. 2.0 - Descripción del Proyecto*.
- 18 "Repsol YPF Describes Peru Block 39 Plans" *Business News Americas*, October 20, 2008.
- 19 LEY N° 28736: *Ley para la protección de pueblos indígenas u originarios en situación de aislamiento y en situación de contacto inicial, artículo 2*, available at <http://www.spda.org.pe/portal/cd-ambiental/documentos/LEY%20NO%2028736.htm>.
- 20 The term 'uncontacted' is used synonymously with the terms 'in voluntary isolation' or 'isolated' throughout this document.
- 21 Huertas Castillo, Beatriz 2004: *Indigenous people living in voluntary isolation in Peru*, p 21. IWGIA Document No

- 100- Copenhagen, and La Defensoria del Pueblo: El Informe Defensorial N° 101 *Pueblos indígenas en situación de aislamiento voluntario y contacto inicial*. Resolución Defensorial N° 032-2005-DP; 15 November 2005.
- 22 Human Rights Council 2007: *Draft Guidelines on the Protection of Indigenous Peoples in Voluntary Isolation and in Initial Contact of the Amazon and El Chaco*. A/HRC/EMRIP/2009/6.
- 23 Brackelaire, Vincent 2006: *Situación de los últimos pueblos indígenas aislados en América Latina. (Bolivia, Brasil, Colombia, Ecuador, Paraguay, Perú, Venezuela)*, available at http://www.trabajoindigenista.org.br/Docs/Diagn%C3%B3stico%20Pueblos%20Aislados_Vicent_jan06.pdf and communication with Beatriz Huertas Castillo 11.October 2010.
- 24 See footnote 22.
- 25 Napolitano, Dora A. 2007: Towards understanding the health vulnerability of the indigenous peoples living in voluntary isolation in the Amazon Rainforest: Experiences from the Kugapakori Nahua Reserve, Peru; in *EcoHealth* Volume 4, Number 4, 515-531, p 520.
- 26 Huertas Castillo, Beatriz 2004: *Indigenous people living in voluntary isolation in Peru*, p 78. IWGIA Document No 100- Copenhagen, and La Defensoria del Pueblo: El Informe Defensorial N° 101 *Pueblos indígenas en situación de aislamiento voluntario y contacto inicial*. Resolución Defensorial N° 032-2005-DP; 15 November 2005.
- 27 See for instance Ribeiro, Darcy 1996: *Os Índios e a Civilização- A integração dos indígenas no Brasil moderno* Cia. das Letras.
- 28 See for instance footnote 25, including the bibliography, and footnote 26. John Hemming 2003: *Die If You Must*, provides an extensive account of impacts on Brazilian Indians. In 2003 the Peruvian Ministry of Health investigated the outbreak of deaths and diseases in the Nanti communities and concluded that the Camisea project's activities and presence were linked to the outbreak of diseases. Repsol is a partner in the Camisea project. Ministerio de Salud 2003: *Pueblos en situación de extrema vulnerabilidad: El caso de los Nanti de la reserva territorial Kugapakori Nahua, Rio Camisea, Cusco*.
- 29 Ministerio de Salud; Oficina General de Epidemiología 2003: *Pueblos en situación de extrema vulnerabilidad: El caso de los Nanti de la reserva territorial Kugapakori Nahua; Rio Camisea, Cusco*. Peru/MINSA/OGE-04/009& Serie Análisis de Situación de Salud y Tendencias.
- 30 Defensoría del Pueblo: Informe Defensorial No 2003; *El Proyecto Camisea y sus efectos en los Derechos de las Personas*, available at <http://www.defensoria.gob.pe/>.
- 31 Huertas Castillo, Beatriz 2004: *Indigenous people living in voluntary isolation in Peru*, pp 82-83. IWGIA Document No 100- Copenhagen.
- 32 Ministerio de Salud 2003: *Pueblos en situación de extrema vulnerabilidad: El caso de los Nanti de la Reserva territorial Kugapakori Nahua, Rio Camisea*, Cusco. Lima; and Stephens, Carolyn et al 2006: Disappearing, displaced, and undervalued: a Call to action for Indigenous health worldwide, in *The Lancet* vol. 367 2019-2028.
- 33 See footnote 25, including bibliography.
- 34 Dwyer, Jane Powell (ed.) 1975: *The Cashinua of Eastern Peru*, Rhode Island: Haffenreffer Museum of Anthropology and Schultz, Harald and Wilma Chiara 1955: *Informações sobre índios do Elto Rio Purus, Revista de Museu Paulista* vol. 9. Both referred to in Survival International 2008: *First Contact and Disaster*. Memo to the Council.
- 35 Rogalski, Filip and Marek Wolodzko 2003: *Informe sobre la presencia de grupos indígenas en situación de aislamiento voluntario en la cuenca de los ríos: Medio y alto Curarau, Arabela, Nashiño y alto Napo. Estudio antropológico basado en el trabajo de campo (octubre – diciembre 2003)*. A cooperation between the Asociación Interétnica de Desarrollo de la Selva Peruana and the Equipo Para el Estudio de las Culturas de América Latina de la Escuela de Etnología y Antropología de Cultura de la Universidad Adam Mickiewicz de Poznan, Polonia. Iquitos 2003. The second study was undertaken by Filip Rogalski between March 2003 and May 2004. The findings of both studies were presented in the AIDSESEP 2003 document: *Estudio Técnico. Delimitación territorial a favor de los pueblos indígenas en situación de aislamiento voluntario. Napo, Tigre, Curaray, Arabela, Nashiño, Pucacuro*.
- 36 AIDSESEP 2003: *Estudio Técnico*, p.1 paragraph 7. According to the Estudio Técnico and other information obtained by the Council, these peoples belong to two different linguistic families the Záparos and the Waoranis. Both families include different ethno-linguistic groups. The Arabela, the Iquito, the Taushiro, and the Zapara are believed to belong to the Zápara-family while the Abijiras belong to the Waorani-family. The Ombudsman's report (see section 5.2.5) refers to Arabela (Zápara family) and Auca groups (Waorani- family). Because the isolated indigenous peoples in the Napo-Tigre area have not identified themselves, (the names of these groups are ethnonyms given by other groups), the names of the groups may vary. This is not unusual. For example, the Matsigenkas living in isolation at Urubamba River in Southern Peru had two different names: Kirineri and Kugapakori. Communications with Beatriz Huertas Castillo, 26 August 2010.
- 37 AIDSESEP 2003: *Estudio Técnico*, pp 1-2, point 8: *‘Los pueblos indígenas en aislamiento se desplazan por toda la zona superior del río medio Arabela, el medio Curaray [] y el medio y alto Yanayacu y Aushiri; por el medio y alto Baratillo (Grande), Tangarana y el divortium aquarum entre el río Pucacuro y las cabeceras del río Nanay, donde aprovechan los recursos del bosque a través de prácticas de subsistencia como la caza, pesca, recolección y manejo de cultivos.’*
- 38 ORPIO-AIDSESEP 2008: *Proyecto de Fortalecimiento de la Propuesta de Creación de la Reserva Territorial Napo-*

- Tigre*. Iquitos, December 2008.
- 39 See footnote 38.
- 40 Google Earth Image prepared by Lukasz Krokoszynski, anthropologist.
- 41 Mora Bernasconi, Carlos 2007: *Opinión Antropológica sobre el Estudio Técnico*. PeruPetro tasked Bernasconi with carrying out a critical evaluation of AIDSESP's *Estudio Técnico*, and his assessment was intended to provide Peru Petro with a basis on which to make a decision. PeruPetro is the state-owned oil company in charge of negotiation and participating in contracts for finding and extracting petroleum. Available at http://www.perenco.com/front/file/Opini%C3%B3n_Antropol%C3%B3gica_sobre_estudio_de_AIDSESP_por_C._Mora.pdf.
- 42 Krokoszynski, Lukasz, Mariusz Kairski, Pawel Chyc and Iwona Stoinska Kairska 2009: *Algunas observaciones referentes a los estudios sobre la presencia de las poblaciones aisladas en la zona fronteriza peruano-ecuatoriana*, available at <http://reducayali.blogspot.com/2009/06/napo-tigre-estudios-sobre-la-presencia.html>.
- 43 Daimi 2008: *Investigación Interdisciplinaria Antropológica en torno a Pueblos Indígenas Aislamiento Voluntario y Contacto Inicial. Propuesta de la Reserva Napo-Tigre-Curaray*, available at <http://www.perenco.com/front/file/IN-FORMEFINALPIAV.pdf>. The study was commissioned by Perenco.
- 44 See footnote 43, pp 122-124.
- 45 Daimi July 2008: *Mapa 01 Rutas de Investigación*.
- 46 The Guardian 4th July 2009: *Rumble in the Jungle* by Rory Carroll, available at <http://www.guardian.co.uk/environment/2009/jul/04/peru-amazon-rainforest-conservation>.
- 47 Communication with anthropologist Adolfo Lopez by email and telephone 17 and 24 September 2010.
- 48 See footnote 43 p. 8.
- 49 Beatriz Huertas Castillo, Memo to the Council, 8 November 2010. For example, the isolated Pano groups on the border with Brasil stopped building large houses and buildings in forest clearings. Instead they build smaller huts which can be hidden under vegetation and which are difficult to find. The Mascho Piros and other groups stopped cultivating large areas and went over to smaller "kitchen gardens" because of how often they had to move, while the Mayoruna groups stopped using clay products.
- 50 Beatriz Huertas Castillo, Memo to the Council, 8 November 2010.
- 51 *Resumen del Seminario taller: Promoción de la actividad de hidrocarburos en comunidades indígenas* (Santa Clotilde, 11-13 August 2003).
- 52 Survival International: *Reports of uncontacted Indians seen by oil workers* 24. juli 2008 <http://www.survival-international.org/news/3540>.
- 53 Ministerio de Energía y Minas: Informe No 043-2008-MEM-OGGS/SL *Supuesto incidente en el Lote 39*. OGGG Report No 043-2008-MEM-OGGS/SL,
- 54 References on file with the Council.
- 55 This is described in detail in: Ministerio de Energía y Minas INFORME No 045-2007-MEM-AAE/GR. *Asunto: Evaluación del Estudio de Impacto Ambiental Programa de 12 Pozos Exploratorios Raya 2X, 3X, 4X, 5X, 6X, 7X; Buena Vista 2X; Abalón 1; Cuvina 1X; Caballa 1X y Arabela 2X y 3 X-Lote 39*, 22 June 2007.
- 56 Ministerio de Energía y Minas INFORME No 0080-2007-MEM-AAE/CIM. *Asunto: Evaluación del Levantamiento de Observaciones del Estudio de Impacto Ambiental (EIA) Prospección 2D-Lote 39*, 14 August 2007.
- 57 INRENA is part of the Ministry of Agriculture in Peru.
- 58 Ministerio de Agricultura/ Instituto Nacional de Recursos Naturales (INRENA): *Observación Técnica No 363-06-INRENA- OGATEIRN-UGAT; EIA Prospección Sísmica 2D (1000 km) LOTE 39*. 22 December 2006.
- 59 Feromenami is another name for the Taromenane. The Tagaeri group belong to the Waorani family, which is the same linguistic family to which uncontacted indigenous groups in Ecuador belong, see footnote 36.
- 60 Repsol YPF/ GEMA 2007: EIA SISMICA 2D (1 000 Km) LOTE 39, Cap. 2.0 - *Descripción del Proyecto.. 'Se tiene referencia de la existencia de grupos de indígenas no contactados(indígenas en aislamiento voluntario como se denomina actualmente). A este respecto, existen informes de moradores y profesionales que señalan la presencia de varios grupos de indígenas no contactados en las cabeceras de los ríos Curaray, Tigre y otros cursos fluviales, del lado de la frontera con Ecuador. Para el caso del Perú, se establece la presencia de dos grupos denominados: Feromenami y Tagaeri. En el caso de la posibilidad de establecer contactos al respecto se explica según las situaciones en el Capítulo 5.0 (Manejo Ambiental) del EIA.'*
- 61 See footnote 56, p. 30 point 56.
- 62 Repsol Exploración Perú, Sucursal del Perú: *Plan de Contingencia para pueblos indígenas en aislamiento voluntario y/o no contactados*, version 02, EP.MASC.049l.
- 63 Ministerio de Energía y Minas: Resolución Directoral No 958-2007-MEM/AAE 28 de noviembre de 2007 (seismic surveys) and Ministerio de Energía y Minas: Resolución Directoral No 976-2007-MEM/AAE 3. Diciembre 2007 (exploration wells).
- 64 Repsol' letter to the Council 13 October 2009.
- 65 Barrett Resources (Perú) LLC/ GEMA 2007: EIA SISMICA 3D - LOTE 67 5-1 CAP. 5.0 *Plan de Manejo Ambiental*, section 5.11.15 *Medidas de Contingencias Antropológicas para contactos con poblaciones en aislamiento voluntario* (p.

- 98): *'En el transcurso de las actividades de la sísmica en las áreas del Lote 67, probablemente los trabajadores tengan un encuentro con estas poblaciones no contactadas, debido a la continua movilidad de estos últimos. Por ello, es necesario que para la campaña sísmica y posteriormente para la etapa de perforación, se deba contar con varios trabajadores indígenas, que puedan oficiar de traductores; los que serán entrenados por el personal de Relaciones Comunitarias de BARRETT.'*
- 66 *Ley para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento y en Situación de Contacto Inicial*, LEY N° 28736, available at <http://www.acnur.org/biblioteca/pdf/6757.pdf>.
- 67 Decreto Supremo No 044-2009: *Declaran de necesidad e interés nacional el desarrollo del Proyecto del Lote 67*, available at http://www.perenco-peru.com/fileadmin/user_upload/Project_of_national_necessity_and_interest.pdf.
- 68 Ministerio de Energía y Minas, Oficina General de Gestión Social: *Actividades petroleras y reservas indígenas: Intereses y Posiciones*, available at http://www.minem.gob.pe/archivos/dgss/notas/Comentarios_Lotes3967.pdf The Ministry states: *'...que ya exigía la presentación de un Plan de Contingencia Antropológico para aquellas áreas donde existen inicios de la presencia de estos pueblos humanos.'*
- 69 Ministerio de Salud 2008: *Norma y Guías Técnicas en Salud. Indígenas en aislamiento o contacto inicial*. Lima. Available at http://www.ins.gob.pe/insvirtual/images/otrpubs/pdf/Normas_Guías_Indigenas_final.pdf.
- 70 See footnote 69, p. 23, pp 52-53.
- 71 See footnote 69, p. 13: *'Reserva Territorial del Estado en favor de los pueblos Arabela, Pananujuri, Taushiro, Huarorani, Taromenane, Iquito-Cahua, en los ríos Curaray, Napo, Arabela, Nashiño, Tigre y Afluentes, en el departamento de Loreto, Frontera con Ecuador.'*
- 72 <http://www.defensoria.gob.pe>.
- 73 Defensoría del Pueblo: El Informe Defensorial No 101 *Pueblos Indígenas en situación de aislamiento voluntario y contacto inicial*. Resolución Defensorial No 032-2005-DP. Lima 15 November 2005, available at <http://www.defensoria.gob.pe>.
- 74 Defensoría del Pueblo: Programa de Comunidades Nativas. *Informe de Viaje No 001-2003/DP-PCN. Informe del viaje realizado al distrito del Napo*. 14 de enero de 2003.
- 75 See footnote 73. *'Estos derechos de aprovechamiento otorgados a terceros constituyen una violación a los derechos a la vida, salud y territorio de estos pueblos indígenas, por lo que es necesario garantizar al máximo la integridad de estas áreas, ya que no se trata de pueblos que puedan ser reubicados para la explotación de tales recursos.'*
- 76 See footnote 73, p. 67, paragraph 3.3.
- 77 Communication with the Ombudsman, 8 November 2010.
- 78 AIDSESEP vs Ministerio de Energía y Minas, Perenco Peru Limited del Peru, Perupetro S.S., Repsol Exploración Peru Sucursal del Peru: *Acción de Amparo. Sentencia. Resolución Número 46*, Corte de Iquitos 1. Julio 2008. Expediente 2007-00919-0-1903-JR-CI-2, available at <http://www.reports-and-materials.org/Perenco-enclosure-Iquitos-court-1-Jul-2008.pdf>.
- 79 AIDSESEP vs Ministerio de Energía y Minas, Perenco Peru Limited del Peru, Perupetro S.S., Repsol Exploración Peru Sucursal del Peru: *Proceso de Amparo. Sentencia. Resolución Número 53*, Segundo Juzgado Civil de Maynas. Expediente 2008-0918-SC/2007-00919-0-1903-JR-CI-2; p 11, available at http://www.perenco-peru.com/fileadmin/user_upload/Second_instance_sentence.pdf.
- 80 Sentencia del Tribunal Constitucional Expediente No 06316-2008-PA/TC, available at <http://www.tc.gob.pe/jurisprudencia/2010/06316-2008-AA.html>.
- 81 See footnote 80, paragraph 3 point 5.
- 82 See footnote 78, paragraph 7: *'Ello no quiere decir en modo alguno que las empresas petroleras emplazadas y el Estado no deban tomar medidas preventivas para evitar cualquier tipo de afectación de derechos de pueblos indígenas no contactados en caso de que existan y se produzcan efectivamente contactos con ellos, pero esto no habilita en las actuales circunstancias a prohibir o suspender las operaciones de hidrocarburos en los lotes 39 y 67, como pretende la demandante.'*
- 83 See footnote 80.
- 84 Sentencia del Tribunal Constitucional Expediente No 06316-2008-PA/TC, paragraph 3 point 7: *'al tratarse de documentos, dictámenes y/o investigaciones que plantean conclusiones contradictorias'*.
- 85 This is further developed by the minority judge, Landa Arroyo in paragraph 3 point 10: *'... on this note, the tribunal has previously decided that 'the exceptional, urgent and swift nature of constitutional processes mean that one cannot allow for a number of evidentiary processes to take place. This because of the context in which a constitutional judge must immediately dictate an order with an aim to stop or suspend the execution of an act which violates a constitutional right, and this cannot be delayed. Consequently immediate protection cannot in principle allow procedural acts of the evidentiary kind.'*
- 86 See footnote 84, paragraph 3.8: *'Todo ello permite sostener a este Colegiado, con relación a este extremo de la pretensión, que el proceso de amparo no es la vía adecuada por carecer de estación probatoria respecto de cuestiones tan controvertidas como las expuestas, resultando de aplicación el artículo 9° del Código Procesal Constitucional.* This follows from article 9 in the *Code of Constitutional Proceedings*.

- 87 See footnote 84, paragraph 4. 12. ‘...es decir, el perjuicio debe ser real, efectivo, tangible, concreto e ineludible, excluyendo del amparo aquellos perjuicios que escapan a una captación objetiva.’
- 88 The court has also considered whether the indigenous peoples’ right to be consulted was violated in connection with the allocation of the blocks. The court concluded that the State had not consulted indigenous groups when the concessions were awarded in 1995 and 1999 and that consequently the state had acted against the constitution. The court states that indigenous peoples have an indisputable right to be consulted in accordance with ILO’s convention 169, which obliges the state to ensure that the companies in question carry out consultations even if concessions have already been granted. Paragraph 6, points 26, 27 and 30.
- 89 See footnote 84, the court’s minority (Judge Landa Arroyo), paragraph 3.11, ‘Ello no es óbice, sin embargo, para dejar establecida la responsabilidad del Estado a través de las instituciones dedicadas a la investigación de las comunidades nativas de la selva, en especial el INDEPA, a efectos de que destine recursos orientados a promover la investigación científica sobre los pueblos en aislamiento voluntario, su ubicación, condiciones de vida, territorios que ocupan, lenguas, cultura y formas de vida. Es deber del Estado, en el marco de la efectiva protección de los derechos de estos pueblos, reconocidos tanto a nivel interno como a través de documentos internacionales suscritos por el Perú, desarrollar investigaciones o promoverlas a través de instituciones privadas o públicas sobre su real existencia, como parte del derecho que tienen estos pueblos de acceder a los demás derechos que se les reconoce. Sin investigaciones que permitan conocer su real existencia y necesidades, el discurso sobre sus derechos resultará siempre vacío de contenido y carecerá de una real intención de atenderlos por parte de los poderes públicos.’
- 90 Peru received a similar request in 2007 ‘to adopt the necessary measures to guarantee the lives and personal integrity of members of the Mashco-Piro, Yora and Amahuaca tribes living in voluntary isolation in the Madre de Dios department. In particular, to adopt the intended measures to safeguard against the immediate or irreparable dangers resulting from the activities of outsiders in their territories.’ In this case illegal logging was the most serious threat, see <http://www.cidh.org/medidas/2007.eng.htm>.
- 91 IAHRC Resolución MC-129-07. The IAHRC requested the Peruvian government to provide information about “el estado actual de los proyectos de exploración y explotación petrolera ubicados en los lotes 67 y 39” and the impacts of the activities on “podrían generar en la vida, la integridad personal, el territorio, la salud, el medio ambiente y la cultura de los pueblos indígenas en situación de aislamiento voluntario”. The letter is referred to at <http://servindi.org/actualidad/2470>.
- 92 *Petición de Medidas Cautelares a favor de los Pueblos indígenas Tagaeri y Taromenani*, 1 May 2006, available at <http://www.ciudadanosporlademocracia.org/cpd/frontEnd/main.php?idSeccion=159>.
- 93 http://iopscience.iop.org/1748-9326/4/3/034005/pdf/1748-9326_4_3_034005.pdf.
- 94 Ministerio del Ambiente 2008: *Plan de Reparación Ambiental y Social (PRAS). Plan de Medidas Cautelares para la Protección de los Pueblos Indígenas Aislados. Informe Técnico sobre la Situación de Obe y Nashiño*.
- 95 Constitución del Ecuador, Article 57, available at http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf. The Penal Code was edited in 2009 as a result of this law to include the following: ‘*Quien irrespetare la autodeterminación de un grupo nacional, étnico, racial o religioso, o su voluntad de permanecer en aislamiento voluntario, incurrirá en delito de etnocidio y será sancionado con pena de reclusión menor ordinaria de tres a seis años*’ (whosoever disrespect the self-determination of a national ethnic, racial or religious national group or their wish to remain in voluntary isolation, will incur in the crime of ethnocide and will be sanctioned with the punishment of minor ordinary reclusion amounting to three to six years.) Communication with ecologist Eduardo Pichilingue, former coordinator of the Action plan for the protection of indigenous people in Ecuador, 9 November 2010.
- 96 Ministerio de Coordinación de Patrimonio Natural y Cultural: *Plan de medidas cautelares a favor de los pueblos Taromenani y Tagaeri*. Quito, Ecuador.
- 97 Letter from the *Ministerio del Ambiente* to the *Ministerio de Relaciones Exteriores, Comercio, e Integración*, dated 24 July 2009.
- 98 Communication with Eduardo Pichilingue, ecologist and Ex-Coordenador del Plan de Medidas Cautelares para la Protección de los Pueblos Indígenas Aislados del Ecuador, 9 November 2010.
- 99 Aplicación de la Resolución 60/251 de la Asamblea General, de 15 de Marzo de 2006, titulada ‘Consejo de Derechos Humanos.’ *Informe del Relator Espacial sobre la situación de los derechos humanos y libertades fundamentales de los indígenas*, Sr Rodolfo Stavenhagen. Adición Misión a Ecuador. A/HRC/4/32/Add.2 28 December 2006, paragraph 40.
- 100 The clash in 2006 is not the first time that members of the Taromenane are killed. In 2003, 26 members of the group were killed when they were attacked by a group of indigenous Huaoranis, see section 5.2.8. Killings have also been reported in 2007 and 2008.
- 101 References on file with the Council.
- 102 Ministerio del Ambiente; *Ficha de monitoreo de señales de presencia, Fecha de Registro: 13 de agosto 2010*.
- 103 *Ley para la protección de pueblos indígenas u originarios en situación de aislamiento y en situación de contacto inicial LEY N° 28736*, available at <http://www.acnur.org/biblioteca/pdf/6757.pdf>.
- 104 See footnote 103 and *Decreto Supremo* No 008-2007-MIMDES.

- 105 Comision Multisectorial: *Caso Napo-Tigre-Curaray*. Informe Técnico No 001-ST-2009. 22 June 2009.
- 106 Communication with the Ombudsman, 8 November 2010.
- 107 AIDSESEP's letter to Mr Mayta Capac Alatrístre Herrera, Executive President, INDEPA, 12 October 2009.
- 108 Letter from the Multisectorial Commission to the Council on Ethics 4 October 2010, '*nuestra Institución considera de suma importancia la verificación en campo de dicha realidad, empero, nuestra limitación de recursos financieros nos restringe en el cumplimiento de dicha actividad.*'
- 109 Human Rights Council: *Draft Guidelines on the Protection of Indigenous peoples in voluntary isolations and in initial contact of the Amazon Basin and El Chaco*. Prepared by the Secretariat. 30 June 2009. A/HRC/ENRIO/2009/6.
- 110 There are 6 such units, on in each of the following regions: Vale do Javari, Rio Envira, Rio Guaporé, Cuminap-nema, Rio Purus and Rio Madeirinha.
- 111 See footnote 109.
- 112 See footnote 109, paragraph 10.
- 113 See footnote 109, paragraph 49.
- 114 See footnote 109, paragraph 54.
- 115 Repsol's letter to the Council on Ethics dated 13 October 2009.
- 116 Repsol's letter to the Council 13 October 2009, ConocoPhillips letter to the Council 12 October 2009, and Reliance Industries' letter to the Council 14 October 2009.
- 117 Repsol's letter to the Council 13 October 2009.
- 118 Repsol Exploración Perú, Sucursal del Perú: *Plan de Contigencia para pueblos indígenas en aislamiento voluntario y/o no contactados*, version 02, EP.MASC.049.
- 119 Proaño, José and Paola Colleoni 2008: *Taromenane Warani Nani, Presencia de Pueblos Tagaeri.Taromenane Fuera de la Zona Intangible en la Amazonia Ecuatoriana*.

To the Ministry of Finance

20 June 2012

Concerning the recommendation on exclusion of Repsol YPF and Reliance Industries

The Council on Ethics makes reference to the Ministry of Finance's letter of 25 May 2012, in which the Ministry requests an update on the Council's recommendation dated 1 December 2010 on the exclusion of Repsol YPF and Reliance Industries, currently under consideration at the Ministry. The Council is asked to provide an update in view of indications that Peruvian authorities have changed their approach towards indigenous peoples. The Ministry makes special mention of the new law on the prior consultation of indigenous peoples and the fact that Peru has stated that it will consider the extraction of economically important resources and social considerations in relation to each other.

The Council on Ethics' point of departure is the assessment of concrete companies, not government authorities or their policies. The recommendation on the exclusion of Repsol and Reliance Industries was issued on 1 December 2010. Together with Petro Vietnam, the companies are partners in a joint venture that explores block 39 in the Peruvian Amazon. In May 2011, it became publicly known that Conoco Phillips had sold its share in the joint venture to Petro Vietnam, which is wholly owned by the Vietnamese Government. Conoco Phillips was not included in the recommendation because the Council was aware at the time that the company was leaving the joint venture. There have been no further changes to the joint venture.

Repsol, the operator of block 39, is planning to continue its exploration activities and drilling of test wells in the block. The company submitted an environmental impact study for further seismic studies and drilling of test wells to the authorities in April 2011. This study is still under assessment by the Ministry of Mines and Energy in Peru.¹ The environmental impact assessment states that the drilling of test wells will take place over a period of five years.² The company expects to start drilling in 2012.³

At the core of the Council's recommendation lies the question of whether or not there is a risk that indigenous peoples in voluntary isolation – so-called uncontacted indigenous peoples – live in block 39. On the basis of an overall assessment of available information, the Council concluded in its recommendation that there is a probability that indigenous people live in voluntary isolation in block 39 and that continued exploratory activity in the block entails an unacceptable risk of the company contributing to human rights violations insofar as it exposes them to contact. The Council also maintained that the uncertainty concerning the presence or otherwise of the uncontacted indigenous peoples in the block was due to the fact that necessary scientific studies had not been carried out to clarify their existence.

To the Council's knowledge, no new studies have been carried out by the company, the multisectorial commission or others to clarify whether uncontacted indigenous

people live in the block since the recommendation was issued. Likewise, there are no reports on new incidental observations of signs of uncontacted indigenous people. The factual basis for the recommendation thus remains unchanged.

The law on the prior consultation of indigenous people in keeping with ILO's convention 169 (Law nr. 29785) was adopted by Peru's Congress in August 2011. The law was positively received by many; disagreements nevertheless exist between government authorities and indigenous organisations on how the law should be implemented in order to be in line with the ILO convention, not least as concerns consultations. The law came into effect in April of this year after a multisectorial commission had drafted its regulations.⁴

The law does not apply retroactively and is consequently of little consequence for activities in block 39. The Council does not consider it relevant in this case as in fact it would be undesirable for companies to contact indigenous people in voluntary isolation in order to carry out prior consultations. As the law has only recently entered into effect, it is still too early to see what effect it will actually have in operations where, as opposed to the present case, indigenous peoples should be consulted.

The Council does not generally find it relevant to consider whether Peru's new government will give more attention to social matters in regards to extractive projects. This case is an assessment of two companies. As concerns activities in Block 39 specifically, the Council is not aware of any additional obligations imposed by the government on the company which could have an impact on the question of the existence of uncontacted indigenous peoples given that permission for the exploration of the block has been granted under the same conditions as previously. In the Council's eyes therefore, political developments in Peru concerning indigenous peoples do not appear to have any relevance for this particular case.

Based on this, the Council finds no reason to do otherwise than to maintain its recommendation on the exclusion of Repsol YPF and Reliance Industries.



Ola Mestad
Chairman of the Council on Ethics

Notes

- ¹ <http://www.minem.gob.pe/descripcion.php?idSector=2&idTitular=218>.
- ² Informe N. 200-2011-MEM-AAE/MB, 5th observation.
- ³ http://www.repsol.com/pe_es/corporacion/conocer-repsol/actividad/upstream/peru_2008.aspx.
- ⁴ <http://www.andina.com.pe/Espanol/noticia-ejecutivo-publica-reglamento-ley-consulta-previa-ampliacion-406709.aspx>.

To the Ministry of Finance

3 April 2014

Recommendation concerning Repsol S.A. and Reliance Industries Limited

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1 Summary

The Council on Ethics no longer recommends the exclusion of the companies Repsol S.A. (Repsol)¹ and Reliance Industries Limited (Reliance) from the investment universe of the Norwegian Government Pension Fund Global (GPF). On 1 December 2010, the Council on Ethics issued a recommendation to exclude Repsol and Reliance from the GPF because of the risk of contributing to serious or systematic violations of human rights in connection with the exploration for oil and gas in Peru. The Ministry of Finance has yet to conclude on this case.

The companies have taken part in a joint venture that has explored for oil and gas in block 39 in the Peruvian Amazon. Repsol has informed the Council on Ethics that the company has sold its share in the joint venture and that there is currently no ongoing activity in the block.

At the core of the Council's recommendation lies the question of whether or not there is a risk that indigenous peoples in voluntary isolation – so-called uncontacted indigenous peoples – live in block 39. On the basis of an overall assessment of available information, the Council concluded in its recommendation that there is a probability that indigenous people live in voluntary isolation in block 39 and that continued exploratory activity in the block entails an unacceptable risk of the company contributing to human rights violations insofar as it exposes them to contact. The Council also maintained that the uncertainty concerning the presence or otherwise of the uncontacted indigenous peoples in the block was due to the fact that necessary scientific studies had not been carried out to clarify their existence.

The Ministry of Finance requested an update on the recommendation in May 2012. In its letter to the Ministry of 20 June 2012, the Council on Ethics upheld its recommendation to exclude Repsol and Reliance.

Now that Repsol has sold its share in the joint venture, the risk of the company contributing to human rights violations in block 39 is no longer present. The foundation on which the recommendation on exclusion was built is therefore no longer present. As concerns Reliance, the Council will consider the risk of contributing to human rights violations when a new joint venture is established and activities in the block begin anew. The Council on Ethics does not presently recommend excluding the company from the GPF.

2 Background

Repsol is an international integrated oil and gas company listed on the Madrid stock exchange. As of the end of 2013, the GPF held shares in the company worth NOK 2.47 billion, amounting to 1.24 per cent of the company.

Reliance is listed on a number of stock exchanges in India and operates in the oil, gas and petrochemical industries. As of the end of 2013, the GPF held shares in the company worth NOK 618.7 million, amounting to 0.22 per cent of the company.

Repsol and Reliance have been partners in a joint venture that explores for oil and

gas in Block 39 in the Peruvian Amazon. Repsol is the operator. Repsol has explored the block since the middle of the 1990s and was awarded 55 per cent of the concession in 2001. Reliance holds a 10 per cent share through its subsidiary, Reliance Exploration and Production DMCC. PetroVietnam holds 35 per cent of the block.

On 1 December 2010, the Council on Ethics recommended that Repsol and Reliance be excluded from the GPFG due to an unacceptable risk of contributing to violations of human rights. At the core of the case was the question of whether or not there live indigenous people in voluntary isolation in Block 39.²

The Council wrote the following on this matter:

‘The question of the existence of uncontacted indigenous peoples in Block 39 is clearly controversial. In this regard the Council finds it noteworthy that neither the government nor the companies have initiated systematic scientific studies with the aim of verifying the existence of isolated indigenous peoples in this area [...]. The Council’s task is to assess the risk of future breaches of the Fund’s guidelines. As part of this assessment the Council must adopt a position on whether it is probable that uncontacted indigenous peoples live in block 39. Based on an overall assessment of the available information, the Council concludes that there is a probability that uncontacted peoples are present in the block. The existing uncertainty emanates from the lack of necessary and thorough on-the-ground investigations aimed at determining the presence of these peoples. Insofar as necessary investigations have not been carried out, the Council on Ethics will let this count against those who gain from the question remaining unresolved.’³

As concerns the question of human rights violations, the Council operated under the understanding that it is scientifically undisputed that contact between extraneous people and uncontacted indigenous peoples will lead to the introduction of new diseases, which poses a serious threat to their existence.

‘In light of the fatal and long-term consequences caused by any contact with the outside world, the Council considers that provoking any such contact, which furthermore is unwanted on the part of the indigenous peoples, is tantamount to serious violations of human rights. This is in accordance with the assessment of the Office of the High Commissioner for Human Rights, which determined that forced or undesired contact with uncontacted indigenous peoples violates their human rights.’⁴

The Council also concluded that there could be no doubt that the companies’ activities in block 39 contributed to increase the risk that any uncontacted indigenous groups living in the block would come into contact with extraneous people. The Council also found that Repsol’s contingency plans would be insufficient to avoid contact insofar as the very presence of workers posed the biggest threat to the uncontacted. ‘In the Council’s view, it seems to be virtually impossible to combine concern for the uncontacted indigenous peoples’ life and health with oil exploration in block 39, insofar as this takes place within their territories.’⁵ On these grounds, the Council on Ethics recommended excluding Repsol and Reliance from the GPFG as ownership of these companies would imply an unacceptable risk of contributing to serious violations of human rights.

On the request of the Ministry of Finance, the Council on Ethics provided an update of the case on 20 June 2012.⁶ The Ministry requested that the case be reconsidered in

light of ‘signs that authorities in Peru have changed their attitude towards the question of indigenous peoples’. The Council on Ethics concluded that the political developments in Peru concerning indigenous peoples did not seem to be of any consequence for this particular case. ‘Consequently the Council finds no reason to do otherwise than to uphold the recommendation on the exclusion of Repsol YPF and Reliance Industries’.⁷

3 Changes in the joint venture for block 39

In a meeting with members of the Council on Ethics in February 2014, Repsol informed the Council that it had entered into an agreement to sell its share in the joint venture in Block 39. The sale depends on the Peruvian Government’s approval. Repsol also confirmed that all operations in the block had ceased.⁸ News articles have later announced that the private company Perenco has purchased Repsol’s share in the joint venture.⁹

The Council on Ethics assumes that the sale and handover of Repsol’s share will be approved. Whether or not the agreement that regulates the partners’ roles and responsibilities in the joint venture will be changed following the inclusion of a new partner and operator is currently unknown, as is the degree to which this may have consequences for Reliance.

4 The Council on Ethics’ assessment

The Council on Ethics has assessed whether the grounds for recommending the exclusion of Repsol and Reliance remain, given that Repsol has sold its share of the joint venture. Repsol can no longer be considered to contribute to possible violations of human rights in block 39 insofar as it no longer is a partner in the joint venture. Consequently the grounds for recommending Repsol’s exclusion are no longer present.

To the Council’s knowledge there has been no new information shedding light on the existence or otherwise of uncontacted indigenous peoples in block 39. In this regard the situation remains unchanged. As there is currently no exploratory activity taking place in the block, and since the organisation of the new joint venture is as yet unknown, the grounds for Reliance’s exclusion has also changed. The Council on Ethics does not currently recommend the exclusion of the company from the fund. The Council will nevertheless reassess the risk of the company contributing to human rights violations when the new joint venture is established and activity in the block starts anew.

5 Recommendation

The Council on Ethics no longer recommends excluding Repsol S.A. and Reliance Industries Limited from the investment universe of the Norwegian Government Pension Fund Global.

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

- 1 Formerly Repsol YPF.
- 2 Indigenous people living in voluntary isolation (also known as uncontacted indigenous people) have not developed social relationships to other members of society and have taken a voluntary and conscious choice to live without contact with the outside world.
- 3 The Council on Ethics' recommendation on the exclusion of Repsol YPF and Reliance Industries Limited from the GPFG, 1 December 2010.
- 4 See footnote 3.
- 5 See footnote 3.
- 6 Letter from the Ministry of Finance to the Council on Ethics of 25 May 2012 concerning the recommendation on exclusion.
- 7 Letter from the Council on Ethics to the Ministry of Finance of 20 June 2012 concerning the recommendation on exclusion.
- 8 Meeting between representatives of Repsol and the Council on Ethics on 12 February 2014 and e-mail from Repsol to the Council on Ethics dated 10 March 2014.
- 9 See for example <http://upsidedownworld.org/main/peru-archives-76/4744-repsol-sells-oil-stake-in-isolated-indigenous-peoples-territory-in-peruvian-amazon>.

To the Ministry of Finance

24 June 2011

Recommendation on the observation of Randgold Resources Ltd.

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1 Background information

At its meeting on 19 April 2010, the Council on Ethics for the Norwegian Government Pension Fund Global (SPU) decided to evaluate whether there is an unacceptable risk that the British mining company Randgold Resources Ltd.¹ contributes to or is itself responsible for violations of the rights of individuals in situations of war or conflict.

As of 31 May 2011, SPU owned 959 325 shares in the company, with a market value of NOK 427 246 312.

Randgold will develop a new gold mine in Kibali, located in the northeastern DRC (Democratic Republic of the Congo). Production is set to start in 2013. According to Randgold, 3,800 families – a total of 15,000 people – will be relocated from the area where the mine is to be established. Kibali is located in the Orientale Province, in an area where conflict has taken place for many decades. The conflict is characterised by particularly systematic and serious offenses, especially against women and children. The United Nations (UN) reports that these offences are carried out by both independent militia groups, and groups within the government's army. Attacks were reported within Randgold's concession areas in the fall of 2009. In February 2011, the UN's Office for the Coordination of Humanitarian Affairs (OCHA) reported that there had been unrest at Dungu-Faradje, some 50 km from Randgold's mining area.

The Council finds that the situation of conflict raises serious questions about the security of the population living in the mining area.

The Council has been in contact with Randgold on several occasions since April 2010, both in the form of meetings and through exchanges of letters. The company has given a detailed account of its plans to ensure that the relocation of people in the mining area takes place in accordance with internationally acknowledged standards. The company maintains that there does not exist a situation of conflict in the immediate vicinity of the mining area, and that there have been no acts of violence in Kibali since the company took over the project in 2009. As concerns security, the company has signed a deal with the government authorities and the police which among other things entails that the company shall not be involved in the conflict. The company makes reference to the police's presence in Kibali and assumes that the police and the government's army will ensure peace and order in the area, as well as protect the local population.

The Council has evaluated the risk that Randgold may contribute to serious violations of the rights of individuals in situations of war or conflict through its activities in Kibali. In its evaluation, the Council has emphasized whether the situation of affected locals, who risk being subjected to serious or systematic acts of violence and other abuses, may be significantly worsened as a result of the company's activities.

The Council has also emphasized whether the company's measures appear to be sufficient to hinder gross violations of norms in relation to the company's activities, and whether the company can be said to have the capacity to adapt to changes in the conflict in order to prevent such violations from taking place.

Randgold's security arrangements assume that the government's forces and the local police will ensure the security of the affected population. The Council emphasises the fact

that the UN has pointed out on several occasions that authorities do not currently have the necessary capacity to carry out this role, that an effective system of courts is lacking, and that lawlessness and violence in the region in which the Kibali project is located are a threat to the inhabitants' security.

Based on the information available, the Council believes that there is a considerable security risk in the area. The Council is consequently uncertain as to whether Randgold's measures will be adjusted to the security risk. How the population's situation will develop in the future will be largely dependent on how the conflict develops and on whether the authorities will be capable of establishing law and order. Because of this uncertainty, the Council has decided that, in accordance with paragraphs 2 (3) and 3 (1) of the ethical guidelines, there are reasons to recommend that Randgold be placed under observation due to the risk of contributing to the violation of the rights of individuals in situations of war and conflict.

2 Sources

This recommendation is based on reports from UN organisations, research institutions, NGOs, and on information received from the company. Both Randgold and the previous owner of the Kibali project have carried out a series of surveys in order to map the demographic situation and the mining project's impact on the population in the area. Randgold has given the Council access to some of these, but the company has not wished for these reports to be made public.

3 What the Council on Ethics has assessed

Pursuant to section 2, third subsection of the Fund's Guidelines concerning observation and exclusion,² the Council has assessed whether there is an unacceptable risk that Randgold contributes to or is responsible for serious violations of the rights of individuals in situations of war and conflict. The Council's assessment focuses on Randgold's Kibali project, located in the Haut-Uélé district in the Orientale Province of the DRC. Section 2, third subsection of the Ethical Guidelines concerns the possible contribution of companies to violations of the rights of individuals in war or conflict. In previous recommendations under the criterion of war and conflict, the company's contribution to violations of international law has formed the basis for recommending its exclusion.³ Both the way in which the decision is formulated and the preparatory work for the Ethical Guidelines nevertheless allow for widening the grounds for assessment beyond the existence of violations of international law. The present recommendation places greater emphasis on the consideration of whether a company, regardless of the existence of violations of international law, behaves in a manner that can imply '*serious violations of the rights of individuals in situations of war or conflicts*.'⁴

Neither the way in which the decision is formulated nor the preparatory work for the

Ethical Guidelines provide direct guidance as to how this criterion should be interpreted, but they do point out that operating in areas of war or conflict is not, in and of itself, necessarily unethical or in breach of international norms.

White Paper no. 20 (2008-2009) to the Norwegian Parliament states that there may ‘*be reason to pay extra attention to companies that operate in war and conflict situations. Such areas will typically be characterised by a high rate of violence and attacks, at the same time as important social institutions such as the police and court system do not exist or function poorly. This suggests that the probability of companies becoming involved in, for example, violations of fundamental human rights or corruption increases, or that the companies improperly exploit their position in another manner.*’⁵

A breach of the ethical guidelines can result from the company’s own actions, or the company’s contribution to another’s actions. The starting point for all the Council’s recommendations is that there must be a clear connection between the company’s operations and the violations. Furthermore, the company must have been aware of the violations but failed to seek to prevent them. In this case, the Council also emphasises whether the company’s own measures are sufficient to prevent serious violations and whether the company seems to have the capacity to adjust to changes in the conflict in order to avoid such violations. The question is also whether the company’s trust in the police’s capability and capacity to ensure the people’s security is adequately grounded.

In evaluating what may constitute a violation of the criterion, the Council emphasises whether the affected locals, who risk being subjected to serious or systematic acts of violence and other abuses, suffer a significant deterioration of their circumstances as a result of the company’s operations.

The Fund’s Ethical Guidelines concern existing and future violations. This recommendation centres on the possible impact of a project that the company has planned, but not yet implemented. In this case, due to the uncertainty regarding how the company will carry out the project, the Council has recommended for the first time that a company should be placed under observation. According to the Guidelines, observation may be considered when there is uncertainty about how the situation will develop.⁶ The Council presumes that observation may also be used when the situation itself requires particular caution. In light of this, the Council is of the opinion that observation may be considered

- in cases where, in principle, it appears *possible* that the company’s operations may be carried out without serious violations, but
- where a significant risk that the company may contribute to serious violations can be said to exist.

4 About Randgold’s activities in the DRC

Randgold Resources Ltd. (Randgold) is a British mining company that develops and operates gold mines in Mali, the Ivory Coast, Senegal, Burkina Faso and the DRC. The company is listed on the London Stock Exchange and NASDAQ in New York.

In 2009 Randgold acquired a stake in the concession to develop a new gold mine at

Kibali, in the Haut-Uélé district of the Orientale Province, in the north-eastern corner of the DRC. The Kibali project is considered to be one of Africa's largest undeveloped gold deposits.⁷

Randgold has entered into a joint venture with the South African mining company AngloGold Ashanti for the ownership and development of the mine. The joint venture has a 90 percent stake in the project, while the remaining 10 percent belongs to the Congolese state-owned mining company Okimo. Randgold and AngloGold Ashanti each have a 50 percent ownership in the joint venture. The joint venture is governed by a joint venture agreement and controlled and authorized by a joint venture committee, in which the partners have equal representation. Decisions require the approval of both parties.⁸ Randgold is the operator of the Kibali project.

5 The Kibali project in the DRC

The exploration permit area covers 1,836 sq km and is situated some 560 km north-east of the city of Kisangani, approximately 150 km west of the border with Uganda. The project is located in the so-called Kilo-Moto Gold Belt. The mining site itself will occupy around 35 sq km and be located near the towns of Doko and Durba in the Watsa territory of the Haut-Uélé district (see Figure 1)⁹. The mine is expected to start production in the course of 2013, having an annual production capacity of 4 million tons of ore. Once the mine is in operation, it will employ approximately 500 people. The project's planned lifespan is 19 years.¹⁰

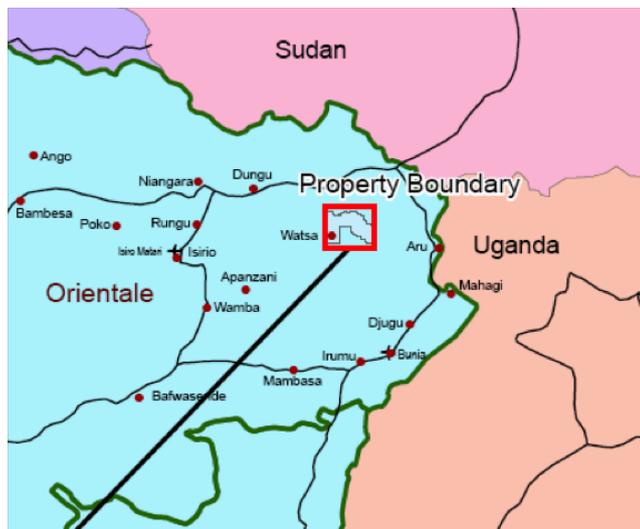


Figure 1: Geographic location of the Kibali project.¹¹

5.1 THE CONFLICT AND THE SECURITY SITUATION IN THE PROJECT AREA

The DRC is about the size of Western Europe and has more than 60 million inhabitants. Long periods of war and conflict have beset the country since it gained its independence from Belgium in 1960. During the war that raged in the DRC between 1998 and 2003, seven African countries and many armed militia groups were involved in what was called 'Africa's first world war'. Over the past 13 years an estimated 5.4 million people have lost their lives as a result of war, hunger and disease in the country. The DRC's large mineral resource deposits are among the factors that have fuelled the conflict, as parties have taken advantage of the anarchy to enrich themselves.¹²

In recent years the conflict has continued mainly in the north-eastern parts of the country. Much of the attention has been directed at the Kivu provinces (south-east of the Orientale Province), where fighting broke out in 2007 between Tutsi militia groups, government forces and other armed groups, including UN forces. The humanitarian consequences have been significant, and the atrocities committed against the population by soldiers from both militia groups and government forces have been particularly brutal and widespread.¹³

Around 2008 the conflict flared up in the Orientale Province as well, spreading from the border with Sudan and south towards the project area.¹⁴ The Council is aware that in 2008 fighting was reported in areas some 100 km from the Kibali project site. In 2009 local militia groups carried out attacks near the town of Durba, which is situated in the heart of the concession area, about 15–20 km north of Watsa town.¹⁵ In February 2011 the UN Office for the Coordination of Humanitarian Affairs, OCHA, reported unrest in Haut-Uélé, particularly between Dungen and Faradje some 50 km north-east of Randgold's project area. Several villages had been attacked by militia groups, forcing the inhabitants to flee.¹⁶

A number of armed militia groups operate in the Haut-Uélé district, but the LRA (the Lord's Resistance Army), a rebel group originally from Uganda, is especially feared because of its brutality towards civilians.¹⁷ In September 2008 Congolese government forces, together with UN forces based in the area (MONUC), attacked the LRA. After this incident the LRA's violence against civilians escalated.¹⁸ In September and October 2009 the LRA launched attacks in the vicinity of Faradje and Watsa (see Figure 2) and there have been reports that they have a presence around Durba/Watsa, within Randgold's concession area.¹⁹

The United Nations Joint Human Rights Office has documented human rights violations and violations of international humanitarian law perpetrated by the LRA and others, including murder, mutilation, sexual violence, looting, and abduction.²⁰ Abducted boys are used as child soldiers and girls as carriers and sex slaves.²¹ In the Haut-Uélé and Bas-Uélé districts, some 300,000 people have been forced to flee because of the group's activities. In the period from September 2008 to June 2009, the LRA is said to have been responsible for 1,200 killings, 1,400 kidnappings (of these, approx. 630 are said to have been children and 400 women), and the destruction and looting of thousands of buildings (including schools, hospitals and churches).²² Similar atrocities have also been reported in 2010.²³

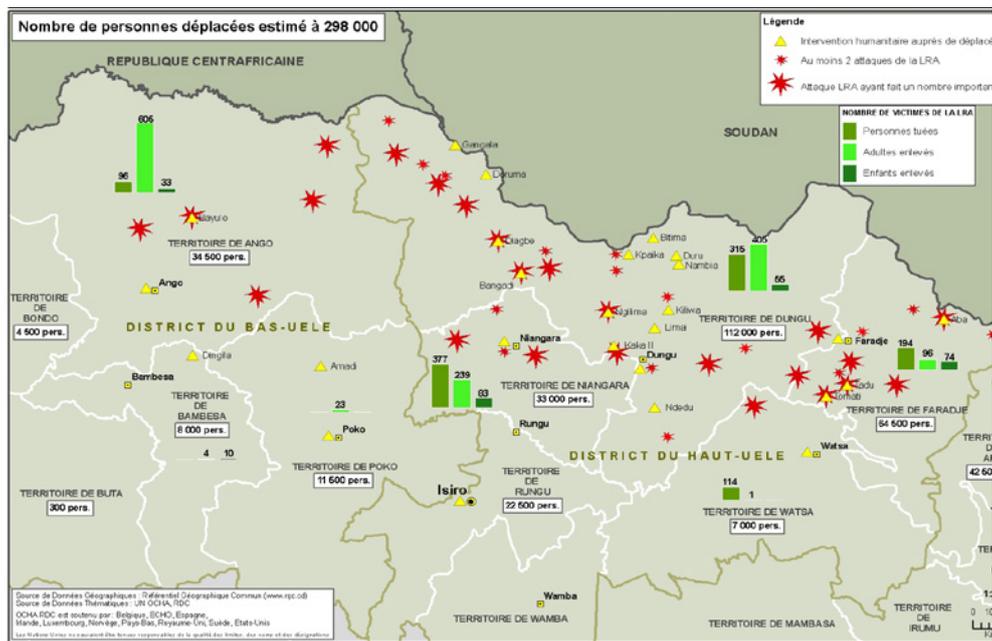


Figure 2: Map which shows attacks by the LRA. The location of the project area around Watsa is indicated by a red box. Stars show attacks by the LRA, triangles show places where there is humanitarian intervention to help those who have fled because of war. Green columns show number of dead (left column), number of adults who have been abducted (middle column) and number of children who have been abducted (right column).²⁴

In 2010 and 2011 there have been reports of increased activity by the LRA. The group currently operates in three countries, Sudan, the Central African Republic and the DRC, while its area of activity is 20 times bigger than in 2008.²⁵ The African Union and the UN have taken initiatives to improve the protection of civilians against the LRA. In the long term this may eliminate the LRA's capacity to terrorize civilians.²⁶

The DRC government forces, *Forces Armées de la République Démocratique du Congo* (FARDC), have positions in the project area, including in the area around the towns of Durba and Watsa.²⁷ Their primary task is to fight the LRA and protect the civilian population. According to surveys that the organization International Peace Information Service (IPIS) has carried out in this area, members of the FARDC have been involved in human rights violations against civilians.²⁸ The UN has also documented cases where the FARDC have committed abuses against the population.²⁹ Furthermore, the IPIS surveys show that several FARDC units are staffed by former members of militia groups, that independent units occur, and that the command lines appear to be unclear.³⁰ According to the UN, *'military operations targeting LRA in the Democratic Republic of the Congo have made little progress.'*³¹ So far, the FARDC have not succeeded in their fight against the LRA and have thus not been able to provide security for the local population.

The causes of the long-lasting conflicts in the country and in the province of Orientale are many and complex, being motivated by historical, ethnic, political, economic and social factors. The Council does not find it relevant to go into further detail on these here.

There is no doubt, however, that the state of lawlessness, where the government seems to have neither the authority nor the capacity to exercise control, as well as the lack of a judicial system, contribute to preserve a particularly dangerous situation for the local population.

In fact, the question of how civilians may be protected has been raised repeatedly at the UN Security Council. The Secretary-General's last report on the situation, from January 2011, states: *'The protection of civilians continues to be an overriding imperative. I continue to be deeply concerned about the high levels of insecurity, violence and human rights abuses facing the population of the Democratic Republic of the Congo, particularly in the conflict-affected areas in the eastern part of the country. Looting, rape, forced labour and robbery remain daily occurrences in this region. The recruitment and abduction of children by armed groups are also of concern. Human rights violations by national security elements are frequently reported. Well-known structural deficiencies of the armed forces, including lack of training, supplies, equipment and logistical support, hinder the efforts of the Democratic Republic of the Congo authorities to impose discipline and bring perpetrators to justice. Those challenges are compounded by the incomplete and tenuous integration of CNDP [32] and other Congolese armed groups into FARDC, and the involvement of some FARDC personnel in the illegal exploitation of natural resources.'*

Considerations regarding the civilian population's security in places such as the Orientale Province have also been an important reason why the UN Security Council passed a resolution in May 2010 on the continued presence of UN forces in the province.³³ The resolution notes, however, that the conflict and the security situation hardly can be solved without addressing the underlying problems: *'These include establishing of effective State authority; building professional and adequately equipped and supplied security and rule-of-law institutions, in particular the armed forces, the national police and the judiciary; curbing the illegal exploitation of natural resources; addressing the weak or absent presence of the State; and neutralizing illegal foreign and local armed groups.'*³⁴

5.2 RESETTLEMENT

Randgold will develop the mine in an area characterised by a long-lasting violent conflict distinguished by extensive and brutal attacks on civilians. According to Randgold, 3,800 families, the equivalent of 15,000 people, must be moved out of the area where the mine is to be established.³⁵ The mining site referred to as the exclusion zone by the company encompasses approximately 30 sq km and will not be accessible to the population (see Figure 3). Today there are 20 villages in the area.³⁶

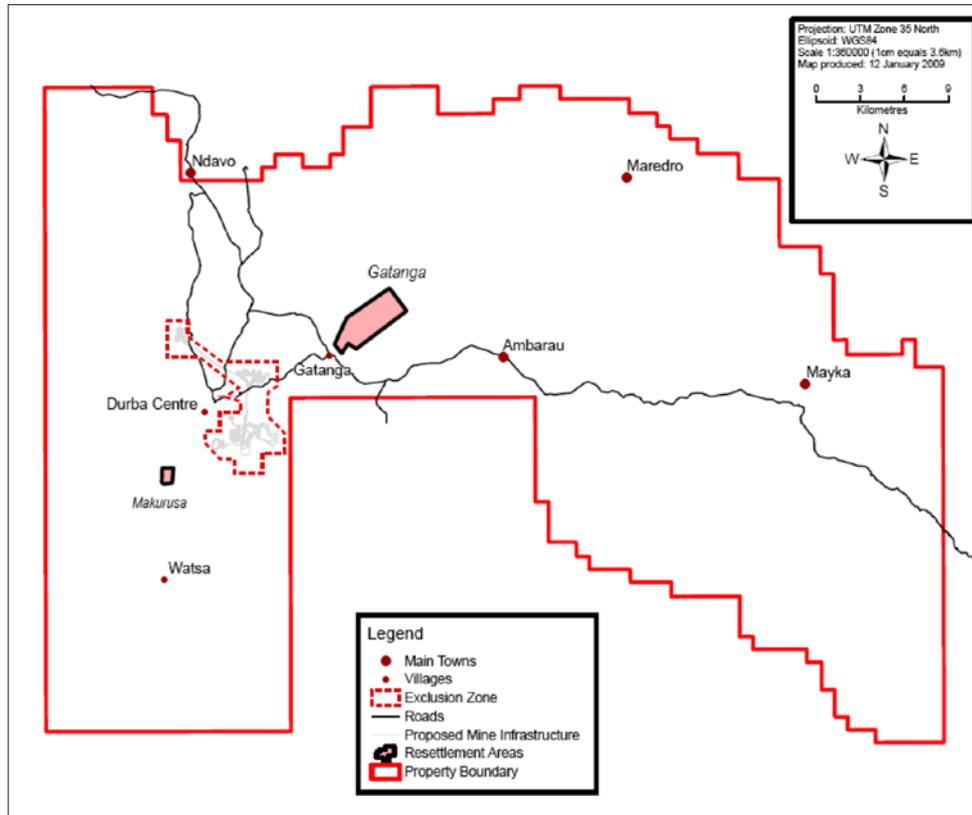


Figure 3: Map of Randgold's concession area (red solid line) and exclusion zone (red dotted line)³⁷

The inhabitants of the exclusion zone, more than half of whom are under 25 years of age, make their living mainly from agriculture (to a great extent subsistence farming) and small-scale artisanal gold mining. Gold mining is the most important source of income for the population, and according to Randgold this has also attracted migrant workers from the surrounding and conflict-torn areas, such as the neighbouring Ituri district.³⁸ There are 11 smaller opencast mines within the zone which, to the Council's knowledge, employ more than half of the male population in the area. Children (6–10 years old) also work in the opencast mines to provide income for their families. The influx of workers creates a local market for the farmers, and many also engage in trade.³⁹ The area offers few other employment opportunities.

Gold mining has been an important and legal livelihood in the area for several decades, where many have mined gold on contracts for the state-owned mining company OKIMO. Once a company has been awarded a mining concession however, other forms of gold mining become illegal. Gold mining has been stopped in the exclusion zone but still seems to be ongoing in the concession area.⁴⁰

Studies commissioned by Randgold show that local communities are characterized by great poverty, poor health and high levels of illiteracy. Infrastructure, such as water supply and sanitation, is non-existent; most dwellings are simple wattle and daub huts.

The resettlement may have positive or negative consequences for a population that already is in a vulnerable position. In order to avoid serious negative effects to the

greatest extent possible, the company has prepared a Resettlement Action Plan including measures and guidelines on how to compensate the population within the exclusion zone. One of the measures will be the establishment of a new town, Kokiza, on the outskirts of Durba, featuring new housing and necessary infrastructure as well as farmland (see Figure 4). Schools are also to be built, while training and jobs that can create employment in both the short and long term will be offered. The resettlement is scheduled to start in June 2011 and to be finished in 2013.⁴¹

Kibali Priority Area - Resettlement

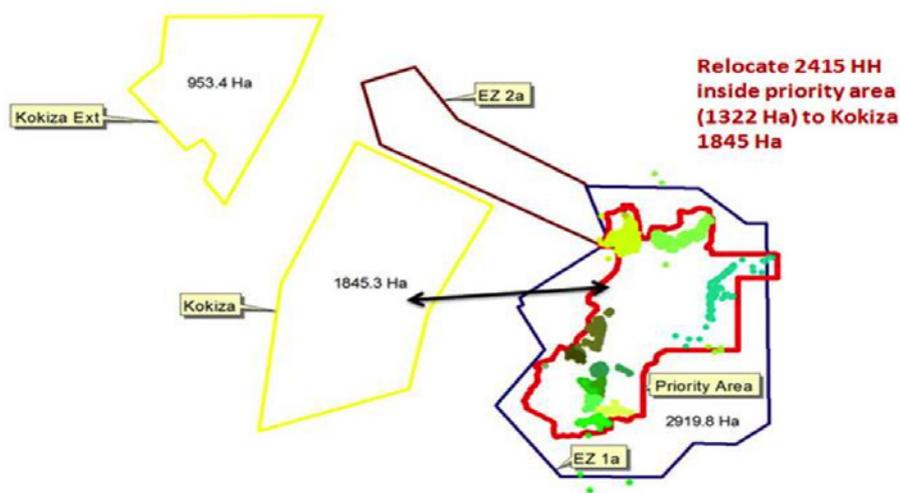


Figure 4: Sketched map showing the exclusion zone (marked by a blue line) and the new resettlement areas Kokiza and Kokiza extension (marked by yellow lines)⁴².

As described above, the resettlement will take place in an area beset by conflict and where militia groups perpetrate atrocities against civilians. The unstable situation in the region may be further exacerbated by the influx of internal refugees and other groups. This may create a tense relationship between local inhabitants, who already barely eke out a living from scarce resources, and the immigrants. According to reports by UN organisations, there are some 320,000 internally displaced persons who are fleeing from the LRA in the districts of Haut-Uélé and Bas-Uélé.⁴³ In July 2010, there were approximately 9,500 internally displaced persons in the Watsa-Durba area.⁴⁴ It is uncertain how many of these may be staying within the exclusion zone.

6 The company's position and its communication with the Council on Ethics

6.1 THE COMPANY'S COMMUNICATION WITH THE COUNCIL

The Council has communicated with Randgold since the spring of 2010. Two letters have been written to the company, on 19 May 2010 and 3 September 2010, to which the company replied on 4 June 2010 and 28 September 2010 respectively. A meeting was also held with Randgold in January 2011. The draft recommendation was sent to Randgold on 16 May 2011 and the company forwarded its comments on 8 June 2011.

The Council has obtained information from the company on several issues, particularly regarding the resettlement, enquiring about who will be responsible for carrying it out, how the security of the population will be ensured, and how the company assesses the conflict in the area.

6.2 THE COMPANY'S POSITION

In its comments to the draft recommendation, Randgold expresses that it *“wholeheartedly believes that besides the formal financial and economic rationale for the development of the Kibali project its implications for the social upliftment and development of the people of North Eastern DRC would be immense.”*⁴⁵

According to the company, the relocation of 15,000 people to new settlements represents one of the key challenges of the project.⁴⁶ The company has designed a Resettlement Action Plan which is to be implemented in such a way as to ensure that the human rights of the affected parties are respected: *‘Randgold Resources has consulted thoroughly with the communities through its elected Community Liaison and its Resettlement Working Group (elected by secret ballot) committees and with all interested and affected parties, including local institutions such as the churches, the government of Kinshasa, the regional and the territorial administrations. This includes consulting and agreeing with affected members of the community about compensation and resettlement preferences and Randgold Resources is responsible for effecting agreements made. These will meet all legal requirements and be congruent with IFC guidelines. Therefore, the human rights of the community are fully considered, including resettling and compensating people who rent accommodation in the exclusion zone and replacing wattle and daub structures with brick structures for which they will have legal title as arranged by Randgold Resources on their behalf.’*⁴⁷ In its plan, the company describes the specific measures that will be implemented and the compensation associated with the resettlement.

In its letters to the Council and in the media, the company has declared that the situation in the area is calm and does not show signs of conflict. *“Randgold acknowledges that the conflict situation in the North Eastern part of DRC is complex, however, since taking over operatorship in October 2009 the incidents of security breaches have diminished. Randgold has maintained close links with the local security infrastructures to ensure that it is aware of any outbreaks of unrest and whilst some have occurred, none has been in the immediate vicinity of the project, nor have any of the inhabitants living within the ambit of the project been affected by such unrest.”*⁴⁸

Randgold further explains that *"The most persuasive evidence to refute the concept of a conflict ridden area is that the people in the exclusion zone specifically chose to be relocated to Kokiza, 5 km from Doko, rather than to other areas of the DRC."*⁴⁹

In order to avoid being given a role in the conflict, Randgold has informed the DRC authorities that *'they [Randgold] do not support private armies and will not engage in the activity of creating one for the protection of its investment in the DRC.'* Randgold has signed an agreement with the government forces and the police, signifying that the company will not be involved *'in the creation of law and order or peace'* and that it will not be asked to contribute materially or otherwise to the services and tasks of the police or government forces.⁵⁰

Randgold expects the police and government forces to ensure adequate security, law and order for the mining operation to be carried out. The company has entered into an agreement with the authorities of the Orientale Province to ensure that government forces act in accordance with international law, safeguard the human rights of inhabitants and employees, and prevent the misuse of company assets by the military.⁵¹

With regard to the company's internal security arrangements, Randgold explains that: *'An independent security company has been appointed who is exclusively responsible for the security of assets located on site. Such company is not authorised to carry firearms in its duties.'*⁵²

The police is responsible for ensuring law and order in the area. According to Randgold, through a local contingent in the Kibali area and patrolling, the police presence is felt in the whole area. The company writes in its letter that: *"The police contingent at Kibali is seconded from its base at Bunia. These police officers are mobile, have excellent communications and have received specialized Human Rights training from the United Nations at Bunia. In addition, further discipline, policing, mine policing and weapons handling training has been provided to this contingent by international security consultants at Kibali. Since its deployment at Kibali, there have been no complaints or grievances received from the community."*⁵³

According to Randgold, the police has never been attacked and its presence supposedly dissuades rebel groups. They say among other things that *"The police unit has never been attacked nor has it had to use its weapons. Security experts have stated that the police presence in the area deters the LRA and others from coming into the area as the latter insurgents modus operandi is to stay away from guarded areas;"*⁵⁴

Randgold states that it keeps up-to-date on the security situation in the area through regular and formal meetings with members of the local community and through contact with other sources that work in the area. If concrete threats come to light, the police, local authorities and the UN will be notified. The company also says that it has developed plans for evacuation and crisis management.⁵⁵

The company has not provided details as to how the security of the population will be maintained during the relocation itself and after the 15,000 individuals have moved to the new town of Kokiza. The company has not informed the Council how internally displaced persons not covered by the Resettlement Action Plan will be managed either.

7 The Council's assessment

The Council on Ethics has assessed whether Randgold Resources Ltd.'s activities in Kibali, in the north-eastern part of the DRC, may be in breach of the Ethical Guidelines' criterion on companies' contribution to – or responsibility for – serious violations of the rights of individuals in situations of war or conflict. Given the insecurity around the possibility of ensuring the security of people in connection with the planned development and operation of the Kibali mine, the Council has assessed whether the company should be placed under formal observation.

In evaluating what may constitute a violation of the criterion, the Council has stressed whether the affected locals, who risk being subjected to serious or systematic acts of violence and other abuses, suffer a significant deterioration of their circumstances as a result of the company's operations. In this respect, the Council has also emphasized the extent to which the company's measures seem to be sufficient to prevent serious violations.

The Council takes as its point of departure that Randgold is in the process of building a gold mine in a conflict area characterized by militia groups that terrorize, loot and perpetrate extremely violent acts against the local population. The Council attaches importance to the reports of attacks around the towns of Durba and Watsa, situated within Randgold's concession area, some 30 km from the site where the mine will be constructed. This is also where the LRA reportedly is present. Government forces are located in the same area, but have so far not been able to provide security for the population. The UN has repeatedly reported that also government forces commit human rights violations and that the lack of state control and the absence of an efficient judiciary constitute a great threat to the security of local communities.

In its communication with the Council on Ethics, Randgold has repeatedly pointed out that there is no conflict in the immediate vicinity of the project area. According to OCHA however, militia groups have carried out attacks along the Dungu-Faradje stretch, approximately 50 km north of the project area, as recently as the spring of 2011. In the fall of 2009, the LRA is to have carried out an attack in Durba, within Randgold's concession areas and near the area where the new town will be established. The company does not comment this case in particular, but highlights that it is not aware of any violent acts taking place in the Kibali area since the company took over the project in 2009. The Council finds that this can indicate that the security situation in the area of the mine is unclear, but that there can be no doubt that the region in which the gold mine lies is an area with a considerable risk of violent conflict.

In this situation, Randgold proposes to move 15 000 people out of the mining area to a new city which the company is currently establishing within its concession area, just north of Durba. According to the company, the inhabitants will be offered new and better housing as well as compensation for lost income. The company believes that this will have a positive effect on the living conditions of local inhabitants. The Council agrees that, by itself, this may improve the situation of those being relocated and is, *a priori* positive towards the company's Resettlement Action Plan.

The Council's concern is nevertheless whether the company will *de facto* be able to

ensure the safety and security of the population during and following the resettlement. There are several risk factors surrounding the project which may worsen the security situation of people in the area. The Kibali project may constitute a stabilising element, but it may also increase the conflict – in the same way as resource extraction has done in other parts of the DRC. The relocation of so many people in a situation which is already tense will also be risky. The Council is not aware of the extent to which the company has carried out an assessment of how security will be managed under the relocation, nor how security will be preserved in the new settlement. Furthermore, the situation of internally displaced people within the project's area remains unresolved.

Randgold's security policy presupposes that the DRC's government forces and local police will uphold law and order in the area, and that security will be ensured so that the mining operation will be feasible. The company has hired a Congolese security company to safeguard the assets within the mining area, and the guards are supposed to be unarmed. Beyond this, local police will take care of security in the concession area in general. The UN has nevertheless repeatedly called attention to the government's lack of sufficient capacity to fill this role today, the absence of an effective judiciary, and the threat that the lawlessness and violence poses to the security of the residents of the region where the Kibali project is located.

Based on the available information, the Council believes that there is a considerable security risk in the area. Even though, as the company claims, people in the mining area and other local actors have not yet been exposed to attacks, given the area's situation of conflict there is a clear risk that this may take place.

The Council is unsure of how Randgold's security plans and measures will be sufficient as regards the risk for violence and conflict in the area. Whether local authorities and the police will be in a condition to ensure the security of the area, a central element in Randgold's own security evaluation, is especially uncertain. Because of this insecurity, the Council has reached the conclusion that the company should be placed under formal observation. Because the relocation will conclude in 2013, the same year as the mine is set to start production; the Council recommends an observation period of four years from the date of publication of this recommendation.

If, within the observation period, it comes to light that Randgold's activities contribute to the deterioration of the local population's security situation, the Council on Ethics will assess whether there are reasons to recommend that the company be excluded from the Fund's investment universe.

8 Recommendation

The Council on Ethics recommends that Randgold Resources Ltd. be placed under observation due to the risk of contributing to serious violations of individuals' rights in situations of war or conflict. The observation concerns the company's Kibali project in the Haut-Uélé district of the Orientale Province in the DRC.

Gro Nystuen Chair	Bente Rathe	Ylva Lindberg	Ola Mestad	Dag Hessen
Sign.	Sign.	Sign.	Sign.	Sign.

Notes

- 1 Hereafter referred to as Randgold
- 2 Hereafter referred to as the Ethical Guidelines.
- 3 See the recommendation of 16 November 2009 to exclude Africa Israel Investments Ltd. and Danya Cebus Ltd.; www.etikkradet.no.
- 4 NOU 2003:22, page 167.
- 5 Ministry of Finance: Report no. 20 (2008-2009) to the Storting, 'On the management of the Government Pension Fund in 2008', p. 126.
- 6 Section 3 (1).
- 7 <http://www.randgoldresources.com>
- 8 Randgold Resources Limited SEC 20F filings for 2010, p. 17; available at www.randgoldresources.com/randgold/content/en/2009/statutory-2010?oid=200922&sn=2009+detail&pid=20918.
- 9 Randgold Resources Ltd Annual Report 2010, p. 38-42; available at www.randgoldresources.com
- 10 See footnote 9. Based on opencast and underground mining, the mining complex will include processing plants, tailings and waste rock deposits, as well as the infrastructure necessary for the operation.
- 11 Randgold 2011: Social and Community note.
- 12 See for example http://news.bbc.co.uk/2/hi/africa/country_profiles/1076399.stm, Artisanal Mining in the DRC (Key Issues, Challenges and Opportunities), CASM, August 2007, page 4.
- 13 See for example Amnesty International 2008: NORTH KIVU: NO END TO WAR ON WOMEN AND CHILDREN <http://www.amnesty.ca/amnestynews/upload/AFR620052008.pdf>
- 14 The "project area" is located in Randgold's "concession area" and is also, by the company, called "the exclusion zone", see Figure 3.
- 15 Mapping Conflict Motives: Province Orientale (DRC), 17 March 2010, International Peace Information Service (IPIS)
- 16 Bulletin d'Information Humanitaire, 08/2/2011, Province Orientale, 'Publication hebdomadaire provinciale produite par OCHA avec la coopération de la communauté humanitaire'.
- 17 Joseph Kony founded the Holy Spirit Mobile Force 2 in northern Uganda in 1987 after a rebel group of the same name was crushed while opposing President Yoweri Museveni's government. In 1989 Kony renamed the militia the Lord's Resistance Army, claiming that the group's objective was the establishment of a Christian-inspired theocracy in Uganda. The LRA moved into southern Sudan in the mid-1990s. In 2005 the Sudanese peace settlement and the indictment of Kony by the ICC forced the LRA to cross into the DRC's Garamba National Park. In December 2008, Ugandan, Sudanese and Congolese (DRC) armies launched a joint offensive in Garamba, but failed to capture the LRA's leadership. The LRA, which is divided into small groups, move on foot across the Uélé districts of north-eastern DRC, the east of the Central African Republic and parts of Southern Sudan. See: <http://www.irinnews.org/Report.aspx?ReportId=89494>
- 18 <http://www.unhcr.org/4d6ce0299.html>
- 19 'Mapping Conflict Motives: Province Orientale (DRC)', IPIS, 17 March 2010, page 16. And see UNHCR at: <http://www.unhcr.org/refworld/pdfid/4d5e14c52.pdf>
- 20 Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, S/2011/20, 17 January 2011, para. 45.
- 21 http://www.intersos.org/sites/default/files/images/DRC_LRA-paper_Ghost-of-Christmas-Past_2010-12-14_EN_0.pdf
- 22 'Summary of fact finding missions on alleged human rights violations committed by the Lord's Resistance Army

- (LRA) in the districts of Haut-Uélé and Bas-Uélé in Orientale province of the Democratic Republic of the Congo', December 2009, para. 72.
- 23 See footnote 20, para. 65.
- 24 http://www.internal-displacement.org/8025708F004CE90B/httpCountry_Maps?ReadForm&country=Democratic%20Republic%20of%20the%20Congo&count=10000
- 25 http://www.intersos.org/sites/default/files/images/DRC_LRA-paper_Ghost-of-Christmas-Past_2010-12-14_EN_0.pdf
- 26 See footnote 22, para. 17 and 82.
- 27 http://www.ipisresearch.be/maps/Orientale/20100322_MappingOrientale.pdf, p. 21.
- 28 http://www.ipisresearch.be/maps/Orientale/20100322_MappingOrientale.pdf, p. 20.
- 29 Reported, among others, in the Security Council's resolution 'The situation concerning the Democratic Republic of the Congo', 29 November 2010 (S/RES/1952 (2010)), in 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo', 8 October 2010 (S/2010/512), and in 'Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo', 9 July 2010 (S/2010/369).
- 30 'Mapping Conflict Motives: Province Orientale (DRC)', IPIS, 17 March 2010, page 21.
- 31 Thirty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2010/164, 30 March 2010, para. 2.
- 32 Congrès national pour la défense du peuple, a militia group that is active in the conflict in the Kivu area.
- 33 S/RES/1925 (2010), preamble.
- 34 S/2011/20, para. 80.
- 35 <http://www.randgoldresources.com/randgold/content/en/2009/page10065>
- 36 Randgold Resources 2011: Social Impact Note.
- 37 Ibid.
- 38 Ibid.
- 39 Ibid.
- 40 Ibid.
- 41 Annual Report 2010, p. 42.
- 42 Randgold Resources 2011: Draft Resettlement Action Plan.
- 43 This figure shows the number of internally displaced persons in the Orientale Province, <http://www.un.org/apps/news/printnewsAr.asp?nid=34562>.
- 44 UN Office for the Coordination of Humanitarian Affairs (UN OCHA) August 2010 (map) available at <http://reliefweb.int/sites/reliefweb.int/files/resources/46AA82E6760300AF85257789005AB42A-map.pdf>.
- 45 Letter from Randgold Resources, 8 June 2011.
- 46 <http://uk.finance.yahoo.com/news/Randgold-Resources-afxcnf-2008521065.html?x=0>
- 47 Letter from Randgold Resources, 28 September 2010. IFC stands for "International Finance Corporation". IFC is a part of the World Bank Group and aims at creating economic growth in developing countries through i.e. giving advice to corporations and governments, and also through financing projects run by private corporations. See <http://www.ifc.org/ifcext/about.nsf/Content/WhatWeDo>.
- 48 Letter from Randgold Resources 8 June 2011.
- 49 Ibid.
- 50 Letter from Randgold Resources, 4 June 2010.
- 51 See footnote 47, attachment *Kibali Security Protocol*.
- 52 Letter from Randgold Resources, 4 June 2010.
- 53 Letter from Randgold Resources, 8 June 2011.
- 54 Ibid.
- 55 Letter from Randgold Resources, 28 September 2010.

To the Ministry of Finance

4 March 2013

The Council on Ethics' first report to the Ministry of Finance on the observation of Randgold Resources Ltd.

The Council on Ethics recommended the observation of Randgold Resources Ltd. on 24 June 2011. The central issue in the recommendation was Randgold's gold mining project in Kibali, Democratic Republic of the Congo (DRC), which would require the relocation of about 15,000 people. The Council's main concern was the risk that this group of people would have its situation worsened as a result of Randgold's project. In June 2012, the Ministry of Finance decided to place the company under confidential observation for a period of up to four years. During this period, the Council on Ethics is required to keep Randgold under observation and monitor the company's operation of the gold-mining project. The Council is required to report annually to the Ministry of Finance on the status of the observation process.

This is the Council's first annual report on Randgold, and includes a summary of developments since the recommendation was issued in June 2011.

Background

As stated in the recommendation, the Council's main concern was the risk that the population in the project area, whose conditions are already perilous, may see its situation worsened as a result of Randgold's activities. Particular emphasis was placed on the company's ability to ensure the safety and security of the population both during resettlement and afterwards. The Council pointed out that while the Kibali project might have a stabilising effect in a region in turmoil, resource extraction has also intensified existing conflicts elsewhere in the DRC. The relocation of so many people in an already precarious situation was also considered to constitute a risk.

The recommendation also highlighted that the company and the Council appraise the risk of conflict in the area differently. The Council was unsure whether the company's own measures would be sufficient to ensure that new and old conflicts were not fuelled, and whether the company would be able to adjust its measures in response to changes in the conflict level.

Sources

The Council had a meeting with Randgold in December 2012. The company also issued its first sustainability report in 2012, which covered all its projects and reported on progress made and the company's policies on different topics.¹

During the observation period, the Council has commissioned two reports by an independent consultant to obtain updated information about the situation on the ground. The first report covers the situation during the second half of 2011, while the second describes the situation in 2012.

Key developments since the recommendation was made

The conflict

Randgold's project is situated in the north-eastern part of the DRC, in the Orientale province, north of the Kivu provinces. This region is generally considered the most violent in the DRC. In the recommendation, the Council emphasised that there had been violent incidents just 30 km from the site where the mine was to be constructed. Whereas the Council understood this to be close to the project area, the company considered it to be relatively far away.

The reports commissioned by the Council mention no new incidents of this kind during the observation period. The risk that mineral extraction might fuel the conflict was the main reason behind the Council's decision to start looking into Randgold's project in the DRC.

The resettlement and the grievance mechanism

The company plans to start gold extraction in Kibali in October 2013. Before that, the company has to move 1,450 families from the project area. This phase is well underway, and many families have moved to their new houses. However, some are still waiting for their houses, and uncertainty about the resettlement date seems to be causing some discontent.

During the observation period, the company has strengthened its local office, which now has 20 local employees working solely on the contact with the local population and other stakeholders. These include a group of grievance officers who deal only with complaints. Randgold's headquarters have also been strengthened through the hiring of one person responsible for the relationship between the company and the local population in the project area. Various international guidelines emphasise the importance of well-functioning grievance mechanisms when new extractive projects are established, particularly in conflict areas.²

Randgold has informed the Council that it has received about 900 complaints from people in the area, but claims that 94 percent of these have been solved. The reports from

the consultant confirm that the company has taken measures to resolve disputes and deal with discontent among people affected by the project. The two reports from the independent consultant indicate some positive developments. The 2011 report described several factors that appeared to be causing discontent in the population, while the report from 2012 showed that these factors had largely been reduced. It seems probable that the fact that more people have received resettlement compensation, including new houses, has had a positive effect and brought with it an increased level of satisfaction among the local population.

The artisanal miners in the area used to make their living from manual gold digging. The project area contained about 2,000 artisanal miners who had to quit as a consequence of Randgold's project. The company states that almost all of these miners are now employed by the project. Only a few have been given cash compensation and have moved from the area. However, the reports from the consultant state that some artisanal miners consider the compensation issue to remain unsolved, and that it still is very difficult to determine exactly what was promised and what has been paid out. Some of the artisanal miners consider the system to be convoluted, and that the uncertainty may cause some to become restive. For its part, Randgold claims that it has now checked that all artisanal miners have received their compensation, and that the company has reached a separate agreement with each and every individual.

Security risk

The Council stated in the recommendation that it was uncertain whether the company's security system and measures would be sufficient in view of the risk of violence and conflict in the area.

Randgold's mining area will contain an increasing amount of valuable equipment and, eventually, gold. This may attract groups wishing to steal from the project, which in turn will increase the need for more stringent security. In its sustainability report, the company has stated that:

*"It is Randgold's policy not to arm any security forces on our mines. We outsource normal mine security to reputable and unarmed security companies. ... The well trained and disciplined Special Police unit from Bunia is used to assist us with security. Their members have been trained on human rights by both the UN (MONUC) and by Kibali mine. Since their deployment at Kibali, there have been no complaints or grievances received from the local community concerning the police's detachment. However, it should be stated that the main component of security at the Kibali project remains an unarmed DRC private security company which are employed directly by Kibali Goldmines SPRL."*²³

Intensification of conflict

The fact that extractive companies with projects in the DRC risk fuelling the ongoing and latent conflicts by trading with local militias has been a theme for discussions and resolutions of the UN Security Council. Randgold has stated that it will not sell any of its gold to individuals or companies inside the DRC, and that the company does not source minerals from external suppliers there.⁴

The Council's assessment

At the meeting between Randgold and the Council in December 2012, the company stated that the largest risks related to this project concern resettlement and the delicate ensuing stages. Notwithstanding individual concerns about the evolution of the project, the overall impression is that the local population is satisfied with Randgold's handling of the project so far.

The Council on Ethics will continue its observation of Randgold's project in the DRC, primarily through maintaining a regular dialogue with the company. The Council on Ethics will also continue to monitor whether information on incidents of increased conflict caused by the company's activities may arise from other sources.

Yours sincerely,



Ola Mestad
Chair

Notes

- 1 Randgold Resources, Sustainability Report, 2011.
- 2 See for example UNs Global Compact's «*Guidance on Responsible Business in Conflict-affected and High-Risk Areas, Guidance point 1*» and IFC's «*Guidance Note 5, Land Acquisition and Involuntary Resettlement*» no 25.
- 3 Randgold Sustainability Report 2011, page 83.
- 4 Meeting in London, in December 2012, between Randgold and the Council.

To the Ministry of Finance

13 January 2014

Recommendation to end the observation of Randgold Resources Ltd.

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1 Summary

The Council on Ethics for the Norwegian Government Pension Fund Global (GPF) recommends ending the observation of the British company Randgold Resources Ltd. (Randgold). The Council no longer finds that there is an unacceptable risk that Randgold contributes to or is itself responsible for serious violations of the rights of individuals in situations of war or conflict.

2 Introduction

As a result of the Council on Ethics' recommendation to formally observe Randgold on 24 June 2011, the Ministry of Finance decided to place the company under confidential observation in June 2012 for a period of up to four years. The Council recommended observing the company because of the risk that the population's already perilous living conditions in the company's project area in Kibali (DRC) could deteriorate further as a result of Randgold's project.

In 2012, the Council submitted an observation report to the Ministry of Finance in which the Council recommended that Randgold be kept under observation. Following an overall assessment which also includes developments during the last year, the Council finds that there are no longer grounds to keep Randgold under particular observation.

Below is a summary of the Council's contact with the company and its research throughout the observation period, the main events of relevance for the assessment, and the latest developments. The report concludes with the Council's assessment and recommendation.

3 Sources

The Council has had an open dialogue with Randgold on the Kibali project. Randgold has issued a Sustainability report in 2013 describing all projects run by Randgold and the company's policies, as well as reporting on achievements and targets.

The Council has commissioned three studies from an independent consultant concerning the situation on the ground following the recommendation. The first report described the situation in the project area in the second half of 2011, the second focused on the situation in 2012 and the third on the situation in 2013. Representatives from the Council have also exchanged written communication and held annual meetings with representatives from Randgold.¹

4 Key developments since the recommendation was made

Fuelling the conflict

There is a risk that mineral extraction in conflict areas in the DRC can fuel the conflict. Randgold's project is situated in the north-eastern DRC in Orientale, north of the Kivus, which is generally considered to be one of the most violent parts of the DRC. The risk that mining activities can fuel the conflict was one of the reasons behind the Council's decision to start looking into Randgold's project in the DRC.

In this case, the risk that mineral extraction may fuel the conflict appears to be limited. The company directly exports all of the gold from the project area, and militias are kept away from the project area through cooperation between the local police and the company's own security contractor. In 2013, Randgold implemented a "Conflict Free Gold Policy". The aim is to make sure that the gold produced by the company is delivered in a manner which does not fuel armed conflict, fund armed groups, or contribute to human rights abuses associated with such conflicts. Randgold does not buy any minerals, including from artisanal miners.

During the latest observation period, there has reportedly been no violence that can be directly linked to Randgold's mine. The most recent violent conflicts in the north-eastern DRC have been related to militias connected to Uganda, but this must be seen as external risks unrelated to Randgold's activities.

The consultancy reports that the Council has commissioned, point at the situation of the artisanal miners in the area as the biggest security risk for the project. Some feel that they are not appropriately compensated for the loss of opportunity when the government mining company, Sokimo, transfers mining licences to companies to the effect that the artisanal miners are excluded from mining in the areas. Those who have not been offered employment in the project or who think that Sokimo has not given them adequate compensation, may turn on Randgold and pose a risk of conflict to the company and to the people in the area.

The resettlement and the grievance mechanism

In its recommendation, the Council emphasized the risk involved in moving some 15,000 people whose living conditions were already precarious. The resettlement phase is now finished, and the company seems to have managed to mitigate this risk successfully.

Despite some dissatisfaction with the size and quality of the houses given as compensation to those who had to relocate, the Council's over-all impression is that people in the area are positive to Randgold's project. This is primarily due to the increased opportunities for employment created by the project.

According to its sustainability report, Randgold has established a complaint mechanism based on guidance laid out by the IFC Performance Standards. According to the company, there were 1,078 grievances in 2012, of which 1,013 had been resolved. The report commissioned by the Council confirms that the grievance mechanism is working, although not all grievances seem to be handled to the full satisfaction of the local community.

Security forces

According to the report, the security situation has improved significantly due in part to the implementation of joint patrols conducted by Randgold's forces and local police. Randgold has informed the Council that it has ensured that not only their own security forces but also local police receive training in human rights standards. The increased security has also brought with it possibilities for people in the area to do business with other communities.

5 The Council's assessment

Randgold's project has had a visible presence in the area for four years. In this period the Council is not aware of security issues of a serious character linked to the project. The company neither sells nor buys minerals locally, reducing the risk of the company dealing directly with people connected to militias.

The company seems to have taken reasonable steps to improve the general security situation in the area and to protect the mine without resorting to violence. The company emphasizes the relationship with the community and seeks to address grievances at an early stage.

The relocation of the people in the exclusion zone has been completed, and in general people seem content with the project. There is still some dissatisfaction with the houses provided by the company, and some artisanal miners feel that their situation has not been given sufficient consideration.

Overall, it is the Council's impression that the company has established good systems to deal with security issues or risks and that the company's standards are implemented. There will almost always be conflicts and security risks connected to the establishment of mining operations, and it is extremely important that issues are handled in a timely and adequate manner. The Council is unable to predict developments in the DRC or the company's future efforts to deal with any security issues which may arise. Based on the way the company has handled the situation so far, the Council does not currently find an unacceptable risk that Randgold contributes to or is itself responsible for serious violations of the rights of individuals in situations of war or conflict. Against this background, the Council on Ethics recommends ending the observation of Randgold's project in the DRC.

6 Recommendation

The Council on Ethics recommends that the observation of Randgold Resources Ltd. be ended.

Ola Mestad
Chair
(sign.)

Dag Olav Hessen
(sign.)

Ylva Lindberg
(sign.)

Marianne Olsson
(sign.)

Bente Rathe
(sign.)

Notes

- 1 Meetings between representatives from the Council and Randgold took place at Randgold's offices in London in December 2011, 2012 and November 2013.

To the Ministry of Finance

17 October 2012

Recommendation on the exclusion of SOCO International plc. from the Government Pension Fund Global's investment universe

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1 Summary

The Council on Ethics recommends that the British oil and gas company SOCO International plc. (SOCO) be excluded from the Government Pension Fund Global (GPF) due to an unacceptable risk that the company will be responsible for severe environmental damage through its oil and gas activities in the Democratic Republic of the Congo (DRC). The recommendation is based on the company's plans and activities in block V in eastern DRC, which largely overlaps with Virunga National Park and World Heritage Site. As per 31 December 2011, the GPF owned shares in the company with a market value of NOK 208 million, representing 2.27 per cent of the shares in the company.

SOCO has interests in block V through its subsidiary SOCO Exploration and Production DRC. SOCO is the operator of a joint venture (JV) with the state-owned company La Congolaise des Hydrocarbures (Cohydro), which has a 15 per cent ownership interest in the project. SOCO's ownership interest totals 85 per cent.

The Council on Ethics has assessed the values in and vulnerability of Virunga National Park and World Heritage Site, the potential consequences of SOCO's plans and activities, conflicts with laws and international standards, SOCO's preventative and mitigating measures in relation to environmental damage, and whether it is likely that the company's practices will continue.

Virunga National Park is the oldest national park in Africa, and one of the largest on the continent. Due to its exceptionally important universal values, the national park has received several international protection statuses, including as a UN (UNESCO) World Natural Heritage Site and as a Ramsar Site (wetlands of international importance). The national park lies in the most biodiverse part of continental Africa, and is also one of the most biodiverse protected areas globally. The park encompasses an unusually wide range of habitats, and is home to many rare and threatened species, including species found nowhere else. Few natural and protected areas in the world contain values matching those of Virunga National Park.

The national park has faced a number of serious threats during the past 20 years, including civil war-like conditions, various armed groups based in the park, organised poaching, organised illegal logging and production of charcoal, illegal exploration for minerals and metals, extreme poverty around the park, a large number of internally displaced people and refugees in the vicinity of the park, a very unstable security situation and the availability of limited resources for the park managers tasked with handling these threats. As a result, the national park was placed on the UN List of World Heritage in Danger in 1994. The national park is still on this list, and is currently one of the most threatened protected areas in the world. The populations of many species have more than halved, and in some cases populations have been reduced to critically low levels.

SOCO has launched preliminary activities to explore the potential for, and map deposits of, petroleum in block V in the national park. Further activities are planned in Virunga National Park and World Heritage Site.

The Council on Ethics has been in contact with SOCO about the company's plans in block V. SOCO has stated that it will implement its plans as long as the authorities in the

DRC want it to. The company has referred to the DRC's right and obligation to exploit its natural resources and create development and benefits to society based on them. Further, SOCO believes that its presence and future support for responsible natural resource management and the protection of the national park may have a positive impact, given the limited resources available to park managers and the great poverty found in the local area. SOCO maintains that the planned activities in the national park do not conflict with either DRC legislation or the UN World Heritage Convention.

The company has already engaged in activities (such as reconnaissance), in the national park which in the view of the Council on Ethics violate the UN World Heritage Convention and DRC legislation. More importantly, the company is planning further, more wide-ranging, activities (such as aerial studies, followed by seismic surveys of Lake Edward and onshore areas in the national park, possibly followed by exploratory drilling), that will also violate the UN World Heritage Convention, DRC legislation and a number of international standards.

The Council on Ethics considers the consequences of oil and gas exploration – and potential subsequent production – in such a vulnerable and valuable conservation area to be very severe. The Council has concluded that damage to the national park and World Heritage Site can only be prevented by the discontinuation of SOCO's activities in the parts of block V that lie in Virunga National Park. Given the challenging situation in and around the vulnerable national park, it appears unlikely that there are mitigating measures that could prevent severe harm to the natural values in the park if SOCO carries out oil or gas exploration – and possibly production – in the park. If the company continues with its planned activities in the national park, it is likely that UNESCO will have to withdraw Virunga's world heritage status. The DRC authorities will then probably have to reduce the size of or dissolve the national park altogether, since oil and gas exploration contravenes the nature conservation and environmental legislation currently in place.

As stated, SOCO's explicit aim is to carry out oil and gas activities in the national park. The Council on Ethics therefore considers the risk of future environmental damage to be high. The most likely consequence is long-term or irreversible damage to or destruction of the national park and World Heritage Site.

2 Introduction

In November 2010, the Council on Ethics decided to assess the Fund's investment in the British oil and gas company SOCO¹ in relation to the Guidelines for the observation and exclusion of companies from the GPF's investment universe (the ethical guidelines).² This decision was based on information about the company's plans that could affect Virunga National Park and World Heritage Site in eastern DRC.

At the end of 2011, the GPF owned shares in the company valued at NOK 208 million, corresponding to a holding of 2.27 per cent of the shares in the company.

2.1 WHAT THE COUNCIL ON ETHICS HAS CONSIDERED

The Council on Ethics has considered whether there is an unacceptable risk of SOCO being responsible for severe environmental damage contrary to section 2(3)(c) of the ethical guidelines. There has been extensive local, national and international criticism of the company's activities in block V in eastern DRC. The criticism has focused especially on the company's plans and activities in Virunga National Park and World Heritage Site, which covers parts of block V. The Council has also been approached by several organisations in connection with SOCO's activities in block V. Among other things, the Council has considered the values in and vulnerability of the area and the potential consequences of SOCO's plans and activities. The Council on Ethics assesses what constitutes severe environmental damage in each individual case, based on an overall assessment of the specific operations and activities of the company under assessment. The Council gives weight to matters such as whether:

- the damage is significant
- the damage will have irreversible or long-term impacts
- the damage has considerable negative consequences for people's lives and health
- the damage is a result of violations of national legislation or international standards
- the company has failed to act to prevent damage
- the company has implemented adequate measures to rectify damage
- it is likely that the company will continue its practice.

2.2 SOURCES

The Council on Ethics has gathered and assessed information and documentation³ through a step-by-step process that began with identifying alleged breaches of standards relating to SOCO's plans and activities in Virunga National Park. Following initial research, the Council contacted SOCO in March 2011. SOCO responded to the Council's questions in writing, and provided additional information in the course of the evaluation. The company also commented on the Council's draft recommendation in August 2012. The Council has collected publicly accessible information from the company, authorities, researchers, international organisations, NGOs and the media.

3 Background

SOCO is an oil and gas company with activities in Vietnam, the Republic of the Congo (Brazzaville), the DRC and Angola. The company is involved in both exploration and production. SOCO is headquartered in London, where it is also listed on the stock exchange.

SOCO has interests in block V in eastern DRC through its subsidiary SOCO Exploration and Production DRC SpL., which is controlled and 85 per cent owned by SOCO⁴. SOCO is the operator of a joint venture (JV) that as at August 2012 comprised the state-owned company La Congolaise des Hydrocarbures (Cohydro) (15 per cent) and SOCO (85 per cent).⁵

4 Main issues and the Council on Ethics' findings

4.1 VIRUNGA NATIONAL PARK AND WORLD HERITAGE SITE

Virunga National Park is the oldest national park in Africa, and was established as the Albert National Park in 1925. The park has subsequently been extended several times. The national park is located close to the equator in eastern DRC (see Figure 1 below). The eastern side of the park largely borders Uganda and various Ugandan protected areas such as the Semuliki, Rwenzori Mountains and Queen Elisabeth national parks. To the southeast, Virunga National Park borders Rwanda's Volcanoes National Park and Uganda's Mgahinga Gorilla National Park. Virunga National Park also includes most of Lake Edward on the border between the DRC and Uganda. At 7,900 km², Virunga is one of the largest national parks on the continent. It is managed by the state organisation Institut Congolais pour la Conservation de la Nature (ICCN), which is responsible for national park management in the DRC.

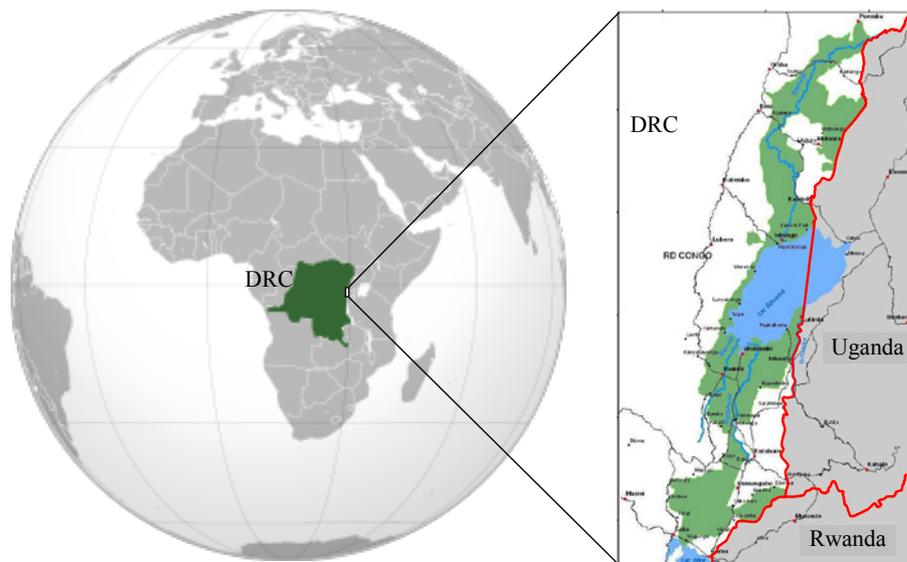


Figure 1 Location of the DRC (dark green to the left) and Virunga National Park (light green to the right) in eastern DRC, on the borders with Uganda and Rwanda (the red line in the map on the right represents international borders).

Virunga National Park is located in mainland Africa's most bio-diverse region, and is one of the most biodiverse protected areas in the world.⁶ This exceptionally diverse region, often called the Albertine Rift, is home to 50 per cent of Africa's bird species, 39 per cent of its mammal species, 19 per cent of its amphibian species, and 14 per cent of its reptiles and flora species. The Albertine Rift features more than 1,000 species found nowhere else in the world (endemic species). In the Albertine Rift, Virunga National Park is the protected area providing habitats for the most species in total, and the most endemic species.⁷ The park has a unique variety of habitats, including savannah featuring large

mammals including elephants, buffalo, hippopotamus, various different antelopes and large predators. Lakes and wetlands are also home to varied, richly diverse animal and plant life. The rainforest and mountain forest areas in particular contain many rare species. Active and extinct volcanoes, high mountains and glaciers contribute to the park's large variety of landscapes and ecosystems. Virunga is home to numerous threatened species on the international Red List.⁸

The national park has received various international protection statuses due to its unique values. Virunga National Park was established as a UN World Heritage Site in 1979,⁹ among other things due to its unique ecological, geological and landscape values, which were deemed to be of particular universal importance.¹⁰ In 1996, the national park was also recognised as a Ramsar Site, i.e. wetlands of international importance.¹¹ The park's great natural value is illustrated, among other things, by its inclusion in most global priority lists for nature conservation and biodiversity, including the WWF's ecoregions,¹² Conservation International's 'biodiversity hotspots',¹³ BirdLife International's Important Bird Areas¹⁴ and Endemic Bird Areas,¹⁵ and the Critical Ecosystem Partnership Fund's list of priorities.¹⁶ Furthermore, this area plays an important role in water supply in the region, in the level of the Nile, and in fishing in lakes such as Lake Edward and Lake Albert, both of which are shared by the DRC and Uganda.

Due to the highly unstable security situation in eastern DRC, there is currently little tourism in the park. Through large investments from international donors, the tourism infrastructure in parts of the park has been significantly upgraded in recent years. Tourist numbers are growing strongly (at about 100 per cent annually in recent years), but still remain at a low level overall.

The national park has faced a number of serious threats over the past 20 years, and park managers have encountered major challenges and, on occasion, direct confrontations with fatal outcomes for both park employees and intruders. Due to the many and serious threats, the park was placed on the UN List of World Heritage in Danger in 1994,¹⁷ an exclusive list in a negative sense. This listing also constitutes encouragement for the international community to implement extra measures and offer further support to safeguard the area. Currently, the national park is one of the most threatened protected areas in the world. It has seen the populations of many species declining by more than half, and in some cases by more than 90 per cent to a critically low level.¹⁸

Civil war-like conditions, various armed groups that have lived in the park, organised poaching, organised illegal logging and production of charcoal, exploration for minerals and metals, extreme poverty in the area around the park, large numbers of internally displaced people and refugees, the highly unstable security situation and limited park management resources are among the factors that have put considerable pressure on the park's resources and values. Virunga National Park is currently very vulnerable.

4.2 PETROLEUM INTERESTS IN AND AROUND VIRUNGA NATIONAL PARK

After several oil discoveries in similar geological formations in the Albertine Graben¹⁹ on the Ugandan side of the border in recent years, interest in oil exploration in eastern DRC

has grown significantly. Three blocks in eastern DRC together cover some 80 per cent of Virunga National Park and World Heritage Site. Blocks V and III are licensed to various companies, while block IV was not licensed as at August 2012. Figure 2 below shows the extent of the park and the three blocks. Exploratory drilling has not yet commenced in these blocks in the DRC. In neighbouring Uganda, licences have been issued for oil and gas exploration blocks that border the DRC. Exploratory drilling has been conducted in a number of blocks on the Ugandan side, and commercially viable oil deposits have been found.

4.2.1 BLOCK V

Block V covers a large area (7,105 km²) in eastern DRC. To the east, block V borders Uganda. More than half of block V overlaps Virunga National Park and World Heritage Site. The national park forms a corridor through block V from the northeast to the central parts of the block in the south. Even though parts of the block are located outside the national park, these areas are in reality of little interest to SOCO, since the areas containing sedimentary rock that may contain oil and gas are largely located in the part of the block that falls within the national park (see Figure 3 for an illustration).

4.2.2 SOCO'S ACTIVITIES THUS FAR

In 2008, SOCO and its partners entered into a production sharing contract (PSC) for block V. According to the contract, the company is to carry out geological and geophysical surveys, acquire at least 300 km of seismic data and drill two exploration wells.²⁰ SOCO's proposed activities were rejected by the DRC's Minister of Environment in March 2011, after SOCO had presented an Environmental Impact Assessment (EIA) for its activities in block V, including Virunga National Park. This coincided with the government's announcement that it would conduct a wider strategic impact assessment to evaluate matters including the environmental impacts of petroleum activities in a larger region in the eastern part of DRC. About a year later (March 2012), SOCO reported that it had received licenses from the petroleum and environmental authorities in the DRC to conduct exploration.²¹ SOCO has started preparatory work in the national park, such as reconnaissance. As at September 2012, the company planned to conduct aerial magnetic and gravitational studies on Lake Edward and onshore savannah areas during the course of 2012.²² These areas are part of the national park and the World Heritage Site. Seismic surveys and exploratory drilling may be carried out later.

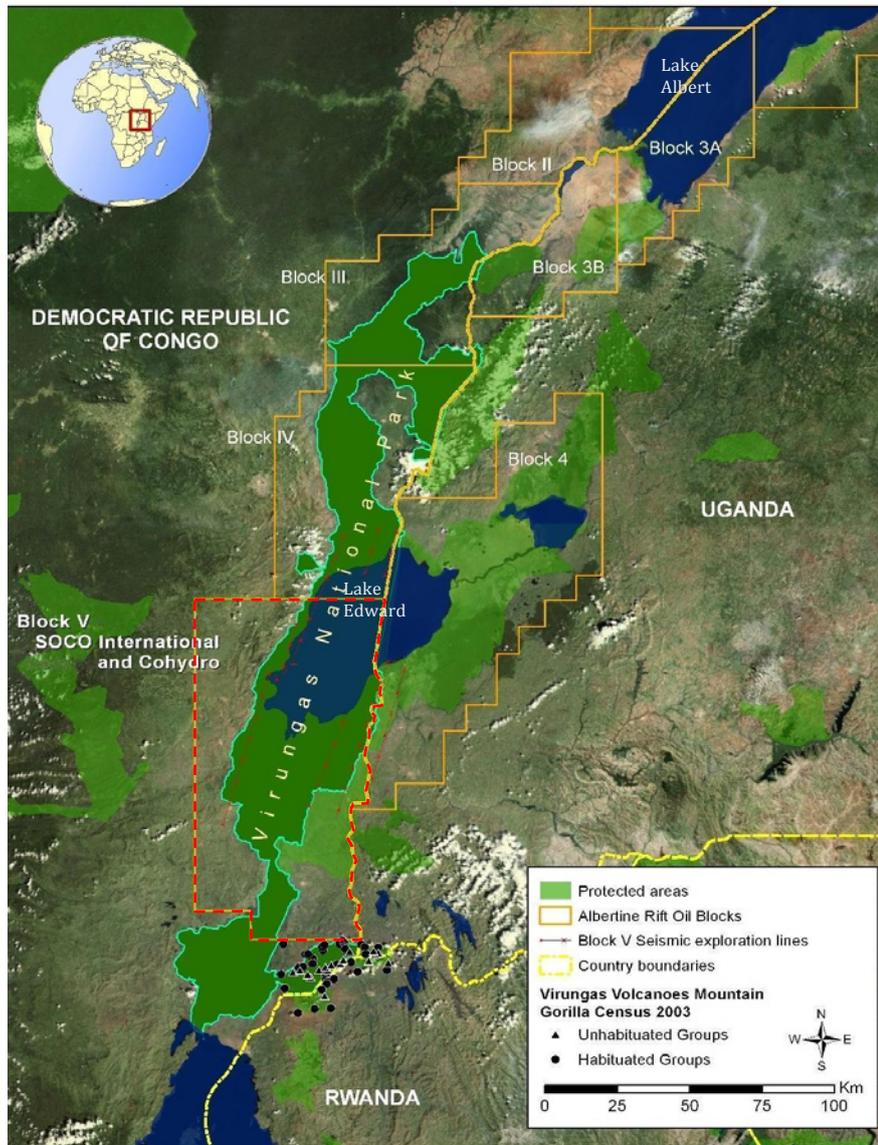


Figure 2 Virunga National Park (in dark green and with a light green border) and oil blocks in the DRC and Uganda (orange borders). SOCO is the operator in block V in the southern part of the national park. Block V is shown with a stippled red line. (Source: based on <http://whc.unesco.org/en/news/849>.)

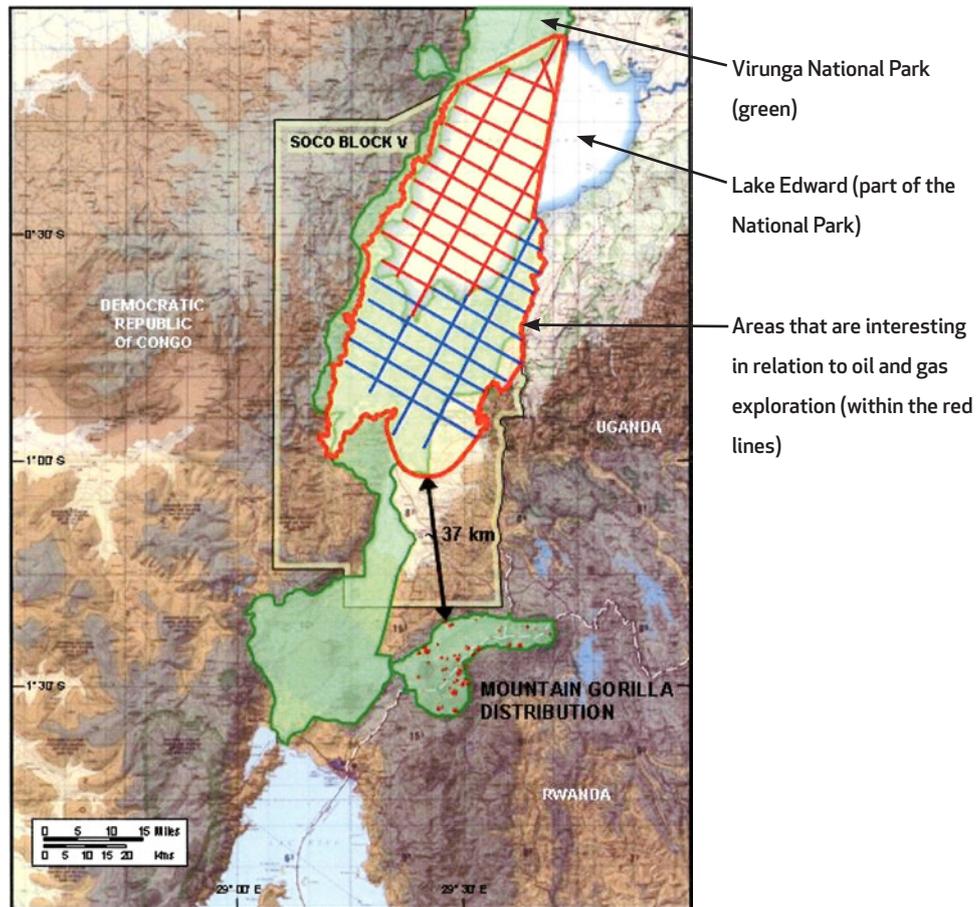


Figure 3 The red line shows areas that are interesting in terms of oil and gas exploration. Almost the entire area falls within the green area that is Virunga National Park, including most of Lake Edward. The red and blue shading indicate areas where seismic studies are to be conducted – Lake Edward and onshore areas, respectively (Source: SOCO International plc.).

4.3 NATIONAL LAWS AND INTERNATIONAL NORMS

Both national law and international conventions and standards are relevant to the petroleum activities in block V in eastern DRC. Article 3 in act number 69-41 (22 August 1969) on nature conservation in the DRC²³ and Article 33 in the new environmental act (act number 11/009, 19 July 2011)²⁴ include prohibitions on oil and gas exploration in national parks, and on other activities that harm the environment in such areas.

The UN World Heritage Convention (1972) has been ratified by the DRC.²⁵ Neither the convention nor the operational guidelines for the implementation of the convention permit oil and gas activities in a world heritage site.²⁶ These issues were also considered and settled during the identification of locations for inclusion on the world heritage list. States that are parties to the convention may not permit oil and gas activities at world heritage sites. In one instance, UNESCO has taken the serious step of excluding a natural area from the world heritage list. This was the Arabian Oryx Sanctuary in Oman,²⁷ which was deleted from the list due to the Omani state's decision to reduce the size of the national protected area that formed the basis for the world heritage site, to permit oil and gas exploration.²⁸

UNESCO has reacted strongly to developments in Virunga, and has asked the DRC authorities to stop SOCO's activities in the national park and not to issue licences in violation of the DRC's obligations under the convention.²⁹ SOCO's activities also appear to violate the Kinshasa Declaration on the protection of the DRC's threatened World Heritage Sites, signed by the UNESCO Director-General and the Prime Minister of the DRC in January 2011.³⁰

World heritage sites contain unique global values. Only states can nominate world heritage site candidates. Nominated areas are subject to a thorough evaluation process before potential inclusion in the UN list of world heritage sites. States, the private sector, local communities, other stakeholders and experts participate in the process of clarifying whether an area fulfils the criteria and can be designated a world heritage site. This process includes clarification of potential conflicts that may prevent inclusion in the list. This thorough process and the opportunities it offers for gathering feedback from different parties was crucial to the 2003 commitment made by many of the world's largest mining companies (through the International Council on Mining and Metals, ICMM) not to explore or produce minerals and ore from world heritage sites, and to avoid interventions near such areas that may harm the universal values being protected there.³¹ Some companies that are not members of the ICMM, including oil companies, have announced similar commitments. Any interventions in this type of protected area are also contrary to international standards, for example the guidelines and standards adopted by the World Bank and the International Finance Corporation (IFC).³²

The European Commission and other donors are financing an Environmental Evaluation Strategy in the DRC that is to provide a comprehensive evaluation of the consequences of petroleum activities in the eastern part of the DRC, not only in block V. This evaluation is still being prepared, and is expected to be completed at the end of 2012 at the earliest. Given the delays thus far, however, it appears most likely that the report will not be completed until after this date. SOCO plans to move ahead with its plans before this evaluation is ready.

A number of international organisations, including the World Bank, EU and numerous bilateral donors and partner countries (e.g. Germany, Norway and Belgium) have voiced strong criticism of SOCO's activities and plans and the DRC authorities' handling of the situation.³³

5 Information from the company

SOCO has regularly updated its homepage with information on the plans and developments in block V.³⁴ SOCO has responded in writing to questions from the Council on Ethics, and has commented on a draft of the recommendation. According to SOCO's policy on health, safety and environment, the company shall comply with all applicable laws and requirements pertaining to health, safety and environment in countries in which the company operates. Where these do not exist, industry standards are the minimum.³⁵

The company has consistently been clear about its position that it will implement its plans and activities as long as the DRC authorities want it to. The company has referred to the DRC's right and duty to exploit the country's natural resources and create

development and benefits to society from them. Further, the company believes that SOCO's presence and future support for responsible natural resource management and the protection of the national park may have a positive effect, given the limited resources available to the park's managers and the substantial poverty in the area. The company has also emphasised that it is not planning activities in the mountain areas of the national park, which are home to critically endangered mountain gorillas, among others.³⁶

In its communications with the Council on Ethics, SOCO has written that it considers that world heritage status does not prohibit the exploitation of resources in the ground, and that oil exploration licences do not breach the spirit of the UNESCO convention and/or mean that Virunga must be deleted from the world heritage list. Among other things, the company is of the opinion that national legislation takes precedence over the convention, and that the activities do not contravene the convention because they are lawful under national legislation. In support of its view, the company has referred to Article 6 of the convention³⁷ and stated that this implies that national legislation takes precedence over the convention. The company has also referred to Article 3 of the convention³⁸ in support of the view that the states party to the convention have a right to limit natural heritage and cultural heritage sites. On this basis, SOCO has concluded that the DRC authorities may grant SOCO oil and gas exploration licences in the national park. SOCO is also of the opinion that its activities are entirely consistent with the DRC's obligations under the Kinshasa Declaration of January 2011.

The company considers that all activities implemented as at August 2012 are lawful under DRC legislation. The company takes the view that older legislation that applied during the establishment and subsequent amendment of the national park (in 1925, 1934 and 1935),³⁹ recognises the existence of mining company rights, that these rights have not yet been withdrawn, that the rights demonstrate the authorities' acceptance of resource exploitation in the park, and that the rights provide a basis for exceptions from the nature conservation act of 1969. On this basis, the company takes the view that the national park does not bar the conduct of petroleum activities. The company has also pointed out that the state of the DRC is sovereign and may amend the protection status of parts or all of the national park at any time in the interests of national development.

As regards the Environmental Evaluation Strategy relating to the eastern DRC (parts of the Albertine Graben) initiated by the authorities, SOCO's position is that the petroleum potential in the Virunga National Park must be investigated. The company considers that the Environmental Evaluation Strategy will be a useless and imbalanced measure without this information. The company has also written that its environmental and social studies are consistent with UNESCO's operational guidelines for the implementation of the World Heritage Convention. SOCO has emphasised that it is aware that Virunga is a particularly sensitive area, and that it is therefore taking extensive steps to minimise the environmental impact.

The company has emphasised that the most important threats to the national park and the reasons why the park is on the UN List of World Heritage in Danger are unrelated to SOCO. The company has claimed that the development of petroleum resources in the region may both promote development and strengthen protection of Virunga National

Park. SOCO aims to ensure that the positive social consequences of petroleum activity greatly outweigh the negative environmental consequences. The company considers that, if petroleum resources are discovered in the national park, these can be produced in an environmentally appropriate and lawful manner, or by modifying the status of the area in which production activities are proceeding. SOCO has written that it has no infrastructure in the park and is not working in the park.

The company plans to conduct helicopters studies over Lake Edward and the savannah areas in the national park in 2012 to collect information on magnetism and gravitation. The studies will cover an area of approximately 3,700 km². Subsequently, the company plans to conduct seismic studies on Lake Edward. SOCO has stated that it has not planned any exploratory drilling so far.

6 The Council on Ethics' assessment

The Council on Ethics has assessed SOCO's activities and plans in block V by reference to the severe environmental damage criterion in the ethical guidelines for the Government Pension Fund Global. The Council has considered the values in and vulnerability of Virunga National Park and World Heritage Site, how severe the damage is expected to be, whether the consequences are expected to be long-term or irreversible, and whether the company's activities violate national law or international standards. Further, the Council has assessed whether the company has implemented or planned sufficient preventative and mitigating measures, and whether it is likely that the company's activities will continue.

The Council has given particular emphasis to the fact that Virunga National Park and World Heritage Site is a large, important protected area that is home to globally unique values, including an unusually large variation in habitats and an extremely high diversity of species. The national park features many rare and threatened species. Among other things, the area is a UN World Heritage Site and a wetland of international significance under the Ramsar Convention, and is included in most global lists of biodiversity and nature conservation priorities. The Council would point out that there are very few nature and conservation areas in the world that can compete with Virunga National Park in terms of its richness of biodiversity.

At the same time, the area is very vulnerable and exposed to a number of threats. This has led the UN to place Virunga National Park on the List of World Heritage in Danger. Oil and gas activities in the area will have severe, negative consequences for the national park. The Council considers it likely that oil and gas activities in the park also will result in increasing numbers of people moving to the area. Indirectly, this will increase the pressure on the natural resources in the park, as people moving to the area in the hope of finding work and income are highly likely to meet some of their food and energy needs by gathering natural resources illegally in the park. This will put further pressure on a vulnerable area in which park managers have few resources to deal with a range of serious threats to a large area.

SOCO wants to conduct oil and gas exploration in the national park. It has an

obligation to the authorities to collect at least 300 km of seismic data and conduct two exploratory drillings in block V. The company's plans and activities show that SOCO is investing with the aim of engaging in a range of petroleum activities in the parts of block V that lie in Virunga National Park and World Heritage Site, both onshore and in Lake Edward. The company considers that these activities are contrary neither to DRC legislation nor the UN World Heritage Convention. The Council has concluded that, in its arguments, the company has been selective and employed incorrect interpretations of the World Heritage Convention and applicable legislation. The company has incorrectly claimed that Article 3 of the convention entitles a state to amend the borders of an established world heritage site. Article 3 points out the right of states to nominate candidates for world heritage status, and their duty to identify locations and propose delimitation in this connection. Decisions regarding the world heritage status of an area, its borders and any subsequent changes are made under the convention – to which the state is a party – not unilaterally by the state. Article 6 of the convention concerns international cooperation and assistance, and obviously does not give the state the right to act in contravention of the convention. Article 6 emphasises how important it is that international cooperation respects the sovereignty of the state and occurs with the consent of the state. As regards national legislation, the Council on Ethics has taken as a point of departure that both the nature conservation act (Article 3 of act number 69-41 of 22 August 1969) and the environment act (Article 33 of act number 11/009 of 19 July 2011) prohibit environmentally harmful activities, including petroleum activities, in Virunga National Park.

The Council on Ethics has therefore concluded that the company's ongoing and planned activities breach international conventions such as the UN World Heritage Convention and the operational guidelines for the implementation of the convention, national legislation and various international standards such as the guidelines adopted by the World Bank, IFC and ICMM. Since the company's activities and plans contravene the World Heritage Convention, UNESCO will probably have to withdraw the national park's world heritage status. It appears likely that the DRC authorities will have to reduce or dissolve the national park, since oil and gas exploration is contrary to the nature conservation and environmental legislation. The most likely consequence of this is long-term or irreversible damage to or destruction of the national park and world heritage site, a location of particular global value and vulnerability.

Given the current situation in and around the vulnerable national park, there do not appear to be any mitigating measures capable of preventing severe damage to the national park's natural values if SOCO explores and potentially produces oil or gas in the national park. As regards preventing damage to the world heritage site, the Council takes the view that only a stop in SOCO's activities in the parts of block V that lie in the national park will have a sufficient impact. SOCO is clear regarding its intentions and plans, and has stated that it has received the necessary licences from the DRC authorities to begin surveying potential oil and gas resources in the park. The Council therefore considers the future risk of severe environmental damage to be great.

7 Recommendation

The Council on Ethics recommends the exclusion of SOCO International plc. from the investment universe in the Government Pension Fund Global due to an unacceptable risk that the company will be responsible for severe environmental damage.

Ola Mestad
Chair
(Signature)

Dag Olav Hessen
(Signature)

Ylva Lindberg
(Signature)

Gro Nystuen
(Signature)

Bente Rathe
(Signature)

Notes

- 1 The company has *Issuer Id*: 225665.
- 2 http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.
- 3 Key documentation is referred to in footnotes. Websites that are referred to were available on 17 October 2012.
- 4 The non-controlling ownership interest of 15 per cent is owned by Quantic Finance Ltd. (SOCO 2012. “Annual Report and Accounts 2011”, page 88). Quantic also owns shares in SOCO International plc. (<http://www.quanticoil.com/quantic.html>). Quantic is privately owned. There are overlaps among the managements of SOCO and Quantic.
- 5 In March 2008, SOCO, Dominion Petroleum Ltd. and Cohydro signed a Production Sharing Contract for block V. As at 2008, Dominion had an ownership interest of 46.75 per cent in block V. Dominion was acquired by Ophir Energy plc. in early 2012. In July 2012, SOCO bought Ophir Energy’s 46.75 per cent stake in the JV, increasing its share from 38.25 to 85 per cent. As at 31 December 2011, the GPFG had no investments in any company in the block V JV other than SOCO.
- 6 Languy, M. & de Merode, E. (red.) 2009. “Virunga: the Survival of Africa’s First National Park”. Lannoo, Tielt.
- 7 Plumptre, A.J., Behangana, M., Davenport, T., Kahindo, C., Ndomba, E., Nkuutu, D., Owijunji, I., Ssegawa, P. & Eilu, G. 2003. “The Biodiversity of the Albertine Rift”. Albertine Rift Technical Reports No. 3. Wildlife Conservation Society, New York and Kampala.
- 8 IUCN Red List (www.iucnredlist.org).
- 9 The Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) authorises the United Nations Educational, Scientific and Cultural Organisation (UNESCO) to designate natural, cultural and combined world heritage sites. As at September 2012, there were 745 cultural heritage sites, 188 natural heritage sites and 29 combined heritage sites. Virunga is on the list of natural heritage sites.
- 10 Virunga National Park was included on the list of world heritage sites because it met three of the four natural heritage criteria: “vii) to contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance”, “viii) to be outstanding examples representing major stages of earth’s history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features”, and “x) to contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.” (<http://whc.unesco.org/en/criteria>). For more information on Virunga’s universal values, see the UNESCO website. (<http://whc.unesco.org/en/list/63>).
- 11 According to the Ramsar Convention (Convention on Wetlands of International Importance, 1971), wetlands that are of international importance can be given status as a Ramsar Site based on nomination of the county in question and expert evaluations from a number of parties (www.ramsar.org).
- 12 <http://www.worldwildlife.org/science/ecoregions/WWFBinaryitem6498.pdf> and http://wwf.panda.org/about_our_earth/ecoregions/albertine_montane_forests.cfm.
- 13 http://www.conservation.org/where/priority_areas/hotspots/africa/Eastern-Afromontane/Pages/default.aspx.
- 14 BirdLife International 2001. “Important Bird Areas in Africa and Associated Islands: Priority Sites for Conservation”. BirdLife Conservation Series no. 11. BirdLife International, Cambridge.
- 15 BirdLife International 1998. “Endemic Bird Areas of the world: Priorities for Biodiversity Conservation”. BirdLife Conservation Series no. 7. BirdLife International, Cambridge.
- 16 http://www.cepf.net/where_we_work/regions/africa/eastern_afromontane/Pages/default.aspx.
- 17 See for example the UNESCO report from the 18th session of the World Heritage Committee (document WHC-94/CONF.003/16). As at September 2012, Virunga is one of 18 world natural heritage sites included on the List of World Heritage in Danger (<http://whc.unesco.org/en/danger/>).
- 18 Languy, M. & de Merode, E. (eds.) 2009. *Op. cit.*

- 19 The Albertine Graben is located in the area referred to as the Albertine Rift above.
- 20 SOCO 2008. "Annual report and accounts 2007", page 19.
- 21 <http://www.socointernational.co.uk/index.php?cID=299&cType=news>.
- 22 <http://www.socointernational.co.uk/block-v-and-the-virunga-national-park#!tab=695>.
- 23 "Public land in protected areas may not be surrendered or allocated. Such land may not be given a status incompatible with the protection of nature." ("Ordonnance-loi 69-041 du 22 août 1969, sur la conservation de la nature", article 3: *Les terres domaniales situées dans les réserves intégrales ne peuvent être ni cédées ni concédées. Elles ne peuvent recevoir d'affectation incompatible avec la protection de la nature.*)
- 24 "Any activity that may harm the environment shall be prohibited in the protected area and in the prohibition zones. Any right granted within the borders of the areas and zones referred to in the first paragraph shall be invalid." ("Loi no. 11/009 du 09 juillet 2011 portant principes fondamentaux relatifs à la protection de l'environnement", article 33: *Toute activité susceptible de nuire à l'environnement est prohibée dans les aires protégées ainsi que dans les zones interdites. Est nul tout droit accordé dans les limites des aires et zones visées à l'alinéa 1er.*)
- 25 The DRC ratified the convention in 1974. As at September 2012, 190 countries had ratified the convention.
- 26 Convention Concerning the Protection of the World Cultural and Natural Heritage, (<http://whc.unesco.org/archive/convention-en.pdf>) and the Operational Guidelines for the Implementation of the World Heritage Convention, (<http://whc.unesco.org/archive/opguide12-en.pdf>).
- 27 UNESCO 2007. "Oman's Arabian Oryx Sanctuary: first site ever to be deleted from UNESCO's World Heritage List" (<http://whc.unesco.org/en/news/362>).
- 28 Decision 31 COM 7B.11 (<http://whc.unesco.org/archive/2007/whc07-31com-24e.pdf>).
- 29 See for example the resolution adopted at the 36th session of the UNESCO World Heritage Committee in 2012: "The World Heritage Committee ... 5. Expresses its deep concern over the granting of a Certificate of Environmental Acceptability for an aeromagnetic and aerogravimetric data gathering campaign, which appears to contradict the Government's decision announced at the 35th session of the Committee to suspend petroleum exploration pending completion of the strategic environmental assessment; 6. Reiterates its request to the State Party to revise its authorizations and not to grant new authorizations for petroleum and mining exploration and exploitation within the property boundaries and recalls its position on the incompatibility of petroleum and mining exploration and exploitation with World Heritage status... 12. Urges the State Party to continue the implementation of the corrective measures decided by the Committee at its 35th session (UNESCO, 2011) in accordance with the commitments in the Kinshasa Declaration to rehabilitate the Outstanding Universal Value of the property..." (UNESCO 2012. "Decisions adopted by the World Heritage Committee at its 36th session (Saint-Petersburg, 2012)". Document WHC-12/36.COM/19, page 13, (<http://whc.unesco.org/archive/2012/whc12-36com-19e.pdf>)). Every year since the 32nd session in 2008, UNESCO's World Heritage Committee has expressed strong concern about Virunga National Park in its resolutions, and commented critically on the oil licences granted for the national park since these breach the World Heritage Convention. The committee has also asked the DRC authorities not to approve, and to withdraw, such licences relating to areas forming part of the world heritage site, and to respect national environmental legislation (<http://whc.unesco.org/archive/2008/whc08-32com-24reve.pdf>, <http://whc.unesco.org/archive/2009/whc09-33com-20e.pdf>, <http://whc.unesco.org/archive/2010/whc10-34com-20e.pdf>, <http://whc.unesco.org/archive/2011/whc11-35com-20e.pdf>, and <http://whc.unesco.org/archive/2012/whc12-36com-19e.pdf>).
- 30 The Kinshasa Declaration (14 January 2011) referred, among other things, to the importance of implementing the World Heritage Convention and environmental and mining legislation in the DRC (<http://whc.unesco.org/uploads/news/documents/news-702-1.pdf>). The resolution adopted at the 36th session of UNESCO's World Heritage Committee in 2012 stated the following, among other things: "The World Heritage Committee... 5. Considers that the recent permit which has been granted to the international oil and gas company SOCO to start oil exploration activities in Virunga National Park is not in conformity with commitments made by the State Party in the Kinshasa Declaration; 6. Urges the State Party to ensure a full implementation of the commitments made in the Kinshasa Declaration..." (<http://whc.unesco.org/archive/2012/whc12-36com-19e.pdf>).
- 31 ICCM 2003. "Mining and protected areas – position statement" (<http://www.icmm.com/document/43>).
- 32 World Bank 2001. "Operational Policy 4.04: Natural Habitats" (<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:20543920~menuPK:1286576~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>), and the International Finance Corporation (IFC) 2012, "Performance Standards on Environmental and Social Sustainability" (www.ifc.org/performancestandards).
- 33 See for example the letter to Prime Minister of the DRC Adolphe Muzito dated 30 November 2010, signed by the World Bank's director for the DRC and the EU, Norwegian and German ambassadors to the DRC.
- 34 <http://www.socointernational.co.uk/block-v-and-the-virunga-national-park>.

- 35 SOCO's "Health, Safety and Environment Policy Statement" (<http://www.socointernational.co.uk/hses-policy-statements#!tab=481>), and SOCO's "Code of Business Conduct and Ethics and Guidelines for Implementation" (<http://www.socointernational.co.uk/code-of-business-conduct-and-ethics#!tab=465>).
- 36 Around 480 of the world's total population of approximately 780 mountain gorillas (*Gorilla beringei beringei*) live in the Virunga massif in the border region between the DRC, Rwanda and Uganda. Virunga is the habitat of one of the two remaining mountain gorilla populations (<http://www.igcp.org/gorillas/mountain-gorillas/>).
- 37 SOCO has quoted the following excerpt from Article 6: "*While respecting the sovereignty of States over the territory in which the cultural and natural heritage mentioned in Articles 1 and 2 is located and without prejudice to the real right provided for by domestic legislation over said heritage, the Party states here acknowledge that it constitutes a universal heritage for the protection...*" (The original quote from the company is reproduced even if there are errors compared to the convention text.)
- 38 SOCO has quoted the following excerpt from Article 3: "*delimit the various assets located in its territory and referred to in Articles 1 and 2 above...*" (The original quote from the company is reproduced even if there are errors compared to the convention text.)
- 39 Decree of 21 April 1925 on the establishment of Albert National Park. Decree of 26 November 1934 on the boundaries of the national park, amended by decree of 12 November 1935.

The Ministry of Finance

13 January 2014

Question regarding the use of the World Heritage Convention in the Council on Ethics' recommendation concerning Soco

In an email of 12 November 2013, the Ministry questioned whether there were grounds for the following sentence in the Council on Ethics' recommendation of 17 October 2012: "... the company's ongoing and planned activities breach international conventions such as the UN World Heritage Convention and the operational guidelines for the implementation of the convention..." The Ministry stated in the email that, "Quality assurance should be undertaken to ensure that no incorrect legal interpretation is applied."

It should first be noted that the above sentence in the recommendation also refers to "national legislation and various international standards such as the guidelines of the World Bank, IFC and ICMM." The legal interpretation (which the Ministry wishes to quality-assure), thus applies to more standards than just the World Heritage Convention.

The scope of Article 5

The Ministry has asked whether the World Heritage Convention requires states parties to refrain from petroleum activities in areas listed in Article 3 of the convention. It has been suggested that the phrases "in so far as possible" and "as appropriate in each country" in Article 5 restrict the negative obligations of the states under the convention. This interpretation appears inconsistent with customary treaty interpretation. Article 5 requires the states parties to implement various measures, insofar as possible and "as appropriate for each country". The reference to measures that must be "appropriate for each country" refers to the large number of different world heritage objects existing in many different countries, and thus allows for the adaptation of measures in individual cases. The phrase "as appropriate for each country" is not a general limitation on the obligations to protect such objects; rather, it constitutes an obligation to implement such measures as are appropriate in the individual state.

Further, the words "in so far as possible" constitute a phrase that must be interpreted as written. Consideration must be given to what is possible for the individual state. As regards negative obligations – such as ensuring, by preserving the status quo, that world heritage objects are not damaged – these will normally be covered by the term "in so far as possible".

The Ministry also appears to suggest that Article 5(4) does not impose concrete obligations on the states parties because it contains the word "appropriate". The provision states that the states parties shall "take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage". Once again, the term "appropriate" must

be interpreted literally: the measures to be implemented in individual countries and in relation to individual objects must be suited to the purpose (appropriate).¹

The Ministry's interpretation of Article 6(3)

In its email, the Ministry stated that Article 6(3) can be interpreted to mean that a state party "is obliged not to adopt, intentionally, any measures that may directly or indirectly damage any world heritage." This is incorrect. Article 6(3) is worded as follows: "Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of *other States Parties to this Convention*." (Our underlining.) Therefore, the provision does not concern the obligations of the states parties in their own territories. As stated in the recommendation (page 13), the Council on Ethics discussed Article 6 because the company had incorrectly claimed that Article 6 established a right for the states parties to breach the convention.

The interpretation of Article 4

Article 4 provides the statutory basis for assessing whether an obligation exists to refrain from certain types of economic activity, such as petroleum production. The article states that each state party acknowledges the following obligations: "...ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2...", and that it will do "...all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain."

The Vienna Convention on the Law of Treaties states that a treaty must be interpreted in accordance with "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The ordinary meaning of the text in question, particularly in light of the convention's object (world heritage objects and areas), and purpose (protecting and conserving specified cultural and natural objects), is that the states must ensure the protection of world heritage areas insofar as possible for each individual state. As the Council on Ethics argued in the recommendation, exploration and production activities in the national park will cause irreparable and irreversible damage to that which world heritage status is intended to protect. The general jurisdiction of the state encompasses not granting permission for exploration and production activities in the part of the area that overlaps the national park. Accordingly, the conclusion that exploration and production activities in the national park contravene the content of Article 4 does not reflect an improper or activist interpretation.

The significance of the committee's jurisdiction

The Council on Ethics' references to the statements of the World Heritage Committee and the operational guidelines are arguments in support of the interpretation of Article 4 that has already been employed based on the wording of the provision as applied to the facts that must be deemed to apply in the present case. However, in its email, the Ministry

appeared to question whether the rules in the convention are legally binding, since the committee lacks jurisdiction to make legally binding orders. The Ministry stated that there “is no system for determining that petroleum activity in world heritage areas constitutes legal infringement of the convention”, and that the UNESCO World Heritage Committee does not issue legally binding orders to the states. In this context, it is unclear whether the Ministry considers that this thus makes it impossible to determine whether the convention has been breached, or whether it considers that the committee’s statements cannot be given weight. Moreover, there are international legal institutions with jurisdiction to interpret treaties with binding legal effect, such as the International Court of Justice (ICJ). Whether or not material rules are directly connected with legally binding institutions is of no significance to the legal scope of the rules. Many areas of international law would be in a bad state if the only rules regarded as binding were those for which there are also institutions with legally binding jurisdiction in relation to the individual rules. In that case, none of the UN human rights conventions could be deemed to constitute applicable law.²

Conclusion

As regards the Ministry’s request for quality assurance of the legal interpretation, it is – in the Council on Ethics’ view – the interpretation of Article 4 and its concrete consequences that may be the subject of different interpretations. The Council is unfamiliar with Norway’s policy on this point in the UNESCO context. In its recommendation, the Council on Ethics omitted a detailed legal discussion of this provision precisely because the Council’s assessment is based on many more factors than this specific one. The Council has considered the ethical guidelines and the Council’s previous practice relating to the environment criterion, whereby any breaches of international or national law simply comprise one of several assessment criteria. Nevertheless, as stated above, the Council is of the opinion that there are strong grounds for asserting that exploration and production activities in the national park will breach the material rules in the convention.



Ola Mestad

Chair of the Council on Ethics

Notes

- 1 On a general basis, it can be pointed out that it would be highly unfortunate if Norway, in cases where the words “as appropriate” occur in legally binding instruments (or negotiated texts that provide political guidance), were to begin interpreting this phrase as a limitation on the obligations in question.
- 2 The supervisory mechanisms, if any exist, are often voluntary, and in any event lack jurisdiction to issue legally binding orders.

To the Ministry of Finance

11 September 2014

Recommendation concerning Soco International plc.

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1 Summary

The Council on Ethics no longer recommends the exclusion of SOCO International plc. (SOCO) from the Government Pension Fund Global (GPF). On 17 October 2012, the Council recommended the exclusion of SOCO from the GPF due to an unacceptable risk that the company would be responsible for severe environmental damage through its oil and gas activities in Virunga National Park in the Democratic Republic of the Congo (DRC). The Ministry of Finance has not made any decision on the matter.

SOCO has interests in block V in eastern DRC. Block V largely overlaps with Virunga National Park, which also has the status of a UN (UNESCO) World Natural Heritage Site. SOCO has an 85 per cent share in, and is the operator of, a joint venture engaged in petroleum exploration in block V. SOCO has surveyed petroleum resource deposits in block V in Virunga National Park, and has planned further activities in the park.

The Council on Ethics' 2012 recommendation concerned the risk of environmental damage caused by SOCO's future activities in Virunga. Virunga National Park is among the world's most biodiverse protected areas. In June 2014, SOCO concluded an agreement with WWF that it would not engage in further exploration or drilling activities in Virunga for as long as the park has world heritage site status. In its letter to the Council of July 2014, the company confirmed that it has ceased its activities in Virunga.

Since the company's activities have ceased, the Council on Ethics considers that there is no longer an unacceptable risk that the company will be responsible for severe environmental damage in Virunga. Accordingly, the basis for the exclusion recommendation has lapsed. The Council thus no longer recommends the exclusion of the company from the GPF.

2 Background

SOCO is an oil and gas company with activities in Vietnam, the Republic of the Congo (Brazzaville), the DRC and Angola. The company is headquartered in London, where it is also listed on the stock exchange.

SOCO has an 85 per cent ownership interest in block V in eastern DRC through its subsidiary SOCO Exploration and Production DRC Sprl. The state-owned company La Congolaise des Hydrocarbures (Cohydro) has a 15 per cent ownership interest. SOCO is the operator of the joint venture. Large parts of block V overlap with Virunga National Park.

Virunga National Park is the oldest national park in Africa. It is also one of the largest on the continent, and lies in the most biodiverse part of continental Africa. Due to its exceptionally important values, the national park has received several international protection statuses, including as a UN (UNESCO) World Natural Heritage Site and as a Ramsar Site (wetlands of international importance). The park forms part of one of the most biodiverse protected areas globally. At the same time, the park is threatened and has been included in UNESCO's List of World Heritage in Danger.¹

On 17 October 2012, the Council on Ethics recommended the exclusion of SOCO from the GPFG due to an unacceptable risk that the company would be responsible for severe environmental damage in Virunga National Park and World Heritage Site.

The heart of the matter was the future risk that exploration and production activities would cause severe environmental damage to the natural values in the park. The Council on Ethics gave particular emphasis to the fact

“that Virunga National Park and World Heritage Site is a large, important protected area that is home to globally unique values, including an unusually large variation in habitats and an extremely high diversity of species. The national park features many rare and threatened species. Among other things, the area is a UN World Heritage Site and a wetland of international significance under the Ramsar Convention, and is included in most global lists of biodiversity and nature conservation priorities. The Council would point out that there are very few nature and conservation areas in the world that can compete with Virunga National Park in terms of its richness of biodiversity.”

The Council also highlighted the vulnerability of and threats to the area, and emphasised that the UN has included Virunga National Park on its List of World Heritage in Danger.

“Oil and gas activities in the area will have severe, negative consequences for the national park. The Council considers it likely that oil and gas activities in the park also will result in increasing numbers of people moving to the area. Indirectly, this will increase the pressure on the natural resources in the park, as people moving to the area in the hope of finding work and income are highly likely to meet some of their food and energy needs by gathering natural resources illegally in the park. This will put further pressure on a vulnerable area in which park managers have few resources to deal with a range of serious threats to a large area.”

The Council also took the view that,

“Given the current situation in and around the vulnerable national park, there do not appear to be any mitigating measures capable of preventing severe damage to the national park’s natural values if SOCO explores and potentially produces oil or gas in the national park. As regards preventing damage to the world heritage site, the Council takes the view that only a stop in SOCO’s activities in the parts of block V that lie in the national park will have a sufficient impact. SOCO is clear regarding its intentions and plans, and has stated that it has received the necessary licences from the DRC authorities to begin surveying potential oil and gas resources in the park. The Council therefore considers the future risk of severe environmental damage to be great.”

3 Changes in block V activities

On 11 June 2014, it was announced that SOCO had concluded an agreement with the World Wide Fund for Nature (WWF), in which it pledged “not to undertake or commission any exploratory or other drilling within Virunga National Park unless UNESCO

and the DRC government agree that such activities are not incompatible with its World Heritage status.” The agreement also contains a commitment by SOCO not to engage in any form of activity in any world heritage site: “SOCO commits not to conduct any operations in any other World Heritage site. The company will seek to ensure that any current or future operations in buffer zones adjacent to World Heritage sites, as defined by the national government and UNESCO, do not jeopardise the Outstanding Universal Value for which these sites are listed.”²

The company wrote that it intended to complete its programme of works in Virunga, which was expected to conclude in mid-July 2014.³

The Council on Ethics wrote to SOCO on 4 July 2014. Among other things, the Council asked whether the company intended to engage in a process with the DRC authorities aimed at facilitating future activities in Virunga. In its reply, SOCO confirmed the following:

“We will honour our investment obligations regarding environmental baseline studies and social projects for as long as we have licence over Block V, a significant portion of which is outside VNP. We confirm that SOCO is not, and will not be, involved in any discussions between the Government of the Democratic Republic of the Congo and UNESCO regarding the convention governing the administration of the VNP... However, should UNESCO and the DRC Government reach an accommodation on the convention that would allow further activity within VNP [Virunga National Park] or surrounding areas, the Company would then assess any further activity on its part within the economic and reputational parameters that are a consideration in all of our project evaluations.” SOCO also wrote that it would take 12–18 months to evaluate the production potential of the block.⁴

At the World Heritage Committee meeting in June 2014, the Committee reiterated that petroleum activities are irreconcilable with Virunga’s status as a world heritage site, and once again asked the DRC authorities to exclude the park from the exploration licences. UNESCO also asked SOCO to submit a written statement to UNESCO on its position regarding Virunga and other world heritage sites.⁵

4 The Council on Ethics’ assessment

The Council on Ethics has assessed whether the basis for the recommendation to exclude SOCO still exists, given that the company’s activities in block V and Virunga National Park have changed. In its recommendation, the Council had emphasised that severe environmental damage could only be avoided if the company’s activities in Virunga stopped.

Based on information received from SOCO, the Council on Ethics has concluded that SOCO’s exploration activities in Virunga have now ceased, and that the company will not

engage in exploration and production activity in the world heritage site in future. Given that SOCO is no longer engaged in activities in the area, there is no risk that that company will be responsible for severe environmental damage, and the recommendation basis has thus lapsed.

However, the Council on Ethics will reassess the risk of severe environmental damage if the company resumes its activities in Virunga, irrespective of any changes to the borders of the world heritage site.

5 Recommendation

The Council on Ethics no longer recommends the exclusion of SOCO from the investment universe of the Government Pension Fund Global.

Ola Mestad
Chair
(Signature)

Dag Olav Hessen
(Signature)

Ylva Lindberg
(Signature)

Marianne Olsson
(Signature)

Bente Rathe
(Signature)

Notes

- 1 As at August 2014, Virunga was one of 20 world natural heritage sites on the list (<http://whc.unesco.org/en/danger/>).
- 2 Joint Statement by SOCO International plc and WWF, 11 June 2014, available at <http://www.socointernational.com/joint-statement>.
- 3 See footnote 2.
- 4 SOCO's letter to the Council on Ethics, 8 July 2014.
- 5 UNESCO World Heritage Committee Thirty-eighth session Doha, Qatar 15 - 25 June 2014. WHC-14/38.COM/16, 7 July 2014, section 37, available at <http://whc.unesco.org/archive/2014/whc14-38com-16en.pdf>.

To the Ministry of Finance

26 June 2013

Recommendation on the exclusion of Noble Group Limited from the Government Pension Fund Global's investment universe

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1 Summary

The Council on Ethics recommends the exclusion of the company Noble Group Limited (Noble) from the Government Pension Fund Global (GPF) due to an unacceptable risk that the company is responsible for severe environmental damage as a result of its conversion of tropical forest into oil palm plantations.

As per the end of 2012, the GPF owned shares in the company with a market value of USD 49.3 million, corresponding to an ownership interest of 0.81 per cent. The GPF also held company bonds valued at some USD 5 million.

The Council on Ethics has assessed the environmental impacts of Noble's two concessions in the provinces of Papua and West Papua on the island of New Guinea, Indonesia. The concession areas total almost 70,000 ha. One of the concessions is owned and operated by Noble's subsidiary PT Pusaka Agro Lestari (PT PAL), while the other is owned by PT Henrison Inti Persada (PT HIP), a joint venture between Noble and Wilmar International Ltd.¹ Both concessions are located in biologically and ecologically important regions known for their unusually extensive and unique biodiversity. The regions are home to many endemic species of plants and animals found in few or no other places on earth.

Noble has conducted High Conservation Value (HCV) assessments for both concessions in order to identify areas that are particularly important for the protection of biodiversity. The assessments for both concessions conclude that HCVs are primarily found in riparian zones, in steep terrain and in peat swamps. To protect these HCVs and areas of cultural importance to the local population, the company intends to set aside some 13,000 ha in the two concession areas. The remaining area of 55,000 ha is to be cleared and converted into oil palm plantations.

The Council finds that the company's protection of HCV areas is a positive step in the protection of biodiversity. Nevertheless, the Council is not convinced that the values worth protecting in these two large concessions are restricted to forest areas alongside waterways and peat swamps. Moreover, these are areas that the company in any event is required to protect under national Indonesian requirements. Accordingly, it does not seem that the measures help to strengthen biodiversity to any greater extent than already required by national legislation.

The Council attaches importance to the fact that the field surveys conducted to map biodiversity in the two concession areas appear to have concentrated exclusively on the areas set aside for protection, and that large areas recommended for conversion have not been inspected on the ground at all. As regards the 55,000 ha of forest that are to be converted into plantations, no information is available on the state of the forest, diversity of species, or the condition of the ecosystem in general. This sampling bias in the surveys toward specific parts of the concessions, combined with the lack of sampling in other areas, may mean that important conservation values have been overlooked. In the Council's view, this affects the strength of the conclusions concerning what HCVs are present in the concession areas, how they have been surveyed and how they should be managed.

Noble has rejected this in its communications with the Council, pointing out that, as a

member of the Roundtable for Sustainable Palm Oil (RSPO), the company has followed all of the organisation's requirements concerning HCV assessments, and that the PT PAL assessment has been approved by the RSPO. Nevertheless, the Council is of the opinion that membership of the RSPO does not in itself guarantee that HCVs will be identified, protected and managed in such a way that biodiversity is protected in connection with the conversion of forests.

In the Council's view, neither of the two HCV assessments provide well-founded answers to the question of whether intact forest will be converted into plantations and what biological values are likely to be lost as a result of conversion. The Council finds that the absence of such data, the size of the area under conversion and the fact that both concessions are located in areas of unusually rich and unique biodiversity, present an unacceptable risk that conversion will result in complete, irreversible change to ecosystems and vegetation in the region. The measures proposed by the company will, in the Council's opinion, be insufficient to reduce severe environmental damage connected to on-going and future conversion of forest into oil palm plantations.

The Council therefore recommends the exclusion of Noble Group from the investment universe of the Government Pension Fund Global.

2 Introduction

At its meeting in December 2012, the Council on Ethics decided to assess the Fund's investment in Noble Group (Noble) against the Guidelines for the Observation and Exclusion of Companies from the GPFG's Investment Universe (the Ethical Guidelines).²

As per the end of 2012, the GPFG owned shares in the company worth USD 49.3 million, corresponding to an ownership interest of 0.81 per cent. The GPFG also owned company bonds worth USD 5 million.

2.1 WHAT THE COUNCIL HAS ASSESSED

The Council's assessment has concentrated on Noble's conversion of rainforests to oil-palm plantation in the provinces of Papua and West Papua, Indonesia. The Council has assessed whether there is an unacceptable risk that Noble contributes to or is itself responsible for severe environmental damage as per paragraph 2, section three of the Ethical Guidelines.³

In previous recommendations regarding severe environmental damage, the Council has given particular emphasis to whether:⁴

- the damage is significant;
- the damage causes irreversible or long-term effects;
- the damage has a considerable negative impact on human life and health;
- the damage is the result of violations of national laws or international norms;
- the company has failed to act to prevent the damage;
- the company has not implemented adequate measures to rectify the damage;
- it is probable that the company's unacceptable practice will continue.

Environmental impacts associated with the clearing of tropical forests

Commercial logging and the conversion of tropical forest into plantations are considered to be some of the most important threats to the preservation of ecosystems and biological diversity; they also contribute significantly to greenhouse gas emissions. Deforestation and forest degradation accounted for 10 to 17 per cent of global greenhouse gas emissions in the period 2000–2005.⁵

Conversion involves the felling of trees and the removal of other vegetation before an area is used to set up plantations for the production of palm oil, lumber or other monocultures. The conversion of forest into plantations is considered destructive to biodiversity and various ecosystem services. Such monocultures have little ecological value compared to natural forests.

The UN, the World Bank and national governments have recognised the need to reduce deforestation and forest degradation through the United Nations Collaborative Initiative on Reducing Emissions from Deforestation and Forest Degradation (REDD and REDD+), among others, which is also supported by the World Bank and others. The Norwegian government has also supported these initiatives by allocating up to NOK three billion a year to efforts to reduce greenhouse gas emissions from deforestation in developing countries. Importance is given to both the need for cutting greenhouse gas emissions and preserving biodiversity while promoting sustainable development.⁶

Indonesia is one of Norway's partners under the REDD+ scheme. Indonesia is home to the world's third-largest tropical forest; it also has some of the highest deforestation rates in the world. Between 1990 and 2010, Indonesia lost an annual average of 12 000 km² of forest, equal to 1.02 per cent of its total forest cover. In 2010, Norway entered into a partnership with Indonesia to support the country's efforts to reduce greenhouse gas emissions from deforestation, forest degradation and the destruction of peatlands. Under the agreement, Indonesia implemented a nationwide moratorium on new forestry and plantation concessions. The moratorium was set to expire in May 2013 but has been prolonged by two years.⁷ The moratorium forms part of Indonesia's efforts to cut its greenhouse gas emissions by 26 per cent by 2020.

The Council considers tropical forests to be among the most bio-diverse ecosystems on earth. They are habitats for many endangered species, and provide important ecosystem services such as carbon storage, water management and erosion protection. They are important for the state of the environment globally, and deforestation and forest conversion are major threats to the future existence of these ecosystems. Accordingly, and taking into account the many international and national initiatives taken to reduce deforestation and the degradation of tropical forest, the Council has evaluated the environmental damage associated with forest conversion. In its assessment, the Council has emphasised the scale of conversion, the extent to which the companies' concessions overlap with areas containing high biological values, and the consequences of conversion for, *inter alia*, endangered species and their habitats.

The Council has not assessed conflicts about land rights

The Council is aware that Noble in one of its concessions (PT Henrison) is involved in conflicts about land rights. The company is alleged of illegally having obtained land rights in land which traditionally belongs to local clans. According to the company the cases are being tried at the District Court in Sorong. The Council has not researched these cases further.

2.2 SOURCES

Little public information is available on Noble's plantation operations or the environmental impacts associated with the company's conversion of tropical forests. In response to the Council's request, Noble has provided information and documents on its plantation operations, including a High Conservation Value Area assessment and management plan prepared by third parties on Noble's behalf.

The Council has consulted additional experts on HCV assessment in Indonesia to gain a better understanding of whether the company's impact assessments and planned mitigation measures may be adequate to mitigate major biodiversity impacts, as well as whether the scale of forest conversion is compatible with maintaining the HCVs that have been confirmed or are likely to exist in the license areas.

This recommendation is primarily based on the aforementioned sources.

3 Background

3.1 ABOUT THE COMPANY

Noble describes itself as a supplier of agricultural and energy products, metals, minerals and ores across the value chain. The company's global operations include mining, farming, processing of raw materials, port operations, shipping and marketing.⁸ Its operations span all regions of the world. Noble is listed on the Singapore stock exchange and has its headquarters in Hong Kong.

Noble began operating plantations in 2010, when it acquired a 51 per cent stake in the company PT Henrison Inti Persada (PT HIP). Noble has informed the Council that it has recently entered into a joint venture agreement with Wilmar International Ltd. relating to this plantation. Under the terms of the agreement, Wilmar will have an ownership interest of 53.74 per cent. "The vehicle that Wilmar would be buying into already owns PT HIP and therefore Noble is no longer the controlling shareholder of PT HIP."⁹ The GPFG has not invested in Wilmar.

In June 2011, Noble acquired a 90 per cent stake in the private company PT Pusaka Agro Lestari (PT PAL).

Both of Noble's concessions are located on the western (Indonesian) half of the island of New Guinea. PT HIP was founded in 2005 to develop an oil palm plantation in Sorong Regency, West Papua province,¹⁰ while PT PAL owns a concession in Mimika Regency, Papua province. The concessions cover an area of 68,300 ha.

3.2 HIGH CONSERVATION VALUES AND IMPACT MITIGATION

All forests hold environmental and social values, such as habitats, protection against erosion and cultural sites of importance to local populations. Where these values are deemed to be particularly important, a forest can be defined as a “High Conservation Value Forest” (HCVF).¹¹

Noble has commissioned assessments of which conservation values exist in its concession areas as well as how these should be managed in order to preserve them following conversion (so-called High Conservation Value (HCV) Area assessments). The assessments are made in accordance with the Guidelines for Identification of High Conservation Values in Indonesia, which are described in Table 1 below.

Table 1: The Six High Conservation Values for Indonesian forests¹²

HCV	Explanation
1	Areas with important levels of Biodiversity
1.1	Areas that Contain or Provide Biodiversity Support Function to Protected or Conservation Areas
1.2	Critically Endangered Species
1.3	Areas that Contain Habitat for Viable Populations of Endangered, Restricted Range or Protected Species
1.4	Areas that Contain Habitat of Temporary Use by Species or Congregations of Species
2	Natural Landscapes and Dynamics
2.1	Large Landscapes with Capacity to Maintain Natural Ecological Processes and Dynamics
2.2	Areas that Contain Two or More Contiguous Ecosystems
2.3	Areas that Contain Populations of Most Naturally Occurring Species
3	Rare or Endangered Ecosystems
4	Environmental Services
4.1	Areas or Ecosystems Important for the Provision of Water and the Prevention of Floods for Downstream Communities
4.2	Areas Important for the Prevention of Erosion and Sedimentation
4.3	Areas that Function as Natural Barriers to the Spread of Destructive Fire
5	Natural Areas Critical for Meeting the Basic Needs of Local People
6	Areas Critical for Maintaining the Cultural Identity of Local Communities

The HCV approach can, in theory, be an effective tool for mitigating the impacts of forest conversion through a two-step process that aims to (a) identify exceptional biological and social attributes of a landscape that merit protection, and (b) develop management and monitoring plans to maintain these attributes even if the forest is converted to plantations.

The success of the HCV framework in mitigating impacts depends on three factors. First, the assessment must properly describe the biophysical and social context of the forest, identify the exceptional attributes that merit protection, map their distribution, and develop a clear understanding of threats to their persistence in the landscape arising from planned conversion. Second, the assessment must develop clear, credible and practical recommendations to protect the HCVs identified in the area. Third, the recommendations

must be implemented and managed by the company to ensure that the HCV areas are maintained. Where one or more of these conditions is not met, the HCV tool is unlikely to contribute to mitigate serious environmental impacts, especially those resulting from an intervention as wide-reaching as forest conversion.

4 High Conservation Values in the concessions

4.1 THE PT PUSAKA AGRO LESTARI CONCESSION

The PT Pusaka Agro Lestari (PT PAL) concession is located in Mimika Regency, approximately 40 km inland from the southern coast of Papua province and at the foot of the Central Cordillera Range. The concession area totals almost 35,760 ha, and covers the transition zone between mixed swamp-forest and lowland rainforest. The area lies in one of the WWF's eco-regions, the Southern New Guinea Lowland Forests Eco-region, and is included on the WWF's Global 200 Priority Eco-regions list¹³ due to its exceptional biodiversity. The region is considered critically endangered by logging, planned habitat conversion and hunting.¹⁴ According to the WWF, the Global Eco-regions list is a science-based global ranking of the Earth's most biologically valuable terrestrial, freshwater and marine habitats. These habitats are also particularly important for the protection of biodiversity.

4.1.1 THE HIGH CONSERVATION VALUE FOREST ASSESSMENT

In 2011, Noble commissioned an assessment of the concession's HCVs. The Council has focused on the part of the assessment that describes HCVs relating to biodiversity and ecosystems (HCV 1–3; see Table 1).

According to the assessment, two major ecosystems dominate the concession – riparian (riverbank) ecosystems and freshwater peat swamps. Riparian ecosystems are present along rivers, streams and lakes. They are important habitats for wildlife, providing movement corridors and playing an important role in the functioning of aquatic ecosystems. Peat swamp forests are waterlogged forests growing on a layer of dead leaves and plant material. Peat thickness in the concession varies from shallow to very deep peat (50 – >300 cm). Peat swamp forests are unique, extremely carbon-rich ecosystems with a high proportion of endemic species.

The assessment states that the concession is covered by forests which have been logged previously. There is little information on the condition of the forest that is being cleared, and the information provided in the HCV assessment is contradictory. On the one hand, the report states that the forest has low timber potential.¹⁵ On the other hand, it refers to the forest as being in “relatively good condition, forming an intact forest block and interconnected with the forests in the surroundings of PT PAL [PT Pusaka] landscape.”¹⁶

A large number of plant species were recorded (273), although less than half were identified by their scientific names. Only one plant species is classified as Vulnerable under the International Union for the Conservation of Nature's (IUCN) Red List.¹⁷ The report states that 58 wildlife species were observed (5 mammal species, 44 bird species and 9 reptile species. Fish, amphibians and insects do not appear to have been recorded). Of these,

23 species are protected under Indonesian law. One is classified as Critically Endangered,¹⁸ while a further eight are categorised as Vulnerable on the IUCN Red List.

The assessment identifies a number of HCVs in the concession,¹⁹ all apparently located in forests bordering rivers, streams, lakes and in peat swamp forests. The report recommends the conservation of these areas, totalling 3,940 ha of the 35,700 ha covered by the concession (see Figure 1). The centrepiece of the conservation plan is a 1500 ha interconnected area of swamp forest on deep peat (>3m) adjacent to Lake Kaya and an additional 15 riparian zones and lakeshore buffers (ca 880 ha). Some of these are connected to the peat forest and form a partial network of corridors that ensures some connectivity between conservation areas. In addition, a further 1540 ha of forest patches were recommended for protection because of their cultural importance to local people. Although these areas may also provide supplementary biodiversity conservation support, that is not their intended function.

With 3,940 ha allocated to conservation, 31,800 ha of forest remain available for conversion.

In the report, the conversion of forest appears to be justified as follows:²⁰

- In relation to the total remaining forest cover of Papua, the concession is considered “very small”, being equivalent to <0.011 per cent of the remaining forest cover province-wide. The loss is regarded as acceptable.
- The government has already allocated the area for conversion to agriculture under its spatial plans, making it difficult to argue against conversion to oil palm.
- Most of the forest area has been logged previously and is assumed to have low biodiversity value.²¹
- A combined total conservation area of 3,900 ha is deemed more than adequate to maintain populations of all species known to be present.

4.1.2 HAVE ALL HCVS IN THE CONCESSION BEEN IDENTIFIED?

The assessment report asserts that only two kinds of ecosystems are found in the concession – riparian forests associated with rivers or lakes, and peat swamp forest. According to experts the Council has consulted, it seems likely that at least one more ecosystem type is present, namely lowland tropical forest on well-drained mineral soils. Terrain that is more than 30m above sea level and more than 100m from large rivers, is likely to support this type of ecosystem rather than riparian forests or swamps. This type of ecosystem may potentially cover an area equal to the forest along the rivers, lakes, peat swamp and other swamp types. It is also likely to support higher levels of floral and faunal diversity than the areas surveyed.²²

The report shows that field sampling was clustered almost exclusively on riparian areas and peat swamp forest.²³ The report concludes that HCVs are only present in the riparian forests and peat swamp areas ultimately recommended for protection. These conservation areas will in particular help protect clean water, prevent floods, sustain habitats for a subset of threatened or protected species, and accommodate local people’s nutritional and cultural needs. The report does not state how long, narrow strips of residual forest

separated by large areas planted with oil palms will be sufficient to ensure that the HCVs linked to biodiversity are protected in the plantation landscape.

It is highly likely that other areas outside riparian and peat forests include ecosystems that support large populations of threatened, protected or endemic species (as per HCV 1.3). These areas have not been surveyed, and consequently there is little data, if any, on what biodiversity will be lost in areas allocated to conversion. Notwithstanding the absence of necessary data on the condition of the forest or the biological diversity, the report recommends the conversion of very large swathes of forest. It also concludes that the planned conservation areas will be sufficient to ensure the persistence of HCVs in the landscape.

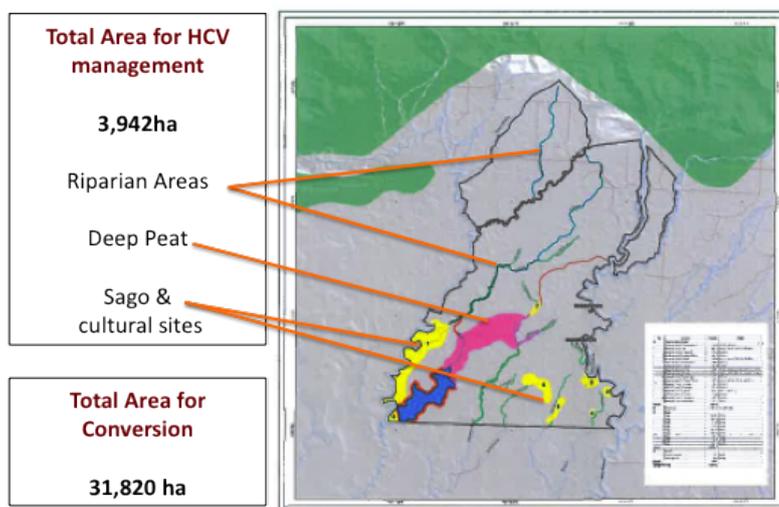


Figure 1: HCV management areas recommended for protection (pink, yellow, green, blue) and areas recommended for conversion (all others) at PT Pusaka Agro Lestari's concession in Mimika Regency, Papua, Indonesia.²⁴

4.2 THE PT HENRISON INTI PERSADA CONCESSION

4.2.1 THE HIGH CONSERVATION VALUE FOREST ASSESSMENT

The PT Henrison Inti Persada (PT HIP) concession is located in Sorong Regency, West Papua province, and covers 325 km² (32,546 ha) of lowland tropical forest. The first land preparations started at the end of 2005, and as of January 2012 about 9,500 ha had been planted. According to Noble, the entire concession is covered by forest²⁵ which was logged previously, in the period 1992–2000, before Noble acquired the concession. There are no peatlands in the concession.

The license area falls within the Vogelkop-Aru Lowland Rain Forests Eco-region,²⁶ which is known for its exceptional biodiversity and is threatened by logging, planned forest-conversion and hunting.²⁷ Lowland forests in the region have some of the richest flora in the whole of New Guinea.²⁸ The eco-region is also known for its rich bird life and a high degree of endemism;²⁹ 366 species are known for the region.³⁰ Of these some 21 species are considered endemic or near endemic, whereof nine are found nowhere else in

the world. The concession also lies in the West Papuan Lowlands Endemic Bird Area, one of BirdLife International's Important Bird Areas.³¹

The HCV assessment for PT HIP was carried out in 2010, shortly after Noble acquired the company. According to the assessment, lowland rainforest is the area's dominant ecosystem. There is little information on the extent or condition of the forest, which is described qualitatively in the report and referred to as degraded, logged-over forest (3,600 ha), highly degraded (9,600 ha) and planted with oil palms (6,000 ha).³² There is no information on forest cover in the remainder of the concession area (13,000 ha).

The report documents an important biodiversity in what concerns both flora and fauna. As many as 661 plant species were found (of which 196 were identified by their scientific name). Three of these are on the IUCN Red list of Endangered, Vulnerable or Near Threatened species.³³ Of the 75 animal species that were identified (10 species of mammals, 55 species of birds, 4 species of reptiles and 6 species of fish), two species are listed as Critically Endangered,³⁴ six are listed as Vulnerable, and two as Near Threatened. Many of the species are protected in Indonesia.

Several HCVs have been identified.³⁵ In this concession too, HCVs are almost exclusively in riparian zones. The report recommends the conservation of some 4,700 ha in order to maintain biodiversity, environmental services and social interests. This includes 33 riparian zones running 25m to 50m along each side of streams and rivers throughout the concession, covering a total of about 4,270 ha. Some of these buffers are interconnected, forming a partial network of riparian corridors that together provide some level of connectivity. In addition, a further 420 ha of forest patches are recommended for protection, mainly on steep slopes and in areas of cultural importance. Although these areas may provide supplementary biodiversity conservation areas, this is not their intended function. Location maps for the HCV values are provided in the report but are not legible.

The same justification is given for the conversion of forest in the PT HIP concession as for PT PAL (see section 4.1 above).

4.2.2 HAVE ALL HCVS IN THE CONCESSION BEEN IDENTIFIED?

As in the assessment concerning PT PAL, the biodiversity sampling areas in the PT HIP concession were clustered almost exclusively around riparian zones. In total, 33 out of 37 field survey sites for flora and fauna were situated immediately beside rivers. The sampling bias toward specific parts of the concession along with an absence of sampling in other areas means that additional HCV attributes may have been overlooked.

According to experts consulted by the Council, the number of plants, birds and animals identified in the field study was low. For example, less than 30 per cent of the plants encountered (196 of 661) could be identified by their scientific name. Many of these are common across Indonesia and are of low conservation concern. This raises questions about whether the actual presence of threatened, protected or endemic species may have been underestimated, including in the areas that were sampled. Several groups of animals (such as insects), were not included in the study.

The concession covers large areas of lowland rainforest at the bottom of valleys and on slopes, hills and plateaus on which no investigations have been carried out. Such areas are

normally home to a considerable range of species of both plants and animals, particularly in areas of intact forest where hunting is restricted. As the concession is located in a region of important biological diversity, it is likely that endangered, protected and endemic species are found in the entire concession area.

This assessment is also unclear about whether intact forest will be converted, and what biodiversity is likely to be lost. The areas recommended for protection will help to protect clean water and prevent floods, sustain habitats for a subset of threatened or protected species, and accommodate forest-dependent cultural traits. Nevertheless, in its current form, the conservation plan recommends the conversion of 27,850 ha of forest without providing sufficient data on forest condition, biodiversity or ecosystems. The corridors that are to be protected also appear to be very narrow. Accordingly, there appears to be no scientific basis for the conclusion that the planned conservation areas are sufficient to ensure the HCV's continued existence.

5 Information provided by the company

5.1 THE COMPANY'S COMMUNICATION WITH THE COUNCIL ON ETHICS

The Council contacted Noble in May 2012, requesting information on the environmental impact of the company's plantation operations. The Council was particularly interested in learning more about how the development of plantations would impact the natural forest, habitats and biodiversity, as well as how HCVs would be protected in the concession.

Noble replied to the Council in June 2012, providing *inter alia* the HCV assessments for the two concession areas.

After reviewing the materials and consulting experts in the field, the Council on Ethics sent Noble a draft recommendation on 21 February 2013. The Council received a reply from the company in March 2013. The main points in the company's comments are presented below.

5.2 THE COMPANY'S RESPONSE TO THE COUNCIL

Noble has been a member of the Roundtable on Sustainable Palm Oil (RSPO) since October 2011.³⁶ The RSPO is a voluntary international association of stakeholders that promotes social and environmental responsibility throughout the palm oil supply chain. The RSPO requires that its members develop new plantations in a manner that ensures the preservation of any HCVs present. Noble commissioned the HCV reports for PT HIP and PT PAL to comply with RSPO requirements.

Noble says that the company will follow the recommendations in the HCV assessments and establish the recommended conservation areas. According to the management plan for the concessions, all identified HCV areas will be managed to maintain their conservation values. This includes measures like the marking of boundaries, the protection of flora and fauna, maintenance of riparian areas, reaching out to local communities and providing training to employees.³⁷ The conservation areas will be periodically monitored

in order to measure developments, including factors which could influence the conservation values or biodiversity as well as other changes to the HCVs.

In its reply to the Council's draft, Noble writes that the Council, in its assessment of what constitutes severe environmental damage, does not refer to any international standards that might express what the Council expects of companies: 'In the absence of such observable standards, companies such as ours, inevitably look to comply with acknowledged standards set by organizations who are perceived to be sustainability leaders, such as the RSPO.'³⁸

The company also states that the Council's recommendation to exclude Noble from the GPFG 'is based on an incorrect assumption that inadequate measures are implemented by the Company to mitigate severe environmental damage associated with ongoing and future development of palm oil in these areas.'

The RSPO requires the publishing of a summary of the HCV assessment and the management plan for public consultation 30 days prior to the planting of new oil palms. Noble points out that this was done for PT PAL, that no objections to the assessment were received, and that the documentation had now been approved by the RSPO. A corresponding consultation process will be conducted for the PT HIP HCV assessment.

Noble rejects the Council's view concerning how the HCV assessments were conducted. Noble maintains that the assessments were carried out by experts approved by the RSPO and in accordance with the RSPO's prescribed methods. The Council's lack of confidence in the methods and assessments that have been used, 'casts fundamental aspersions on the whole process of independent RSPO certification, the validity of the NPP [new planting procedure] process and the professionalism of the HCV studies carried out by those that are certified by the RSPO.'

Noble also writes that the management of the HCVs was further improved in 2012, when the company engaged an Indonesian environmental organisation to develop a master plan for nature conservation. The company also plans to establish dedicated Conservation Departments in both oil palm companies in mid-2013. Further, the area to be set aside for protection has been further expanded by 4.7 km². The company has not specified which concession area this concerns (or if both are included), or the HCVs that are to be protected.

In conclusion, Noble states that it cannot see how it breaches the Council's requirements relating to severe environmental damage, and that it is in fact doing more than required of it as an RSPO member.

6 The Council on Ethics' assessment

The Council on Ethics has assessed whether is an unacceptable risk that Noble may be responsible for severe environmental damage pursuant to section 2, third paragraph, of the Ethical Guidelines. Noble is currently converting tropical forest into palm oil plantations in the provinces of Papua and West Papua in Indonesia.

The Council has not given weight to the fact that Nobel has reduced its ownership

interest in one of the concessions to 46.2 per cent in 2013 and is thus no longer the controlling owner of the joint venture company that owns PT Henrison Inti Persada. Noble conducted the HCV assessments on which the plantation development is based and retains a considerable ownership interest in the joint venture company. Moreover, Noble is the controlling owner of PT Pusaka Agro Lestari.

The island of New Guinea is home to the third-largest contiguous rainforest in the world after those found in the Amazon and the DR Congo.³⁹ It is the home of an estimated five per cent of the world's animal and plant species, some two-thirds of which are only found on New Guinea. Noble's two concessions cover almost 700 km² and lie in two global eco-regions, the Southern New Guinea Lowland Forests eco-region and the Vogelkop-Aru Lowland Rain Forests eco-region.⁴⁰ One of the concessions also lies in the West Papuan Lowlands Endemic Bird Area, an important habitat for birds.⁴¹ Noble's concessions are located in areas of particular ecological importance featuring an especially rich and unusual biodiversity. This raises the question of whether the conversion of rainforest in this part of Papua, and on such a large scale, is at all possible without running a high risk of irreversible damage to biodiversity and ecosystems in these unique areas.

Noble has carried out surveys of HCVs in both concession areas, not least to identify areas that are particularly important for the protection of biodiversity. To protect these HCVs and areas that are culturally important for the local population, the company plans to set aside some 130 km² in the two concession areas. The Council considers this to be a positive initiative. However, the Council gives greater weight to the fact that the company's HCV assessments do not specify what loss of biodiversity will result from the conversion of forest in these ecologically important areas. The Council finds that the field surveys undertaken to map biodiversity in the two concession areas appear to concentrate on the areas set aside for protection and only cover plants and certain (higher) animal groups. Moreover, large areas recommended for conversion have not been inspected in the field at all. This sampling bias in the surveys toward specific parts of the concessions, combined with the lack of sampling in other areas, may mean that important HCVs have been overlooked. In the Council's view, this affects the strength of the conclusions regarding what HCVs are present in the concession areas, how they have been surveyed, and how they should be managed. As regards the 550 km² of forest that are to be converted into plantations, no information is available on the state of the forest, biodiversity or ecosystems.

In this context, the Council would also emphasise that the areas the company has set aside for protection are very limited in size, and are in fact areas that the company is required to protect under national Indonesian requirements. Accordingly, it does not seem that the measures help to strengthen biodiversity to any greater extent than already required by legislation.

In this regard, the Council would also mention the UN and World Bank REDD initiatives, which express international agreement on the importance of stopping deforestation and forest degradation in tropical rainforests for the sake of both the climate and biodiversity. Noble's conversion of tropical forest into plantations is strongly contrary to international anti-deforestation initiatives.

In its letter to the Council on Ethics, Noble rejected the Council's view regarding how the HCV assessments were conducted. The company emphasizes its membership in the Roundtable for Sustainable Palm Oil (RSPO) and points out that the HCV assessment for one of the concession areas has been approved by the RSPO while the company is in the process of securing approval of the second assessment. In Noble's view, it has followed all procedures and requirements and is in fact doing more than required of it as an RSPO member by protecting such large areas. The company is also of the opinion that the Council on Ethics has demonstrated a lack of confidence in the RSPO system, and that the Council is thereby undermining the entire system of independent third-party certification as well as the professionalism of the consultants approved by the RSPO to conduct such assessments.

The Council is of the opinion that membership in the RSPO does not in and of itself guarantee that HCVs will be identified, protected and managed in such a way that biodiversity is protected in connection with forest conversion. In the present case, as in all other cases, the Council has sought to evaluate the actual facts of the case to the extent possible. In this instance, and notwithstanding the company's membership in the RSPO, the Council has found that the assessments undertaken and the measures implemented appear insufficient to prevent severe environmental damage for the reasons explained above and summarised below.

In the Council's opinion, neither of the two HCV assessments provides well-founded answers to the question of whether intact forest will be converted into plantations or the question of what biodiversity will be lost as a result of conversion. The Council finds that the lack of such data, the scale of conversion and the fact that both concessions are located in areas of unusually rich and unique biodiversity present an unacceptable risk that conversion will result in complete, irreversible change to ecosystems and vegetation. The measures proposed by the company will, in the Council's view, be insufficient to reduce the risk of severe environmental damage connected to current and future conversion of forest into oil palm plantations.

7 Recommendation

The Council on Ethics recommends the exclusion of Noble Group from the investment universe of the Government Pension Fund Global due to an unacceptable risk of the company being responsible for severe environmental damage.

Ola Mestad
Chair
(sign.)

Dag Olav Hessen
(sign.)

Ylva Lindberg
(sign.)

Marianne Olsson
(sign.)

Bente Rathe
(sign.)

Notes

- 1 The GPFG has not invested in this company.
- 2 http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.
- 3 Hereafter referred to as the Ethical Guidelines, http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.
- 4 In previous recommendations, the Council has elaborated on the criteria for *severe environmental damage*. See for instance the Council's recommendations regarding Samling Global, available at www.etikkradet.no.
- 5 IPCC 2007: Fourth Assessment Report: Climate Change 2007, http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml. This report estimated that deforestation accounted for 17 per cent of emissions. This estimate is reduced in a 2012 study, which calculated that tropical deforestation in the period 2000–2005 accounted for about 10 per cent of global greenhouse gas emissions; see N. L. Harris, S. Brown, S. C. Hagen, S. S. Saatchi, S. Petrova, W. Salas, M. C. Hansen, P. V. Potapov, A. Lotsch. 'Baseline Map of Carbon Emissions from Deforestation in Tropical Regions'. *Science*, 2012; 336 (6088): 1573 DOI: [10.1126/science.1217962](https://doi.org/10.1126/science.1217962).
- 6 The government's forest and climate initiative, <http://www.regjeringen.no/en/dep/md/Selected-topics/climate/the-government-of-norways-international-/why-a-climate-and-forest-initiative.html?id=547202>
- 7 http://www.norway.or.id/Norway_in_Indonesia/Environment/Indonesias-Moratorium-on-Primary-Forests-and-Peatlands-Extended-for-Two-More-Years-/.
- 8 Noble Group website: http://www.thisisnoble.com/index.php?option=com_content&view=article&id=29&Itemid=50.
- 9 Email from Noble to the Council on Ethics, 19 April 2013.
- 10 <http://www.rspo.org/en/member/594>.
- 11 The Guidelines for Identification of High Conservation Values in Indonesia <http://www.daemeter.org/downloads/guidelines/>.
- 12 HCV toolkit-Indonesia, see footnote 11.
- 13 The Global 200 is a list of eco-regions identified by the World Wildlife Fund (WWF) as priorities for conservation. An eco-region is defined as 'a large unit of land or water containing a geographically distinct assemblage of species, natural communities, and environmental conditions'. http://wwf.panda.org/about_our_earth/ecoregions/about/.
- 14 Wikramanayake et al. (2002): Terrestrial Ecoregions of the Indo-Pacific. A Conservation Assessment. USA: Island Press.
- 15 Identification and Analysis of HCVs Presence in the area of PT Pusaka Agro Lestari Mimika Regency – Papua Province (HCV assessment report for PT PAL), page III-8.
- 16 See footnote 15, page IV 29.
- 17 *Intsia bijuga* o.k. (merbau).
- 18 The *Chitra Chitra*, or Soft Shell Turtle, is classified as Critically Endangered (CR) on the IUCN Red List and is listed in Appendix II of CITES.
- 19 The report identifies values HCV 1.1–1.3; HCV 2.3; HCV 3; HCV 4.1 and HCV 6; see Table 1 for an explanation.
- 20 HCV assessment report for PT PAL, pages IV-31, 32, III-6, III-8, Section IV.
- 21 This argument overlooks a growing body of literature concerning the biodiversity and carbon value of logged forest, indicating that logged forests may retain substantial biodiversity, carbon, and timber stocks. See e.g. Putz et al. (2012): Sustaining conservation values in selectively logged tropical forests: the attained and the attainable, *Conservation Letters* 5:296–303, Meijaard et al. (2005) Life after logging. Reconciling wildlife conservation and production forestry in Indonesian Borneo, Centre for International Forestry Research, Jakarta., Berry et al. (2010): The high value of logged tropical forests: lessons from northern Borneo, *Biodiversity and Conservation* 19:985-997, Edwards et al. (2009) The value of rehabilitating logged rainforest for birds, *Conservation Biology* 23:1628-1633.
- 22 The report describes the occurrence of four soil types, two of which are well-draining mineral soils (e.g. page III-5). The report also refers to 6 different land system classes (see page III-32), including classes which refer to lowland tropical forests.
- 23 HCV assessment for PT PAL, Table II-1 and Figure II-2. Of the 20 flora and fauna field survey sites, 19 were located immediately next to rivers and lakes, while one was located on peat land.
- 24 HCV assessment report for PT PAL, page V-2.
- 25 Noble Group's letter to the Council of 25 June 2012.
- 26 <http://worldwildlife.org/ecoregions/aa0128>
- 27 Wikramanayake et al. (2002): Terrestrial Ecoregions of the Indo-Pacific. A Conservation Assessment. USA: Island Press.
- 28 Pajmans (1975): Vegetation of Papua New Guinea. CSRIO.
- 29 Endemism is used to describe a species whose natural habitat is restricted to a particular area.
- 30 Beehler et al. (1986): Birds of New Guinea. Princeton University Press, Princeton NJ, USA.
- 31 <http://www.birdlife.org/datazone/ebafactsheet.php?id=172>

- 32 Identifikasi&Analisis Keberadaan Nilai Konservasi Tinggi di areal ijin PT Henrison Inti Persada Propinsi Irian Jaya Barat (HCV assessment report for PT HIP), see page IV-44.
- 33 The *Anisoptera grossivenia* (a lowland dipterocarp forest species) is endangered.
- 34 The *Zaglossus bruijnii* (long-beaked echidna) and *Spilococcus rufoniger* (black-spotted cuscus) are Critically Endangered.
- 35 The following HCVs were identified: HCV 1.1, 1.2, 1.3, 1.4; HCV 2.3; HCV 4.1, 4.2; HCV 5 and HCV 6; see Table 1 for an explanation.
- 36 <http://www.rspo.org/en/member/830>
- 37 PT PAL 2011: Summary Report of the Management Plan. RSPO summary of management plan PT PAL, [http://www.rspo.org/blog/topic/3/noble_plantation_pte_ltd_\(pt_pusaka_agro_lestari_papua_province_indonesia\)_new_planting_assessmentapplication_process](http://www.rspo.org/blog/topic/3/noble_plantation_pte_ltd_(pt_pusaka_agro_lestari_papua_province_indonesia)_new_planting_assessmentapplication_process)
- 38 Noble's letter to the Council on Ethics of 25 March 2013.
- 39 [http://wwf.panda.org/what_we_do/where_we_work/new_guinea_forests/.](http://wwf.panda.org/what_we_do/where_we_work/new_guinea_forests/)
- 40 [http://wwf.panda.org/about_our_earth/ecoregions/southnewguinea_lowland_forests.cfm.](http://wwf.panda.org/about_our_earth/ecoregions/southnewguinea_lowland_forests.cfm)
- 41 [http://www.birdlife.org/datazone/ebafactsheet.php?id=172.](http://www.birdlife.org/datazone/ebafactsheet.php?id=172)

To the Ministry of Finance

8 November 2013

Recommendation to exclude China Ocean Resources from the investment universe of the Government Pension Fund Global

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1 Summary

The Council on Ethics recommends the exclusion of the South Korean company China Ocean Resources from the investment universe of the Government Pension Fund Global (GPF) due to an unacceptable risk of the company contributing to severe environmental damage. At the end of August 2013, the GPF's shares in the company had a market value of approximately NOK 12 million.

This recommendation concerns fishing activities that the Council regards as particularly harmful to the environment, including participation in illegal, unregulated and unreported fishing and catching of globally threatened species in international waters.

China Ocean Resources is a fishing company that engages in fishing of, for example, grouper, snapper, shark and marlin in the Indian Ocean and the Pacific Ocean. The available information indicates that the company engages in systematic illegal fishing in the management zones of the Inter-American Tropical Tuna Commission and the Western and Central Pacific Fisheries Convention. Investigations suggest that 15 of the 25 vessels identified by the Council engage in fishing in these zones without being licensed to do so.

The Council would also emphasise that the company engages in targeted catching of globally threatened shark species included on the red list of the International Union for Conservation of Nature (IUCN). One of these species was included in Appendix 2 to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 2013, meaning that, from the autumn of 2014, the company will require a licence in order to export shark fins and other shark products.

Little public information is available about China Ocean Resources' fishing activities. The Council has requested information from the company and, in accordance with the Ethical Guidelines, has also sent the company a draft of the recommendation for comments. The company has not provided any information in the case.

Based on the available information, the Council finds that there is an unacceptable risk that the company will contribute to severe environmental damage through its fishing activities. In the Council's view, there is little doubt that the company systematically participates in illegal fishing and engages in targeted catching of threatened species. In the Council's opinion, the risk is heightened by the lack of transparency about the company's operations, and the fact that the company does not appear to be taking any steps to develop its operations in a more sustainable direction. The Council therefore recommends the exclusion of China Ocean Resources from the investment universe of the GPF.

2 Introduction

China Ocean Resources was included in the GPF portfolio in 2013. At the end of August 2013, the GPF's shares in the company had a market value of NOK 12 million.

2.1 WHAT THE COUNCIL HAS ASSESSED

The Council's assessment concerns China Ocean Resources' fishing activities. The Council

has assessed whether there is an unacceptable risk that China Ocean Resources will be responsible for severe environmental damage in accordance with section 2(3) of the Guidelines for the observation and exclusion of companies from the Government Pension Fund Global's investment universe.¹

In previous recommendations regarding severe environmental damage, the Council on Ethics has given emphasis to whether:²

- the damage is significant;
- the damage has irreversible or long-term effects;
- the damage has a considerable negative impact on human life and health;
- the damage is a result of violations of national laws or international norms;
- the company has neglected to act to prevent the damage;
- the company has not implemented adequate measures to rectify the damage; and
- it is probable that the company's unacceptable practice will continue.

Environmental damage linked to fishing activities

In the past 20 to 30 years, the fishing industry has become a global industry in which large companies engage in the catching, transportation and processing of fish. These companies operate in all of the world's oceans, depending on where fish stocks are found and where fishing is profitable. To exploit the capacity of the fishing vessels, fish are often transferred at sea (transshipped) from the fishing vessels to specialised carriers (reefers or fish carriers), which bring the fish ashore, often in other parts of the world than where the fish were caught. This allows the fishing vessels to fish almost continuously, interrupted only by repair and maintenance periods. There is much to indicate that some of the fish that is transshipped is never reported to the authorities. This increases the risk of quota breaches and, as a result, strong declines in – or the extinction of – unregulated stocks.

This recommendation concerns fishing activities that the Council regards as particularly harmful to the environment, including participation in illegal, unregulated and unreported (IUU) fishing and catching of globally threatened species in international waters. However, the Council also takes the view that other fishing activities that are particularly harmful to the environment, such as the overfishing of stocks, may be regarded as a reason for exclusion. In this context, the term "fishing activities" includes the entire value chain, from catch and transport to purchase, sale and processing. Specifically, it includes companies that own fishing vessels or vessels that transfer and transport fish from fishing grounds to ports, port companies and purchasers of fish, such as processing companies.

IUU fishing is a material cause of overfishing, and one of the greatest threats to the world's fish stocks and marine ecosystems. IUU fishing is defined in the UN Food and Agriculture Organization's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, and is an internationally established term that, in brief, means:³

- Illegal fishing: fishing in violation of national laws, international obligations and adopted rules.
- Unreported fishing: fishing activities which have not been reported, or have been misreported, to the relevant authority or management organisation.

- **Unregulated fishing:** fishing activities in areas or involving fish stocks that are not regulated or subject to management.

IUU fishing is a global problem, and substantial in scope. Commercial unreported and unregulated fishing, in particular, undermines opportunities to manage fish stocks sustainably. It results in overexploitation of stocks and prevents the recovery of fish stocks and ecosystems. In this context, the Council has given weight to the significant national and international efforts being made by various UN organisations (including the UN Environment Programme (UNEP) and the UN Food and Agriculture Organization (FAO) and its Committee on Fisheries (COFI)) and the EU to combat IUU fishing, and to international fisheries management, which is primarily focused on preventing IUU activities.

In the Council's view, if it can be demonstrated that a company in the GPFG is participating in illegal and unreported fishing, this alone may constitute a reason for exclusion. Whether or not unregulated fishing will constitute a reason for exclusion will depend on, for example, whether the company's activities are hindering the sustainable management of a stock or whether the company is avoiding requirements applicable to other fishing companies, for example by using a flag of convenience. In all cases of IUU fishing, the Council will give weight to whether the breaches of standards are gross or systematic.

2.2 SOURCE

Little public information is available about China Ocean Resources' fishing activities. In 2010, the company published a company presentation, which appears to be the only source of information in English. The company's annual reports provide few details of the actual fishing operations.

The Council has asked the company for information about its fishing vessels, fishing rights and the waters in which it fishes, but the company has not provided any information in the case.

The recommendation is therefore largely based on the Council's own investigations.

3 Background

3.1 BRIEF DETAILS ABOUT CHINA OCEAN RESOURCES

According to China Ocean Resources, it engages in deep-sea fishing in the Indian Ocean and the western Pacific Ocean. The company was stock exchange-listed in Korea in 2009. Fishing is conducted through the wholly-owned Chinese subsidiary Fujian Lianjiang Far-Sea Fishery CO. Ltd. (Fujian), which is based in Lianjiang Xian in Fujian Province, China. The company recently completed the construction of a fishing base in Lianjiang, comprising quay structures, a dockyard, refrigeration facilities, processing factories and a research station, as well as other infrastructure and living quarters.⁴

In 2010, the company had 7.7 percent of the deep-sea fishing market in China, and is the only one of the five largest companies in the market to focus on shark products.⁵ According to the company's annual report, all revenue is generated in China.

3.2 THE COMPANY'S FISHING ACTIVITIES

China Ocean Resources engages in fishing in the western part of the central Pacific Ocean and in the Indian Ocean. In January 2013, the company announced that it would expand its operation during the course of the year, sending a larger number of fishing boats to Africa following the conclusion of a cooperation agreement between the Tanzanian and Chinese authorities on the development of the Tanzanian fishing industry.⁶

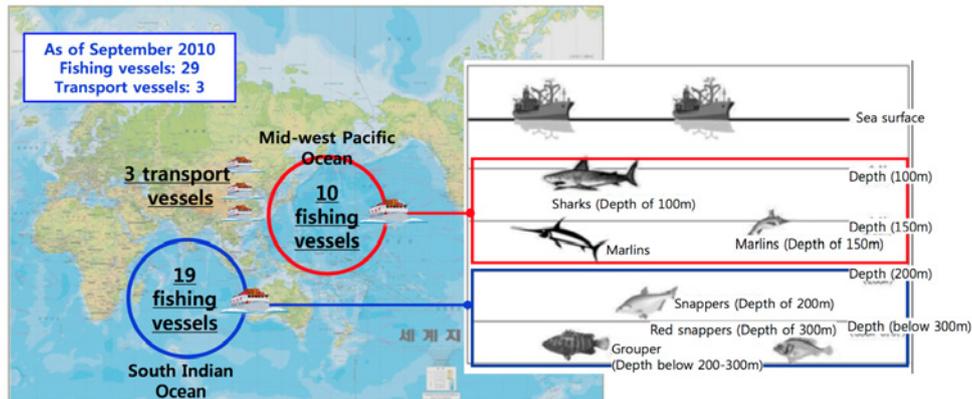


Figure 1: China Ocean Resources' fishing activities⁷

In 2009, the company's overall catch totalled almost 13,600 tonnes. Grouper, shark and marlin (also called sailfish), accounted for around 3,000 tonnes each. The grouper catch generated 60 per cent of the company's catch revenue (see Table 1).

Table 1: China Ocean Resources' catches of different species in 2009⁸

Species	Share of catch by weight (%)	Tonnes	Share of catch by value (%)	Revenue in USD thousands*	Price per kg (USD)
Grouper	21.4	2,909	60	47,067	16.18
Snapper	13.4	1,821	8.2	6,432	3.53
Shark	20.4	2,773	12.3	9,648	3.48
Marlin	21.7	2,949	11.8	9,250	3.14
Other	23.1	3,140	7.7	6,040	1.92
Total	100	13,594	100	78,445	5.77

*2009 RMB/USD=0.145

Catch data on the company's website show that the company harvested 5,000 tonnes of fish using 29 boats in the second quarter of 2010. This matches the figure for the fourth quarter of 2009, after the company's fleet was expanded by 15 boats.⁹ The total catch in 2010 can be estimated at around 20,000 tonnes. Catch volumes for different species appear to be stable.

According to the website of the company's subsidiary Fujian, the company now owns and operates 40 fishing vessels, including three transfer vessels. Eight of the boats were purchased in 2012.

3.3 FISHERIES MANAGEMENT IN THE MARINE AREAS IN QUESTION

Fishing of stocks that straddle or migrate between economic zones and seas is regulated by UNFSA, the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. UNFSA implements and expands the provisions of the UN Convention on the Law of the Sea concerning straddling and highly migratory fish stocks. In principle, the convention applies in international waters, but also governs the actual management of straddling fish stocks. It provides that the management of resources in international waters and adjacent national waters must be consistent. The convention introduces a set of rights and obligations that require states to preserve and manage both fish stocks and related and dependent species, and to protect biodiversity in marine environments. It also establishes that management must be based on the precautionary approach and the best scientific information available. Under the convention, the parties, whether regional or sub-regional, must cooperate on the management of stocks, including through Regional Fisheries Management Organizations (RFMOs).

RFMOs are international, regional management organisations whose membership comprises states with fisheries interests in the area in question. They are authorised to set quotas, adopt rules on fishing equipment and participation in fishing, etc., and to conduct supervision.¹⁰ RFMOs often impose specific requirements relating to the use of fishing equipment, primarily because different fishing equipment is used for different fish species.

The marine areas in which China Ocean Resources states that it engages in fishing (see Figure 1), are managed by two different RFMOs – the Western and Central Pacific Fisheries Commission (WCPFC),¹¹ and the Indian Ocean Tuna Commission (IOTC).¹² Both organisations are responsible for the sustainable management of tuna stocks, but also administer rules for the catching of shark, marlin and swordfish.

The member states of an RFMO are obliged to establish and maintain a register of fishing vessels approved to fish in the convention area. Each RFMO secretariat maintains a database of approved vessels registered by each member state. The database is a control mechanism that is used to ensure that all fishing boats operate legally in the convention area.

4 The Council on Ethics' findings

As stated, China Ocean Resources states that the company engages in deep-sea fishing for grouper, snapper, shark and marlin. The Council has considered the illegal fishing aspect of IUU fishing. The Council has no information about the company's catch reports, and has therefore not evaluated this issue in detail. Although it also appears that the company engages in unregulated fishing of grouper and snapper in the Indian Ocean, the Council has not investigated the potentially harmful environmental consequences of this.

4.1 ILLEGAL FISHING

Of the 40 vessels owned and operated by China Ocean Resources, 25 are listed by name on the company's website (see Table 2). Reefers are not mentioned.

Table 2 provides an overview of the vessels owned by China Ocean Resources and the marine areas in which the boats are licensed to fish. According to the relevant RFMO vessel registers, only three of the vessels are authorized to engage in fishing (by the IOTC). The authorizations of five of the vessels have expired, while 16 of the fishing boats hold no authorization at all.

Table 2 China Ocean Resources' fishing vessels and RFMO approvals

Vessel (name)	Fishing equipment	WCPFC registration number	WCPFC authorisation for target species	WCPFC authorisation period	IATTC registration number	IOTC registration number	AIS signal in area 2012/2013
FU YUAN YU 063	Line	1252	tunfisk	Ap2010-Ma2012	7147		IATTC
FU YUAN YU 064	Line	1253	tunfisk	Ap2010-Ma2012	7149		
FU YUAN YU 105							
FU YUAN YU 106	Line	122					
FU YUAN YU 107							IATTC and WCPFC
FU YUAN YU 860	Line					IOTC009232	
FU YUAN YU 861	Line					IOTC008752	
FU YUAN YU 862	Line					IOTC008753	
FU YUAN YU 863							IATTC
FU YUAN YU 864							
FU YUAN YU 865							IATTC
FU YUAN YU 866							IATTC
FU YUAN YU 867							IATTC
Fu Yuan Yu 868							IATTC
FU YUAN YU 869							
FU YUAN YU 870							IATTC and WCPFC
FU YUAN YU 871							IATTC
FU YUAN YU 872							IATTC
FU YUAN YU 987							IATTC
FU YUAN YU 988	Line	4548					
Fu Yuan Yu 991	Line	9553	tuna	Ap2010-Ma2012	14709		IATTC
Fu Yuan Yu 992	Line	9554	tuna	Ap2010-Ma2012	14710		IATTC
Fu Yuan Yu 993	Line	9746	tuna	Ap2010-Ma2012	14711		
Fu Yuan Yu 995	Line	9589	tuna	Ap2010-Ma2012	14712		IATTC
Fu Yuan Yu 996	Line	9590	tuna	Ap2010-Ma2012	14713		IATTC

Marlin and shark are target species for the company's fleet operating in the mid-western Pacific Ocean (see Figure 1). Catches of marlin and shark are regulated by both the WCPFC and the IATTC, and vessels fishing in these areas must be authorized by the relevant RFMO. As shown in Table 2, none of the company's vessels are registered to fish in these areas.

Fifteen of the company's vessels can be tracked using the boat's Automatic Identification System (AIS). AIS is an automatic tracking system used by vessels and marine traffic control centres to identify and locate vessels. The satellite-based system provides information on vessels' position, direction and speed both over time and in real time.

The AIS tracking data indicates that China Ocean Resources engages in extensive fishing in the eastern part of the Pacific Ocean. The movements of the boats are shown by green and red lines in Figure 2. The tracking data shows that the boats have a pattern of movement consistent with fishing (including speed and movement). The area in which fishing appears to occur is administered by the Inter-American Tropical Tuna Commission (IATCC),¹³ and borders on the convention area administered by the Western and Central Pacific Fisheries Convention (WCPFC). The boundary between the WCPFC and the IATTC is 155° East (shown by the red vertical line in Figure 2). Only five of 15 vessels are approved to fish in the IATCC area (see Table 2). Two of the boats have a pattern of movement that indicates that the company is also fishing in the WCPFC management zone immediately west of the boundary. These vessels are not included on the WCPFC's list of authorised boats. The tracking data covers the period November 2012–August 2013. The information suggests that China Ocean Resources engages in systematic illegal fishing in both the IATCC management zone and across the boundary in the WCPFC zone.

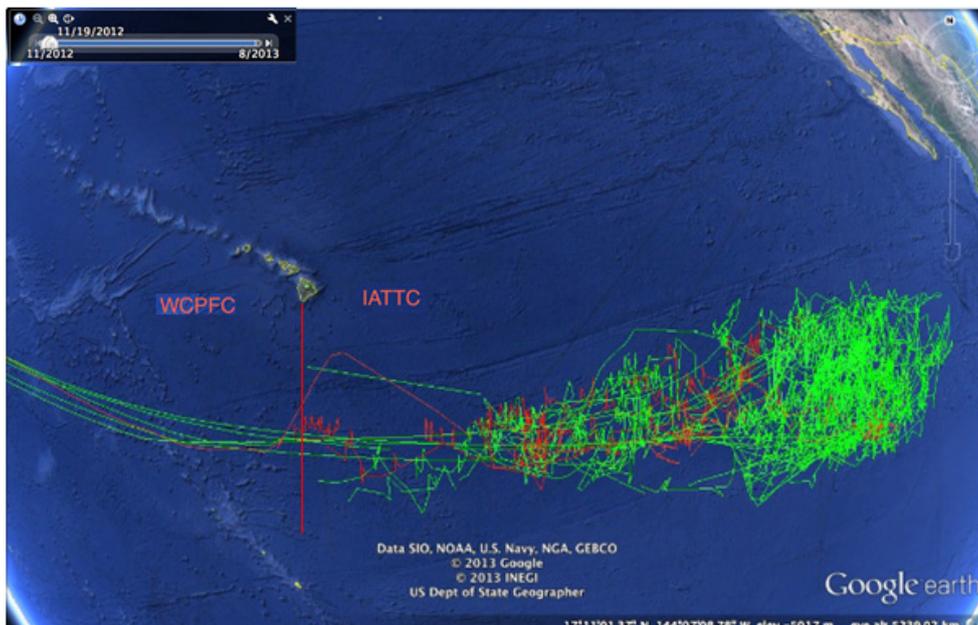


Figure 2: AIS group tracking of 15 of China Ocean Resources' vessels from November 2012 to August 2013. The green and red lines show the boats' movement patterns. Each line represents a boat. The red vertical line is the boundary between the WCPFC and IATTC management zones. The tracking data indicate that the boats have a pattern of movement consistent with fishing in the IATCC zone and in the WCPFC zone immediately west of the boundary.

4.2 CATCHING OF VULNERABLE SPECIES

According to its website, China Ocean Resources catches four species of shark:

- Silky shark (*Carcharhinus falciformis*)
- Smooth hammerhead (*Sphyrna zygaena*)
- Pelagic thresher shark (*Alopias pelagicus*)
- Gummy shark (*Mustelus manazo*)¹⁴

The first three species are included on the International Union for the Conservation of Nature (IUCN) red list of threatened species.¹⁵ The silky shark is near threatened, while the smooth hammerhead and the pelagic thresher shark are classed as vulnerable.¹⁶ These species are also covered by Annex 1 to the Convention on the Law of the Sea, which lists species that states are urged to manage cooperatively. Such cooperation has not yet come into existence.¹⁷

In March 2013, the smooth hammerhead was included in Appendix II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Appendix II includes species that are not necessarily at risk of extinction, but where trade in the species must be controlled to prevent them from becoming extinct. From September 2014, an export licence will be required for species on the list.¹⁸

Pelagic thresher shark is considered particularly vulnerable, as it is both a target species and a common bycatch in tuna and marlin fishing. The Indian Ocean Tuna Commission has banned the catching of pelagic thresher shark in its convention area.¹⁹

The catching of shark is driven by demand for shark fins, the most valuable part of the shark.²⁰ In 2009, China Ocean Resources sold 468 tonnes of shark fins. Shark meat sales totalled 5,700 tonnes.²¹

5 Information from the company

The Council wrote to China Ocean Resources in June 2013, requesting information on the company's fishing activities, including about the company's vessels and fishing rights. The company replied to the Council by email in August, confirming that it did not wish to reply to the Council's enquiry. The company stated that it is subject to stock-exchange requirements in South Korea and that it has published all necessary information on its website.

In September 2013, the Council sent the company the draft recommendation for comments. The company replied one month later, stating that the Council, without evidence, had gathered outdated and fragmentary information from the internet and assessed it subjectively based on the assumption that China Ocean Resources is involved in illegal activities.²² The company has made no other comments on the draft recommendation.

The Council on Ethics has found no information on how the company deals with the social and environmental impacts of its fishing activities.

6 The Council on Ethics' assessment

Based on the available information, the Council on Ethics has assessed whether China Ocean Resources is contributing to, or is itself responsible for, severe environmental damage in accordance with section 2, third paragraph, of the ethical guidelines.

The Council has considered whether the company is involved in fishing activities that are particularly harmful to the environment. In this recommendation, the Council has given weight to the risk that the company may participate in illegal fishing, and to the fact that the company engages in targeted fishing of globally threatened species in international waters. In the Council's view, if it can be demonstrated that a company in the GPFG is participating in illegal fishing, this alone may constitute a reason for exclusion if the breaches of standards are deemed gross or systematic.

Based on AIS tracking information for 15 of the company's vessels during a period of 10 months, the Council finds it likely that the company was engaged in systematic illegal fishing in the management zones of the Inter-American Tropical Tuna Commission (IATTC) and the Western and Central Pacific Fisheries Convention (WCPFC). The tracking patterns of the boats correspond to the normal movements of vessels during fishing. Ten of these boats are not authorized for fishing in either the IATTC convention area or the WCPFC convention area. The company itself states that it fishes for shark and marlin in these marine areas.

The Council has also given weight to the fact that China Ocean Resources engages in targeted fishing of shark species that are deemed threatened in a global context. Three of the species are included on the IUCN red list, and one of these was recently included in Appendix II to CITES. Since sharks are at the top of the food chain, they are considered key species whose disappearance may upset the entire structure of the food chain. Such a development could have far-reaching environmental consequences. In the Council's view, the company's catching of threatened shark species may reinforce the downward trend seen in stocks of these species.

In its reply to the Council, the company stated, among other things, that the Council had based its assessment of the company on outdated information taken from the internet. The Council would point out that the company was given several opportunities to provide information in the case. The company stated that it did not wish to provide information in addition to that contained in annual reports and on the company's website.

Based on the available information, the Council finds that there is an unacceptable risk that the company will contribute to severe environmental damage through its fishing activities. In the Council's view, there is little doubt that the company systematically participated in illegal fishing and engages in targeted catching of threatened species. In the Council's opinion, the risk is heightened by the lack of transparency about the company's operations, and the fact that the company does not appear to be taking any steps to develop its operations in a more sustainable direction.

7 Recommendation

The Council on Ethics recommends the exclusion of China Ocean Resources from the investment universe of the Government Pension Fund Global due to an unacceptable risk of the company contributing to severe environmental damage.

Ola Mestad
Chair
(Signature)

Dag Olav Hessen
(Signature)

Ylva Lindberg
(Signature)

Marianne Olsson
(Signature)

Bente Rathe
(Signature)

Notes

- 1 Hereafter referred to as the ethical guidelines; see http://www.regjeringen.no/en/sub/styrrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.
- 2 In earlier recommendations, the Council has expanded upon and specified the criteria that define *severe environmental damage*. See, for example, the recommendations relating to Freeport McMoRan and Ta Ann on www.etikkkradet.no.
- 3 See <http://www.fao.org/docrep/003/y1224e/y1224e00.HTM> for a complete definition of IUU fishing.
- 4 Company website: <http://www.chinaocean.co.kr/>; <http://www.infoyu.net/NewsCenter/Aquaculture/12-12-27-91.html>; http://www.chinadaily.com.cn/m/fuzhou/e/2012-12/25/content_16053842.htm.
- 5 China Ocean Resources. Presentation of the company. September 2010, available at <http://www.chinaocean.co.kr/common/filedown.asp?ix=179>.
- 6 African Farming and Food Processing 2.1.2013: *Tanzania set to benefit from Chinese investment in fisheries industry*, <http://www.africanfarming.net/livestock/aquaculture/tanzania-set-to-benefit-from-chinese-investment-in-the-fisheries-industry>.
- 7 China Ocean Resources. Presentation of the company. September 2010.
- 8 See footnote 7.
- 9 See footnote 7.
- 10 The flag state remains primarily responsible for ensuring that fishing complies with the regulations, but the convention permits parties other than the flag state to implement enforcement and control measures relating to international regulatory provisions. Accordingly, under the convention, the parties have a general power to board and inspect fishing vessels registered in other convention states in international waters.
- 11 The WCPFC was established under the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* in 2004; see <http://www.wcpfc.int/>.
- 12 The convention establishing the Indian Ocean Tuna Commission was adopted under Article XIV of the FAO statutes, and entered into force in March 1996. See <http://www.iotc.org/English/index.php>.
- 13 The IATTC was established under the Convention for the Establishment of an Inter-American Tropical Tuna Commission in 1949, and was reinforced and replaced by the Antigua Convention in 2010. See <http://www.iattc.org/HomeENG.htm>.
- 14 On the company website, the scientific name and the common name of this species do not match. *Mustelus manazo* is the Scientific name for *Star-spotted smooth-hound* which is a common species in the Western Pacific. The scientific name for Gummy shark is *Mustelus antarcticus* which is a highly abundant southern Australian endemic, according to the IUCN. The Council assumes that the company catches the first mentioned species.
- 15 <http://www.iucnredlist.org/>.
- 16 <http://www.iucnredlist.org/details/39370/0>. The category “near threatened” is used for species deemed to be threatened by extinction in the near future.
- 17 Highly migratory species as listed in Annex I of 1982 under the Convention on the Law of the Sea; see <http://www.fao.org/docrep/003/t3740e/T3740E06.htm>.
- 18 <http://www.cites.org/>.
- 19 This species is included on the list of highly migratory species under UNFSA (1995). The agreement states that coastal states and fishery states shall cooperate on measures to ensure the proper management of the species on the list. Thus far, few steps have been taken to implement this.
- 20 http://www.nmfs.noaa.gov/sfa/domes_fish/ReportsToCongress/SharkFinningReport11.pdf.
- 21 China Ocean Resources. Presentation of the company. September 2010. Other sources refer to shark fins being sold

for USD 400–1,000 per kg; see <http://wildaid.org/sites/default/files/resources/EndOfTheLine2007US.pdf>.

- 22 Letter dated 18 October 2013 from the law firm Ren De on behalf of China Ocean Resources. The letter was written in Chinese and translated into Norwegian.

To the Ministry of Finance

31 January 2014

Recommendation to revoke the exclusion of the company Dongfeng Motor Group Co. Ltd. from the investment universe of the Government Pension Fund Global

1 Summary

The Council on Ethics for the Government Pension Fund Global (GPFG) recommends revoking the exclusion of the Chinese company Dongfeng Motor Group Co. Ltd.

The company was excluded from the GPFG in 2009 because it was supplying military materiel to the authorities in Myanmar. The Ministry of Finance has decided that such activities should no longer constitute grounds for excluding companies from the GPFG.

2 Background

On 14 November 2008, the Council on Ethics recommended to the Ministry of Finance that the company Dongfeng Motor Group Co. Ltd. should be excluded from the GPFG because it was supplying military vehicles to the authorities in Myanmar.¹ The Ministry of Finance followed the recommendation and the company has been excluded from the GPFG since March 2009.

Paragraph 2, first subsection, letter c of the GPFG's ethical guidelines states that assets in the Fund shall not be invested in companies which themselves or through entities they control sell weapons or military material to states that are affected by investment restrictions on government bonds as described in paragraph 3-1, subsection 2 letter c of the management mandate for the Government Pension Fund Global.²

The Ministry of Finance has informed the Council on Ethics in a letter dated 28 January 2014 that the restriction on investments in government bonds no longer applies to Myanmar.

Accordingly, the grounds for excluding the company Dongfeng Motor Group Co. Ltd. no longer apply, and the Council on Ethics recommends revoking the exclusion of the company.

3 Recommendation

The Council on Ethics for the Government Pension Fund Global recommends revoking the exclusion of the company Dongfeng Motor Group Co. Ltd.

Ola Mestad
Chair
(Signature)

Dag Olav Hessen
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Ylva Lindberg
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Marianne Olsson
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Bente Rathe
(Signature)

Notes

- 1 Recommendation of 14 November 2008 on the exclusion of the company Dongfeng Motor Group Co. Ltd., http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/recommendations-on-companies-supplying-a.html?id=614301.
- 2 Guidelines for the observation and exclusion of companies from the Government Pension Fund Global's investment universe, http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.

To the Ministry of Finance

8 April 2014

Recommendation to exclude Tahoe Resources Inc. from the investment universe of the Government Pension Fund Global

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1 Summary

The Council on Ethics recommends the exclusion of the company Tahoe Resources Inc. (Tahoe Resources) from the Government Pension Fund Global (GPF) due to an unacceptable risk of the company contributing to serious human rights violations through its operation in Guatemala.

The company runs El Escobal, a mine located in the Santa Rosa region of south-eastern Guatemala. An at times very serious conflict has raged in and around El Escobal for several years. At least five people have been killed and around 50 have been injured. The situation came to a head in the spring of 2013, leading the authorities to declare a state of emergency in the region on 2 May 2013.

The involved parties strongly dispute the cause of the conflict and events during various clashes. The parties have accused one another of spreading lies and misinformation.

Tahoe Resources is of the opinion that the violence in and around El Escobal is the fault of external criminal groups, rather than real opposition to the mine. The company also believes that the majority of the local population supports the mining operation.

This view is not shared by the Guatemala office of the UN High Commissioner for Human Rights, which writes that the violent conflict in the area is due to dissatisfaction with the mine and the authorities' licensing process, in which the local population was not sufficiently consulted. Further, the office of the high commissioner points at the situation at the mine as an example of how human rights and indigenous rights activists are particularly vulnerable to violence and persecution in connection with extraction projects in Guatemala. Based on the violence that occurred at El Escobal in 2013, the office of the high commissioner concluded that extraction companies lack mechanisms capable of guaranteeing that their security practices meet international expectations.

The Council on Ethics has been in contact with Tahoe Resources several times, and the company has commented on a draft of the recommendation.

The situation described in the reports from the office of the UN high commissioner is serious, and in such circumstances it is particularly important that companies seek to comply with international standards and guidelines. The deadlocked situation and the company's replies to the Council make it difficult for the Council to conclude that the company's systems and strategies are suited to reveal, prevent and compensate for human rights violations connected to the operation.

Following an overall assessment, the Council has concluded that there is an unacceptable risk of Tahoe Resources contributing to serious human rights violations.

2 Introduction

In June 2013, the Council on Ethics decided to assess the Fund's investment in Tahoe Resources¹ against the Guidelines for the observation and exclusion of companies from the GPFG's investment universe (the Ethical Guidelines).² The background for the decision was the existence of information about serious human rights violations connected to the company's mine, El Escobal. Peaceful resistance to the mine had escalated into a violent conflict in which both opponents of the mine and police officers had been killed.

At the end of 2013, the GPFG owned shares in the company valued at NOK 86.5 million, corresponding to an ownership interest of 0.59 per cent.

2.1 WHAT THE COUNCIL HAS CONSIDERED

The Council on Ethics has assessed whether there is an unacceptable risk of Tahoe Resources contributing to serious or systematic violations of human rights as per paragraph 2, third subsection, letter a of the Ethical Guidelines.

In its assessment, the Council has given weight to the UN Guiding Principles on Business and Human Rights, which state that companies must ensure that they do not contribute to violations of the human rights of those affected by their operations.³ In this lies the obligation to follow national laws even if these are not enforced by the authorities in the area and, in the absence of national laws, to respect the principles laid down in relevant international instruments. The UN Global Compact and the OECD Guidelines for Multinational Enterprises also apply the UN Guiding Principles in their work focused on business and human rights.⁴

According to the UN Guiding Principles, companies should assess the actual and potential negative effects their operations may have on human rights. Companies should then implement measures adapted to the results of the assessment and investigate the effects of measures as well as adjust them so as to prevent future violations. Companies must also communicate externally how they are addressing the risk of violations. The principles state that this due diligence process:

- a) 'Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impact, and the nature and context of its operations;
- c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.'

This means that a company that has been granted a licence to extract natural resources in a given area should, before launching its operation and as early as possible, assess whether the operation may result in human rights violations. The required complexity of a due diligence process will depend on the scale of the operation, the risk of a negative impact on human rights and the situation in general. Accordingly, the establishment of a large operation in an area presenting a high risk of human rights violations will require

particularly extensive efforts to avoid contributing to human rights violations.⁵

The UN Guiding Principles also state in Article 18 that companies should conduct open, inclusive assessments to identify the parties on whose human rights they will have an impact:

‘In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should... involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.’

And further:

‘To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement.’

In other cases in which the Council on Ethics has considered exclusion under the human rights criterion, the Council has taken the following considerations as its point of departure:

- Is there a clear connection between the company’s activities and the breaches of norms?
- Has the company contributed actively to the breaches of standards, or has the company known of the breaches but failed to seek to prevent them?
- Are the breaches of standards continuing, or is it likely that breaches will be committed in future?

In evaluating the relationship between the company’s operation and the breaches of norms, the Council has also emphasised whether the breaches have been committed with the aim of serving the company’s interests or to facilitate conditions for the company. Further, the Council has emphasised what the company has done to prevent future breaches.

2.2 SOURCES

The recommendation is based on UN reports, court decisions, reports from interest groups – including the indigenous people’s organisation the Xinka Parliament and the human rights organisations Amnesty International and UDEFEGUA⁶ – news articles, and radio and television interviews.⁷ Information from these and other sources mentioned in the footnotes were collated with information from researchers at the University of Oslo with field experience from the area and information from the Guatemala office of the UN High Commissioner for Human Rights. The company has commented on a draft of the recommendation, and has replied to questions from the Council. Information about Tahoe Resources and El Escobal has been taken from the company’s website.⁸

The involved parties accuse one another of spreading lies and misinformation. This has complicated the Council on Ethics’ gathering of information.

3 Background

3.1 ABOUT TAHOE RESOURCES AND THE EL ESCOBAL MINE

Tahoe Resources (formerly CKM Resources Inc.), is a US mining company based in Nevada, USA. The company is listed in Toronto and New York. Goldcorp Inc. (Goldcorp) is Tahoe Resources' largest shareholder, with a 40 per cent stake.

Tahoe Resources owns 100 per cent of the El Escobal mine through its wholly-owned subsidiary Minera San Rafael.⁹ An exploration licence was initially granted to Goldcorp's wholly-owned subsidiary Entre Mares de Guatemala in 2007.¹⁰ Tahoe Resources purchased this licence in 2010 and has subsequently renewed it once. The company has conducted an environmental impact assessment, which was approved by the authorities in 2011.¹¹ In April 2013, Tahoe Resources was granted an extraction licence by the Guatemalan Ministry of Energy and Mining. Tahoe Resources is licensed to operate the mine for 25 years, although this term may be extended to 50 years.

Commercial production of silver, gold, lead and zinc began in January 2014. According to the company, the mine will create more than 800 jobs and account for 2 per cent of Guatemala's GDP once it is in full production.¹² The closest town is San Rafael las Flores, which has approximately 3,000 inhabitants.

El Escobal is the company's only ongoing project. The company has also applied for other licenses totalling approximately 2,500 km² in the region. Of these, the company has thus far been awarded just under 130 km².¹³ The licences the company has applied for are spread across three departments (Santa Rosa, Jalapa and Jutiapa), and encompass 10 cities and up to 50 towns. In 2013 the Guatemalan president announced a temporary moratorium on new awards of exploration licences, but according to the company this will not have a major impact on its activities.¹⁴



Figure 1: Basic map of Guatemala showing the location of El Escobal.¹⁵

3.2 BRIEF DETAILS OF THE CONFLICT AT EL ESCOBAL

An at times serious conflict has taken place in and around El Escobal for several years. The conflict is complicated and appears to encompass more than just opposition to Tahoe Resources, although opposition to the mine is key in the events in and around San Rafael las Flores.¹⁶

Violent clashes between demonstrators and security forces in recent years have resulted in around 50 injured, at least five deaths and widespread damage to property. The violence escalated in the first half of 2013, leading the authorities to declare a state of emergency in the region on 2 May 2013.¹⁷

There is strong disagreement regarding the reason for the conflict. The company is of the opinion that the conflict is due to external circumstances unrelated to the mine, and that the mine enjoys the support of the local population.

Human rights and indigenous people's organisations, the Catholic Church, the mayors of two neighbouring municipalities, a number of interest groups and large parts of the populations of the three regions affected by the conflict (Santa Rosa, Jalapa and Jutiapa), take a different view.¹⁸ These parties have organised themselves in the form of an active protest movement that has demonstrated against the mine since 2011.

The protest movement argues that the source of the conflict is that the local population, which does not want a mining operation in the area, was not consulted or sufficiently informed when the exploration and extraction licences were awarded to the company. The protesters state that many people did not know about the mining plans until it was too late, and that the Ministry of Energy and Mining did not take the appeals that were submitted into account before granting the company a licence to establish the mine.¹⁹ According to the protest movement the local population is protesting against this situation, but in recent years it has been met with violence, threats and legal prosecution by the company and the authorities.²⁰

According to the protest movement, the mining operation has no support among the local population. The protesters refer to Article 63-66 of Guatemala's Municipalities Act, which gives the local population in a municipality the right to be consulted, 'when the matter involves general issues affecting all of the inhabitants'.²¹ Based on this act, a number of consultations (so-called *consultas*) have been arranged since 2011 to examine whether 'the mine' (El Escobal particularly and all mining activities in general), has the support of the local population in the cities and villages surrounding El Escobal. Almost all of the *consultas* conducted show that a large majority in the region is against the mine.²² The protest movement is therefore of the opinion that further activities should be stopped.

Tahoe Resources and the Chamber of Industry of Guatemala (*Camara de Industria de Guatemala*), take the view that these *consultas* are contrary to the Guatemalan Constitution, given that their purpose is to stop an extraction project for which the State has already granted a licence. Further, the company believes that the *consulta* processes have been manipulated, and that the population was sufficiently consulted in accordance with the statutory requirements as part of the licence award process.²³

One of these *consultas* was appealed to the Guatemalan Supreme Court, which concluded in December 2013 that the *consulta* was not unconstitutional, and that the local

population is entitled to be consulted on issues affecting it directly.²⁴ *Consultas* do not give the local population a right to veto state authorities' grants of licences, but are intended to be a part of the state's decision-making process.²⁵

The fact that this was not the case when Tahoe Resources was granted the licence for El Escobal apparently created great distrust in the authorities and the company, not least among the Xinka people.²⁶ The majority of the remaining Xinka population (16,000 people according to the most recent census), lives in Santa Rosa, Jutiapa and Jalapa, where Tahoe Resources is operating or has applied for licences (see Figure 2). According to the UN Special Rapporteur on the Rights of Indigenous Peoples, the lack of real consultations is one of the main reasons for violent conflict in connection with extractive projects in Guatemala.²⁷

Generally speaking, the Xinka people have little confidence in Guatemala's authorities, whom they consider racist.²⁸ The Xinka Parliament and other Xinka organisations have engaged actively in opposing the mine and what they consider the imposition of a development model based on major interventions in nature. Accordingly, they oppose the mining operation and demand that they be consulted before licences are granted in the areas in which they live.²⁹

San Rafael las Flores is not considered a traditional Xinka village, and the majority of the population (99.6 per cent) are *ladinos*, i.e. descendants of the indigenous population who speak Spanish and wear Western clothing. Nevertheless, the Xinka people consider themselves to be directly impacted by the company and its mining licences in the region. Like the rest of the protest movement, they point out that the company has been granted or is seeking licences covering large parts of Santa Rosa, Jalapa and Jutiapa (see Figure 2). They regard El Escobal as the first of a number of mining projects that will affect them directly, which they do not want and which they feel unable to stop.³⁰

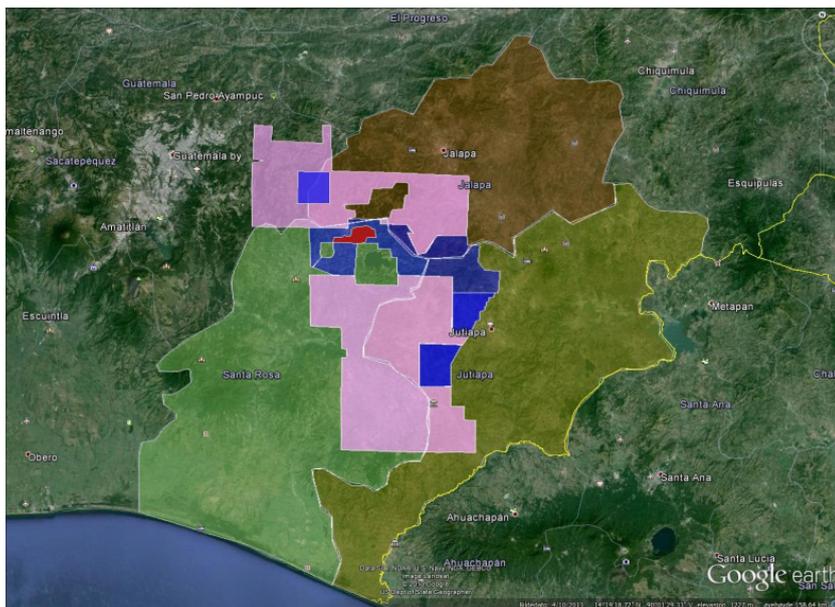


Figure 2: Google Earth map of the relevant area. The three regions of Jalapa, Santa Rosa and Jutiapa are indicated. The licences which the company has applied for or been granted are also indicated. Pink indicates prospecting activities, blue indicates exploration licences and red indicates an extraction licence.³¹

4 Allegations concerning human rights violations at El Escobal

The protest movement, human rights organisations and indigenous people's rights organisations are of the opinion that the company and the authorities are using violence, threats, arbitrary detention and military power to combat, blacken and criminalise legitimate human rights activists.³²

Allegations concerning the use of violence against demonstrators

Following a number of violent episodes in recent years, Guatemala's prosecuting authorities are to have investigated the potential role of the company's former security manager, Alberto Rotondo, in some of the conflicts relating to the mine. The authorities apparently interviewed Mr. Rotondo in connection with the violent clashes that took place on 11 January 2013, which among other things resulted in the deaths of two security guards and one demonstrator. The demonstrator apparently died as a result of the injuries he sustained after being thrown out of a moving car.³³ The prosecuting authorities apparently subsequently ordered telephone surveillance of Mr. Rotondo.³⁴

On 6 May 2013, the prosecuting authorities produced several telephone conversations in court during which Mr. Rotondo appears to order the killing of demonstrators.³⁵ The conversations apparently took place in connection with events on 27 April, when the company's security forces fired rubber bullets at demonstrators.³⁶ Seven people were injured, including two individuals who suffered serious injuries. The company claims that the injured persons were among a group of 20 people with machetes who tried to break into the mine grounds.³⁷ The demonstrators, on the other hand, claim that they were simply standing outside the mine and talking to one another.³⁸

During one of the conversations produced in court, Mr. Rotondo apparently said to Tahoe's communications and security adviser, Juan Pablo Oliva, that they had to 'remove the garbage', and that they could not allow the development of permanent opposition to the mine. During the conversations he also ordered a clean-up of the scene and that the official police report be changed. During a later conversation, Mr. Rotondo told his son that he had ordered the killing of demonstrators and had to leave Guatemala to avoid problems with the law.³⁹

As a result of the conversations, Mr. Rotondo was arrested at the airport and charged with causing bodily injury, among other things.⁴⁰ Mr. Rotondo resigned as security manager on 29 April 2013. The legal proceedings have not concluded.

The Guatemala office of the UN High Commissioner for Human Rights mentioned this incident as one of several examples of 'abuse by security company personnel during protests against mining projects' in its 2013 report to the UN Human Rights Council. The high commissioner concluded: 'The absence of mechanisms within the business sector, particularly among extractive companies, to guarantee that company security practices are in compliance with international standards, is of concern.'⁴¹

Allegations concerning murders and threats

On 17 March 2013, four people were apparently kidnapped while travelling home after participating in a *consulta* in the village of El Volcancito, which lies close to El Escobal. Three of the four individuals held leading positions among the Xinka people: the president, deputy president and secretary of the Xinka Parliament. The car in which they were travelling was stopped by between 10 and 12 armed persons. The secretary was later found dead. According to the police report, he had been bound and gagged. The deputy president escaped by leaping from a moving car, while the third person ran away. The president was found alive the following day. During the kidnapping, he was apparently asked questions about his connections with El Escobal and the protest movement. As far as the Council is aware, the kidnapping and murder have not been solved.⁴² The Guatemala office of the UN High Commissioner for Human Rights mentions the murder as one of three murders of human rights activists in Guatemala connected to conflicts concerning the extraction of natural resources.⁴³

The organisation *Centro de Acción Legal Ambiental y Social de Guatemala* (CALAS) has challenged the company's extraction licence in court. On 3 April, a motorcyclist apparently drove up to CALAS's office and fired three shots into the air. On the same day, someone apparently broke into the house of CALAS's lawyer, Rafael Maldonado, for the second time (the first time was apparently on 19 March).⁴⁴

Human rights organisations and the protest movement interpret these and similar incidents as attempts to frighten members of the protest movement into silence.⁴⁵

Criminalisation of legitimate human rights activists

According to the Guatemala office of the UN High Commissioner for Human Rights, people fighting for economic, social, cultural and environmental rights in connection with extraction projects in Guatemala are particularly vulnerable. San Rafael las Flores is quoted as an example of this in the 2013 report to the UN Human Rights Commission, which states, among other things, that, 'Protests by indigenous and peasant communities and social organizations, as in the land conflicts in Los Regadillos, Quiché; Santa María Xalapán, Jalapa; San Rafael Las Flores, Santa Rosa; and Santa Cruz Barillas, Huehuetenango, often resulted in the use of disproportionate criminal charges, such as those of resistance, attack, terrorism and illegal association'.⁴⁶

The office of the UN High Commissioner for Human Rights also referred directly to San Rafael las Flores in its 2014 report: 'OHCHR-Guatemala observed that protests by communities and social organizations against projects for the exploitation of natural resources frequently triggered criminal proceedings against protestors with charges such as terrorism and criminal conspiracy, which appear disproportionate to the gravity of the alleged offences. Several cases were dismissed by the judiciary due to the lack of evidence and the inability to prove individual responsibility. Examples include... the cases of 26 people detained in San Rafael las Flores, in April, on charges of "unlawful assembly" and attacks on public authorities, who were subsequently released due to lack of evidence'.⁴⁷

In September 2013, Xinka and Maya organisations filed a complaint against Guatemala with the Inter-American Commission on Human Rights (CIDH). The organisations are

of the opinion that the Mining Law and the process preceding it violate human rights. In their complaint, the organisations criticise the fact that mining licences are granted without the local population being consulted. They claim also that authorities criminalise protest leaders who protest against existing mines and licence-award processes, and that violence against demonstrators is not investigated. The complaint quotes El Escobal as an example in this regard.⁴⁸

The protest movement claims that the police rely solely on information from the company when arresting demonstrators.⁴⁹ Among other things, the demonstrators refer to a list of opponents of the El Escobal mine which the company's security manager, Mr. Rotondo, apparently gave to the chief of police and which formed the basis for the arrests.⁵⁰

The state of emergency in May 2013

A state of emergency (*estado de sitio*) was declared on 2 May 2013 in Jalapa, Mataquescuintla, Castillas and San Rafael las Flores.⁵¹ During the state of emergency, the authorities mobilised 2,500 soldiers, 600 police officers and 1,000 support staff, as well as armoured vehicles and helicopters.⁵² A permanent military force numbering several hundred soldiers was established close to the mine.

The Guatemala office of the UN High Commissioner for Human Rights associated the state of emergency directly with the conflict at El Escobal in its 2013 report to the Human Rights Council: 'Energy and mining projects, especially those in indigenous territories, were one of the main sources of unrest. The conflicts related to these projects occasionally led to episodes of violence, such as in El Escobal and Santa Cruz Barillas. In May, a state of emergency (*estado de sitio*) was declared in some municipalities in the departments of Jalapa and Santa Rosa. A common denominator in these social conflicts was the failure to inform and to consult with indigenous and other local communities potentially affected by these projects.'⁵³

Guatemala's Human Rights Ombudsman (*Procurador de los derechos humanos*) writes that the Guatemalan authorities use states of emergency to limit the rights of local populations in situations where local populations protest against extractive projects. The situation in San Rafael las Flores is quoted as an example of this, and the state of emergency of 2 May 2013 is mentioned as an example of how the police suppress the popular protest movement against El Escobal.⁵⁴

As the Council understands it, the state of emergency resulted in the break-up of organised resistance to the mine and a temporary stoppage in the consultation process. Arrest orders were apparently also issued against leaders of the protest movement, including the president of the Xinka Parliament. All of the charges were apparently later dropped.⁵⁵ The local population is apparently of the clear opinion that the purpose of the state of emergency was to protect the interests of the mining company.⁵⁶

5 Information from the company

The Council on Ethics has received information from Tahoe Resources on several occasions, initially on 14 August 2013. The company has also answered follow-up questions asked in subsequent exchanges of emails with the Council, and commented on a draft of the recommendation.

The company is of the opinion that the Council's analysis is based on imprecise media coverage and speculations without a factual basis. Further, in the company's view, the Council is assuming that Alberto Rotondo is guilty of the things of which he is accused even though the case against him is ongoing.

The company considers that the situation in and around El Escobal has been a peaceful since the authorities declared a state of emergency. The company writes,

'...President Perez Molina lifted the regional state of emergency in late May and established a much needed permanent police force in San Rafael. The residents of the San Rafael communities have seen significantly decreased tension since that time, as outside interference has diminished. Permanent security forces have also been established in several departments in the region because of criminal activities unrelated to the mine. The re-establishment of law and order has calmed the region.'

The company believes that it has the support of the local community:

'According to San Rafael Mayor Victor Leonel Morales, 70% of the population of San Rafael supports the project and the rest do not have an opinion with the exception of a very small number of vocal opponents who unfortunately foment discord in the region.'

The company also writes,

'Numerous consultations were held with local communities prior to submission of the EIS [Environmental Impact Statement]. These consultations formed a significant basis for the EIS's socio-economic assessment, assuring all involved parties that the project would provide significant positive benefits to our workers, the local and regional communities and the Guatemalan economy... Given the thorough nature of the EIS and its public availability, and further given our extensive community outreach efforts and support, the Company is confident that we met or exceeded the requirements of local, regional, national and international law prior to issuance of the exploitation license.'

The company states that the EIS was made publicly available in Guatemala City from 15 June to 13 July 2011, but that no objections were received. According to the company, any peaceful opposition to the mine has come from

'outlying municipalities that are not directly impacted by the project—Nueva Santa Rosa and Mataquesuintla, to name two primary villages. These towns are led by very vocal mayors who gained office by running on anti-mining platforms. We have engaged a number of municipal councilmen from these areas who have visited the project and expressed their support. Still, those two mayors refuse to visit the mine or engage with our community relations staff.'

With respect to the cause of the violence in and around El Escobal, the company writes the following:

'[...] the violent criminal incidents of Sept. 2012 and Jan. 2013 and others that we have

experienced in the vicinity of the Escobal project are largely perpetrated by a few bad local actors and outside groups who financially and politically benefit from causing chaos in and around the San Rafael community.’

The company denies that the four Xinka leaders were kidnapped and that one of them was killed. In its reply to the Council, the company refers to a report from the Ministry of Justice (*Ministerio de Gobernación*), which apparently states that the cause of death of the one Xinka leader was that he choked on his own vomit after drinking too much alcohol, and that the president of the Xinka Parliament orchestrated his own kidnapping. The company was unable to provide this report in response to the Council’s request.

As regards the events of 27 April, the company writes the following:

‘On April 27, 2013, non-lethal force (rubber bullets and tear gas) was used at the mine gate against protestors armed with large sticks, clubs and machetes who were engaged in impeding traffic to and from the mine. Seven individuals were injured by rubber bullets and were treated and released at local hospitals. The security management contractor, Alberto Rotondo, was later charged with causing injuries and obstruction of justice. Within 24 hours of the incident, Mr. Rotondo was dismissed from his position... After the incident the Company conducted a thorough internal investigation, including a review of all the evidence presented by the [prosecuting authorities] at Mr. Rotondo’s arraignment. From that investigation, the Company concluded that Mr. Rotondo violated the Company’s rules of engagement, security protocols and direct orders from management when he ordered the use of non-lethal force to clear the mine entrance.’

The Council has requested further information on the investigation and the company’s rules of engagement, but has not received this.

The company denies that Mr. Rotondo ordered the murder of demonstrators but did not wish to expand on this in view of the ongoing proceedings. In a later reply to the Council, the company questioned whether the prosecuting authority had grounds for tapping Mr. Rotondo’s telephone.

As regards the use of security forces, the company writes the following: ‘The project’s perimeter security is provided by Grupo Golan, a well-established Israeli-based security company that was founded in Guatemala in 1987.’ Grupo Golan does not follow the International Standards on Protocol for Security Service Providers, but,

‘[After] the armed attack on our security forces in January 2013 resulted in two deaths and several injuries to our contract guards, we began private consultations with an international security consultant which adheres to the International Standards on Protocol for Security Service Providers.’

The company has also engaged the organisation Business for Social Responsibility (BSR) ‘to help guide our CSR and human rights programs in Guatemala.’ BSR is to conduct a ‘Social Performance Gap Analysis’. The analysis is to provide the company with a ‘baseline of current status and provide recommendations’. Further, BSR is to conduct a ‘Security and Human Rights Assessment’ through which the organisation is to assist the company ‘in identifying and managing key human rights and security risks. BSR will review compliance with the Voluntary Principles and [Tahoe’s] security risks in the context of human rights.’ BSR is also to run a capacity-building programme ‘to increase

staff knowledge and skills to implement Tahoe Resources' CSR, human rights and security strategies and practices in order to improve management and communications internally and externally. The capacity building will compliment and build off of the Social Performance Gap Analysis and Human Rights and Security Assessment.' The Council on Ethics has requested access to BSR's reports and materials but not been given these.

6 The Council on Ethics' assessment

The Council has assessed whether there is an unacceptable risk of Tahoe Resources contributing to serious or systematic violations of human rights.

The situation in San Rafael las Flores is complex. The ongoing conflict is characterised by reciprocal allegations by the involved parties regarding the spreading of lies and misinformation. The Council notes that both the company and the protest movement accuse one another of serious human rights violations such as murders and kidnappings.

The Council on Ethics' point of departure is the reports from the Guatemala office of the UN High Commissioner for Human Rights. The high commissioner points at the situation at El Escobal as an example of how the security forces of mining companies engage in violence against demonstrators. The high commissioner also refers to the situation in San Rafael las Flores as an example of how human rights activists are particularly vulnerable to violence and persecution.

The company has engaged security personnel and received assistance from local and special police forces to protect the company's property. These parties were apparently provided with the company's human rights policy and human rights training. At the same time, the company's own security chief appears to have ordered the use of violence against demonstrators.

The Council notes that a lack of confidence in the authorities appears to be the primary reason for the spread of the conflict to surrounding municipalities, including Xinka villages. The local populations in these areas are fighting against what they consider a continuous restriction of their territories, which are being awarded to mining companies without their being sufficiently consulted or having an opportunity to stop the projects. According to the UN Special Rapporteur on the Rights of Indigenous Peoples, the lack of real consultation processes is one of the main reasons for violent conflict in connection with extractive projects in Guatemala.

There is disagreement as to whether the company conducted a proper consultation process before the mine was established. Tahoe Resources has informed the Council that it complied with Guatemalan law during the consultation process, and that the local population has therefore been adequately consulted. The company also points out that it has held information meetings, arranged mine visits and dialogue meetings, and established a complaints scheme. The company has also referred to 'extensive stakeholder identification', but has not shared the details of this with the Council.

Members of the protest movement, on the other hand, complain that they did not discover the plans for the mine until it was too late. They point out that the environmental

impact assessment was only available at the offices of the Ministry of the Environment in Guatemala City, and was thus in practice inaccessible to most people. It has also been pointed out that a number of formal complaints were made against the licence award process, but that these were rejected by the Ministry of Energy and Mining.

The Council on Ethics is of the opinion that it is insufficient for a consultation process to satisfy formal legal requirements if the legislation does not accord with international guidelines. The Council notes the criticism expressed by the UN High Commissioner for Human Rights, and the fact that indigenous people's organisations filed a complaint against Guatemala with the Inter-American Commission on Human Rights in September 2013, based precisely on a lack of consultation. The Council on Ethics also notes that the results of various '*consultas*' indicate considerable resistance to the mining operation in the local population.

As regards the risk of future violations, the Council notes that the company has engaged the organisation BSR to conduct a Social Performance Gap Analysis. The Council has asked for information about the content of this process, but the company has informed the Council that this information is confidential.

The Council has received the company's human rights policy, in which human rights are described as an 'integral part of Tahoe Resources' ethical standards'. However, the document makes it clear that the company's obligation to the local community is limited to respecting national laws and 'cultural values' in the country of operation. The Council has also requested other parts of the company's policy and systems in the human rights area, but the company was unable to share these because the Council could not guarantee full confidentiality.

Given the many conflict situations and violence in connection with demonstrations against the mine, it is difficult for the Council on Ethics to assume that the company is taking sufficient steps to comply with international standards and guidelines.

The Council is of the opinion that a social due diligence process in accordance with the UN Guiding Principles could have helped to reduce future risk. In this process, it is important for the company to take responsibility for its role in the ongoing conflict, carefully identify and analyse the stakeholders in the specific area, and accept that critical stakeholders should also be heard. Given the deadlocked situation and the company's replies to the Council, it appears unlikely that such a due diligence process will be conducted in the near future.

As regards the immediate risk of violence, the company's statement that the situation in and around San Rafael las Flores is now more peaceful than in the months preceding the state of emergency is probably correct. As the Council understands it, this is due to the militarisation occasioned by the conflict.

Following an overall assessment, the Council is of the view that there is an unacceptable risk of Tahoe Resources contributing to serious human rights violations.

7 Recommendation

The Council on Ethics recommends the exclusion of Tahoe Resources Inc. from the investment universe of the Government Pension Fund Global due to an unacceptable risk of the company contributing to serious human rights violations.

Ola Mestad Chair (Signature)	Dag Olav Hessen (Signature)	Ylva Lindberg (Signature)	Marianne Olsson (Signature)	Bente Rathe (Signature)
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Notes

- 1 The company has *Issuer Id*: 18846897 and ISIN no.: CA8738681037.
- 2 http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277<http://www.regjeringen.no/nb/sub/styrer-rad-utvalg/etikkradet/etiske-retningslinjer.html?id=425277>.
- 3 See the Guiding Principles on Business and Human Rights: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>.
- 4 See the Global Compact: http://www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html and the OECD Guidelines for Multinational Enterprises: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.
- 5 Articles 14 and 17(b) of the UN Guiding Principles on Business and Human Rights, with related comments.
- 6 UDEFEGUA stands for *Unidad de Protección a Defensoras y Defensores de Derechos Humanos, Guatemala*, and is a well-known human rights organisation in Guatemala.
- 7 Particularly from the Guatemala office of the UN High Commissioner for Human Rights (<http://www.ohchr.org/gt/informes.asp>), but also the UN Special Rapporteur on the Rights of Indigenous Peoples, see particularly <http://unsr.jamesanaya.org/special-reports/observations-on-the-situation-of-the-rights-of-the-indigenous-people-of-guatemala-with-relation-to-the-extraction-projects-and-other-types-of-projects-in-their-traditional-territories>, COPXIG (2012?) *Mapeo de la situación actual de la región Xinka por la operación de las empresas de extracción de Santa Rosa, Jutiapa y Jalapa* and COPXIG (2012), *Propuestas de desarrollo planteadas por las comunidades Xinkas de Santa Rosa Jutiapa y Jalapa*. See also *Petición de los Pueblos Maya y Xinka contra el Estado de Guatemala* (September 2013), and the reports from Amnesty International, CALAS and UDEFEGUA cited in the footnotes.
- 8 www.tahoeresourcesinc.com. All websites in this recommendation were available as at 22 February 2013.
- 9 Minera San Rafael and Tahoe Resources Inc. are hereafter referred to as Tahoe Resources.
- 10 Entre Mares de Guatemala and Goldcorp Inc. are hereafter referred to as Goldcorp.
- 11 <http://www.tahoeresourcesinc.com/tahoe-resources-receives-environmental-permit-to-commence-underground-development/>.
- 12 Communications with the company and the company's factsheet: <http://www.tahoeresourcesinc.com/wp-content/uploads/2010/09/TahoeCSRSnapshot.pdf>.
- 13 http://www.tahoeresourcesinc.com/wp-content/uploads/2010/09/Escobal_NI43-101_PEA_May2012.zip.
- 14 <http://www.tahoeresourcesinc.com/guatemala-proposes-temporary-moratorium-on-new-mining-licenses/>.
- 15 http://www.tahoeresourcesinc.com/wp-content/uploads/2010/09/Escobal_NI43-101_PEA_May2012.zip.
- 16 For an overview of specific incidents, see: <http://www.plazapublica.com.gt/content/cronologia-del-conflicto-entorno-la-mina-san-rafael>.
- 17 See for example the report from the office of the UN High Commissioner for Human Rights, 'Approval of licenses for mining and energy projects continued to generate conflict. In the mining site of El Escobal (San Rafael las Flores, Santa Rosa), peaceful anti-mining protests involving neighbouring communities were held, but there were also recurring outbreaks of violence. In January, two private security guards were killed by armed persons. In April, six villagers were injured by security guards, one policeman was killed in San Rafael and 25 police officers were detained by the communities for 14 hours in Xalapán. These incidents led to the declaration of a state of emergency in May.' A/HRC/25/19/Add.1 (2014), *Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala*, section 64, available at: <http://www.refworld.org/docid/53353ed24.html>.
- 18 Aguilar Stoen (2013), *Cada día somos más*; *The campaign against 'El Escobal' mine in south-eastern Guatemala*.
- 19 The protest movement is of the opinion that the licence should not have been granted before the appeals were heard. According to the Ministry, the appeals were rejected because the appellants had no legal interest. In July

- 2013, the district court ordered the Ministry to consider the appeals. The Ministry has appealed this decision. http://www.prensalibre.com/noticias/justicia/Sala-ordena-conocer-oposicion-mineria_0_962303773.html.
- 20 Amnesty International (2012), *Submission to the UN Human Rights Committee*, http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GTM/INT_CCPR_NGO_GTM_104_8958_E.doc, page 13.
- 21 *Código Municipal de Guatemala* (paragraph 64), available at: <http://derecholeyes.com/wp-content/uploads/2013/02/Co%CC%81digo-Municipal-Guatemala.pdf>.
- 22 The Council on Ethics has gained access to the results of 13 *consultas* in five municipalities and eight villages (in the municipality of San Rafael las Flores). The number of participants in the *consultas* has varied, from several hundred in the villages to 24,500 in Jalapa. In 12 *consultas*, more than 96 per cent were against the mining operation in the area. In one of the votes, 53 per cent of the population of the village voted for the mine, while 47 per cent voted against.
- 23 See section 5, Information from the company.
- 24 <http://www.businessweek.com/ap/2013-12-09/guatemala-top-court-local-polls-on-mining-legal>.
- 25 See the conclusion and page 24 onwards (particularly page 27) of the judgment. The case reference numbers are 4639-2012 and 4646-2012.
- 26 The Council's e-mail exchange with Mariel Aguilar-Støen. Aguilar-Støen is a senior researcher at the University of Oslo who conducted fieldwork in Santa Rosa in 2009 and has regularly visited the area since then to conduct research into the protest movement.
- 27 See Anaya, James (7 June 2011), *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya - Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories*. http://unsr.jamesanaya.org/docs/special/2011-special-guatemala-a-hrc-18-35-add3_en.pdf, section 14.
- 28 COPXIG (2012?) *Mapeo de la situación actual de la región Xinka por la operación de las empresas de extracción de Santa Rosa, Jutiapa y Jalapa*.
- 29 COPXIG (2012), *Propuestas de desarrollo planteadas por las comunidades Xinkas de Santa Rosa Jutiapa y Jalapa*.
- 30 Aguilar-Støen, Mariel (2013): 'Central to the dispute between "El Escobal"s" proponents and opponents is the geographical location of the activities of the mine. In discussions about the mine, the government and the company refer only to the area where the infrastructure of the mine is visible in the municipality of San Rafael las Flores and to the 29 square kilometres for which the exploitation license has been granted (marked in red in the map). Opponents to the mine refer to the almost three thousand kilometres involved in exploitation, exploration and reconnaissance licenses. That is one of the reasons why the anti-mining campaign gathers people from over thirty communities from ten municipalities and three departments'. See also <http://www.plazapublica.com.gt/content/xalapan-el-fuerte-en-la-montana>.
- 31 The Council on Ethics' own map, solely intended for illustration purposes. The company's licences are taken from: http://www.tahoeresourcesinc.com/wp-content/uploads/2010/09/Escobal_NI43-101_PEA_May2012.zip.
- 32 See for example Amnesty (2013), *Public Statement on Tahoe Resources' Escobal Project*, <http://www.amnesty.ca/news/public-statements/public-statement-on-tahoe-resources%E2%80%99-escobal-project>, *Petición de los Pueblos Maya y Xinka contra el Estado de Guatemala* (September 2013) and UDEFEGUA (2013) *Denuncia 9-2013* dated 2 May 2013.
- 33 <http://www.plazapublica.com.gt/content/cronologia-del-conflicto-en-torno-la-mina-san-rafael>.
- 34 <http://www.plazapublica.com.gt/content/el-pico-del-conflicto-minero>.
- 35 During a telephone conversation with his subordinate, Mr. Rotondo apparently said the following, among other things: 'Maten a esos hijos de la gran puta'; 'malditos perros que no entienden que la mina genera trabajo'; and 'Hay que quitar a esos animales pedazos de mierda'. <http://www.s21.com.gt/node/302047>.
- 36 UDEFEGUA (2013).
- 37 <http://www.tahoeresourcesinc.com/tahoe-clarifies-reports-regarding-incidents-near-escobal-project/>.
- 38 <http://www.plazapublica.com.gt/content/el-pico-del-conflicto-minero>. See also UDEFEGUA (2013), *Denuncia 9-2013*.
- 39 <http://www.s21.com.gt/node/302047>.
- 40 <http://www.mp.gob.gt/2013/05/asesor-de-mina-san-rafael-ligado-a-proceso/>.
- 41 A/HRC/25/19/Add.1 (2014), section 44: 'Additionally, OHCHR-Guatemala registered new complaints of abuse by security company personnel during protests against mining projects. In May, a security official from the San Rafael mine was charged with bodily injury and obstruction of justice during an attack by the company's private security guards against a group of demonstrators.'
- 42 See <http://www.elperiodico.com.gt/es/20130319/pais/226108> and <http://www.elperiodico.com.gt/es/20130320/pais/226150/>. See also an interview with the Xinka Parliament's president and deputy minister for security immediately after the incidents here: <http://noticias.emisorasunidas.com/noticias/primera-hora/lider-comunitario-santa-maria-xalapan-relata-secuestro>. The dead man apparently choked on his own vomit, and showed signs of having suffered strong blows to the head.

- 43 'According to the Unit for the Protection of Human Rights Defenders of Guatemala (UDEFEGUA), attacks and threats against human rights defenders increased in the past five years... These included the killings of... Exaltación Marcos Ucelo, a member of the Council of Santa María Xalapan.... These three cases took place in the context of conflicts related to the exploitation of natural resources-' A/HRC/25/19/Add.1 (2014).
- 44 UDEFEGUA (2013) *Denuncia 9-2013* dated 2 May 2013. See an interview with Rafael Maldonado her: <http://noticias.emisorasunidas.com/noticias/primera-hora/lider-comunitario-santa-maria-xalapan-relata-secuestro>. The break-in was also mentioned in the report from the Guatemala office of the UN High Commissioner for Human Rights; see A/HRC/25/19/Add.1, section 46.
- 45 The Council has also received credible information regarding another Xinka, who was apparently threatened on 17 April 2013. He was apparently told not to criticise the mine project. For yet another example, see <http://cmiguate.org/comunicado-unsitragua-detencion-ilegal-de-roberto-gonzalez-ucelo/>.
- 46 A/HRC/22/17/Add.1 (2013), *Annual report of the United Nations High Commissioner for Human Rights; Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala*. Available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add1_EN.pdf.
- 47 A/HRC/25/19/Add.1 (2014), section 47.
- 48 *Petición de los Pueblos Maya y Xinka contra el Estado de Guatemala* (September 2013).
- 49 According to the human rights organisation Nisgua (*Network in Solidarity with the People of Guatemala*), more than 70 different legal cases have been brought against people in the opposition movement since November 2011. All of the cases have been dismissed. <http://nisgua.org/r77.pdf>. See also Amnesty International (2013) and *Petición de los Pueblos Maya y Xinka contra el Estado de Guatemala* (September 2013) (particularly footnote 31).
- 50 <http://www.plazapublica.com.gt/content/el-pico-del-conflicto-minero>.
- 51 The state of emergency was based on a) a series of serious acts of sabotage 'affecting the production activities of people and legal persons', b) the theft of explosives, c) violence against military and police forces, and d) the interruption of free traffic movement. The president has publicly linked these actions to organised crime, drug smugglers and other 'external groups' that he holds responsible for the recent violence in the region.
- 52 <http://www.plazapublica.com.gt/content/las-mentiras-del-estado-de-sitio>.
- 53 A/HRC/25/19/Add.1, section 16. San Rafael las Flores is located in Santa Rosa.
- 54 Procurador de los Derechos Humanos (2013), *Cuestionario Relatora Especial de Naciones Unidas para Defensores y Defensoras de Derechos Humanos; Grandes proyectos de desarrollo y un entorno favorable y seguro para defensores y defensoras de derechos humanos*. See also UDEFEGUA (2013b) "*Condenamos el uso del estado de sitio para resolver problemática social derivada de imposición de empresa minera canadiense*". UDEFEGUA has also written that, for some time, the State has employed a strategy whereby it provokes violent conflicts in order to undermine legitimate opponents, who are described as terrorists, criminals and lawbreakers.
- 55 <http://noticias.emisorasunidas.com/noticias/nacionales/quedan-libres-capturados-disturbios-protestas-contra-mineria>.
- 56 <http://www.lahora.com.gt/index.php/nacional/guatemala/actualidad/177113-declaran-estado-de-sitio-en-cuatro-municipios-de-jalapa-y-santa-rosa> and <http://www.plazapublica.com.gt/content/xalapan-el-fuerte-en-la-montana>.

To the Ministry of Finance

26.09.2014

Recommendation to exclude Innophos Holdings Inc. from the investment universe of the Government Pension Fund Global

1 Summary

The Council on Ethics recommends the exclusion of the company Innophos Holdings Inc. (Innophos) from the Government Pension Fund Global (GPF) due to an unacceptable risk of the company contributing to particularly serious violations of fundamental ethical norms through the purchase of phosphate from Western Sahara.

The state-owned Moroccan company OCP extracts phosphate minerals from Western Sahara and sells it to companies such as Innophos.

Morocco controls most of the territory of Western Sahara, but does not have legal sovereign right over the area's natural resources. The Council assumes that Moroccan mineral extraction in the area may be acceptable if it is conducted in accordance with the wishes and interests of the local population, but this requirement cannot be said to be fulfilled here, and, further, that the activity contributes to maintaining a situation of unresolved international legal status of the area. Within this context, the Council has considered it grossly unethical by the company to purchase on long-term contract phosphate minerals which OCP has extracted in Western Sahara.

The Council on Ethics has repeatedly sent requests for information to the company, but the company has not responded.

2 Introduction

In April 2014, the Council on Ethics decided to review the Fund's investment in Innophos Holdings Inc.¹ by reference to the Guidelines for the observation and exclusion of companies from the Government Pension Fund Global's investment universe (the ethical guidelines).² The reason for this decision was information that the company's wholly-owned subsidiary Innophos Mexicana SA de CV (hereafter also referred to as "Innophos") is purchasing phosphate extracted in Western Sahara under a long-term contract with the Moroccan state-owned company *Office Chérifien des Phosphates* (OCP). Western Sahara has the status in the UN as a Non-Self-Governing Territory without a recognized administrator. Most of the area is *de facto* controlled by Morocco, but it does not follow from this that Morocco has sovereign rights over the area's natural resources.

In 2010, the Council on Ethics recommended the exclusion of two companies that

were purchasing, on long-term contracts, phosphate extracted in Western Sahara.³ The Ministry of Finance adopted the recommendation. The assessments of the Council on Ethics in the present case are largely identical to those in the 2010 recommendation.

At the end of 2013, the GPFG owned shares in the company valued at NOK 36 million, corresponding to an ownership interest of 0.6 per cent of the company's shares.

2.1 WHAT THE COUNCIL HAS CONSIDERED

The Council has considered whether there is an unacceptable risk of Innophos contributing to particularly serious violations of fundamental ethical norms in accordance with section 2(3)(e) of the ethical guidelines.

This recommendation assesses the company's purchases of phosphate *extracted* in Western Sahara under long-term contracts. The Council has considered whether such purchases must be deemed to constitute serious violations of norms because the wishes and interests of the local population are not respected in connection with *extraction* and because OCP's activities contribute to maintaining a situation of unresolved international legal status of the area.

The Council on Ethics has proceeded on the basis that mineral *extraction* in Western Sahara may be acceptable if it occurs in accordance with the wishes and interests of the local population. The Council on Ethics' assessment in the present case is that OCP's activities do not respect the wishes and interests of the local population, and that this is one reason why OCP's activities in Western Sahara must be regarded as grossly unethical.

Accordingly, the Council on Ethics has considered whether it must be regarded as grossly unethical for the company to purchase phosphate from OCP under long-term contracts.

2.2 SOURCES

The Council has repeatedly sought information from the company on its purchases of phosphate minerals from Western Sahara, but the company has not responded.

Some general information is provided in the company's 2013 Annual Report. More specific information on the company's phosphate purchases from Western Sahara has been obtained from the organisation Western Sahara Resource Watch (WSRW) and is outlined in section 4.

3 Background

3.1 THE SITUATION IN WESTERN SAHARA

The Council on Ethics has described the situation in Western Sahara in earlier recommendations to the Ministry of Finance (2005 and 2010). The fundamental conditions in the area have not changed since these recommendations were made.

Western Sahara, a Spanish protectorate since 1884, became a Non-Self-Governing Territory in 1963 under the UN Charter. At the same time, Spain was appointed the administering power of what was then called Spanish Sahara.

According to the UN, Western Sahara remains a Non-Self-Governing Territory. Unlike

other Non-Self-Governing Territories, Western Sahara does not have any recognised administrating power.

Morocco has *de facto* control over most of the territory, but no UN body has recognised neither Morocco's sovereignty nor that it is the lawful administrating power of Western Sahara. Morocco refers to Western Sahara as the “*Moroccan Saharan Provinces*”, and claims sovereignty over most of the area.

The liberation movement Polisario (*Frente Popular de Liberación de Saguía el Hamra y Río de Oro*) was established in 1973 with the objective of securing independence for Western Sahara. Polisario started an armed insurgency against the Spanish administration. In 1975, the International Court of Justice (ICJ) in The Hague rejected Morocco and Mauritania's claims to sovereignty over their respective parts of Western Sahara. Immediately afterwards, Morocco invaded parts of Western Sahara, resulting in strong condemnation by the UN Security Council. Later in 1975, Spain signed an agreement (the Madrid Accords) with Mauritania and Morocco on the transfer of administrative power over Western Sahara. The Madrid Accords confirmed Spain's intention to support the decolonisation of Western Sahara and to transfer its duties as administering power to Morocco and Mauritania. Accordingly, the agreement did not transfer sovereignty over Western Sahara to Morocco and Mauritania, as Spain did not have – and thus could not cede or transfer – such sovereignty. Nor did the agreement alter Western Sahara's status as a Non-Self-Governing Territory under the UN Charter. The Spanish authorities presumed that a referendum would be held in Western Sahara regarding the territory's future status. In 1976, Morocco and Mauritania agreed to divide Western Sahara between them. However, Mauritania withdrew in 1979, and Morocco has in practice controlled most of the territory since then.

Morocco has exercised sovereignty over most of the territory since 1979 without being the administering power pursuant to the provisions of the UN Charter. As the rightful administering power of the territory, Morocco would, under Article 73 of the UN Charter, have an obligation to “*ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement...*” and to “*develop self-government, to take due account of the political aspirations of the peoples...*”

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

Since the 1990s, several initiatives have been launched under the auspices of the UN with the aim of holding a referendum on the future of the territory. Although the Moroccan authorities and Polisario resumed talks in April 2007, these have suffered several breakdowns and made little progress. Morocco has presented a proposal for the territory involving limited self-rule under Moroccan sovereignty. Polisario is maintaining its demand for a referendum that includes the option of independence. In April 2014, the UN Security Council adopted a resolution that once again extended the MINURSO mission and again urged the parties to find a negotiated solution to the conflict.⁴

Today, Western Sahara is largely populated by people of Moroccan origin who moved there after Morocco's *de facto* annexation of the territory. The current population of Western Sahara totals approximately 550,000 people.⁵

Approximately 165,000 Saharawis, the territory's indigenous population, have been displaced to refugee camps in Algeria, where they live under very difficult conditions.

3.2 THE PHOSPHATE INDUSTRY

Around 15 different minerals are referred to as phosphates. These minerals contain the element phosphorus. Depending on their composition, phosphates are mainly used in the manufacture of different types of inorganic fertilisers,⁶ but also in the production of chemicals (such as phosphoric acid), and for other purposes. Approximately 90 per cent of extracted phosphate is used in fertiliser production.⁷

Worldwide annual phosphate extraction amounts to approximately 225 million tonnes. This total is expected to increase to 260 million tonnes by 2017.⁸

Morocco extracts around 30 million tonnes per year, and is the world's third-largest phosphate producer after China and the USA. Morocco differs from other large phosphate-producing countries in that it has limited agricultural activity and thus a small domestic demand for phosphate. Both China and the USA are net importers of phosphate, and the USA in particular will in future have to increase its imports significantly because its own deposits are running out. OCP has announced plans to invest the equivalent of USD 9 billion in the period to 2020 to boost its annual production to 47 million tonnes.⁹

In Western Sahara, phosphate is extracted at the Bou Craa mine¹⁰ by the state-owned Moroccan company OCP.¹¹ Annual phosphate extraction in Western Sahara totals 2.3 million tonnes.¹² The export value of this production corresponds to approximately NOK 2 billion and constitutes less than 10 per cent of Morocco's total phosphate production.

Bou Craa is the only known phosphate deposit in Western Sahara.

3.3 COMPANIES' PURCHASES OF PHOSPHATE

In the processing industry, it is common practice to sign long-term contracts for the supply of raw materials. The reason for this is the desire to ensure delivery and homogenous quality. Contracts for periods of five to 10 years including price adjustment options are not uncommon.

As regards the purchase of phosphate, the buyers – mainly fertiliser and chemicals manufacturers – normally specify the desired quality of the phosphate, including its chemical composition and other properties. Accordingly, the phosphate's origin (source/mine) will normally also be specified in the supply contract, and thus be known to the buyer.

4 The basis for the Council on Ethics' assessment

4.1 THE COUNCIL ON ETHICS' CONTACT WITH THE COMPANY

The Council on Ethics initially contacted the company in January 2010, asking whether it was buying phosphate extracted in Western Sahara. The company did not reply to this enquiry. Since the company was nevertheless not in the GPFG's portfolio shortly afterwards, the Council did not pursue the matter further.

In 2013, the company was once again in the GPFG's portfolio, and in April 2014 the

Council on Ethics again wrote to Innophos, asking whether it purchases phosphate from Morocco that may stem from Western Sahara and, if so:

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

Innophos has not replied to either the Council on Ethics' enquiry in April or a follow-up enquiry made in May of this year. A draft version of this recommendation was submitted to the company in July 2014, and the company was invited to provide any comments it may have. The company did not respond to this, either.

4.2 INFORMATION PROVIDED IN THE COMPANY'S 2013 ANNUAL REPORT

In its 2013 annual report, Innophos wrote that it was importing phosphate for its plant at Coatzacoalcos, Mexico, from various suppliers, but that the company expected the majority of its imports in 2014 to come from two suppliers. The company also stated that, until 2010, it had purchased phosphate solely from OCP:

*"We import phosphate rock for our Coatzacoalcos, Mexico site from multiple global suppliers. We are currently capable of successfully processing industrial scale quantities of phosphate rock from five separate suppliers and, for 2014, we expect the majority of our requirements to be met from two of these suppliers. Previously, the Coatzacoalcos facility was supplied exclusively by OCP, S.A., a state-owned mining company in Morocco under a 1992 supply agreement that expired in September 2010. Although the Coatzacoalcos facility has made significant advances in its ability to handle alternative grades of rock without adversely affecting operating efficiency, further investment may be required to realize the full benefits of improved process flexibility."*¹³

4.3 INFORMATION FROM WSRW ON INNOPHOS' PURCHASES OF PHOSPHATE FROM WESTERN SAHARA

The organisation Western Sahara Resource Watch (WSRW) monitors the shipping traffic departing from El Aaiun in Western Sahara, the departure point for phosphate from Bou Craa.

In 2012–2013, at least five shiploads of phosphate were transported from El Aaiun to Coatzacoalcos, Mexico. According to the port authorities, Innophos was the specified importer of these shipments.¹⁴ In total, the company purchased an estimated 270,000 tonnes of phosphate from OCP in Western Sahara in 2013.

4.4 LEGAL OPINION FROM THE UN'S LEGAL AFFAIRS ADVISER

A 2002 legal opinion from Ambassador Hans Corell, then the UN Under-Secretary-General for Legal Affairs, addressed the legality of mineral resource extraction in Non-Self-Governing Territories in general, and included an assessment of this issue with respect to the situation in Western Sahara in particular.

The legal opinion was based on Article 73 of the UN Charter, which obliges states that

have assumed responsibility for Non-Self-Governing Territories to manage their resources in accordance with the interests of the inhabitants. This principle has been affirmed in a number of UN resolutions.

According to the legal opinion, not all forms of economic activity in Non-Self-Governing Territories are problematic. Reference was made to several UN resolutions that have established a distinction between economic activities in Non-Self-Governing Territories that harm the inhabitants and economic activities that benefit them:

“In recognizing the inalienable rights of the peoples of Non-Self-Governing Territories to the natural resources of their territories, the General Assembly has consistently condemned the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of those Territories and deprive them of their legitimate rights over their natural resources. The Assembly recognized, however, the value of economic activities which are undertaken in accordance with the wishes of the peoples of those Territories, and their contribution to the development of such Territories.”¹⁵

The 2002 legal opinion thus concluded that mineral extraction in Non-Self-Governing Territories is only acceptable if proper consideration is given to the wishes and interests of the inhabitants.

Ambassador Corell¹⁶ has subsequently made it clear that the best point of departure for the legal opinion was an analogy based on Article 73 of the UN Charter, since Morocco is not recognised as Western Sahara’s rightful administering power. For states that are the *de facto*, rather than legitimate, administering powers of Non-Self-Governing Territories, the requirement that the inhabitants must benefit from resource exploitation must be considered a minimum standard:

“I came to the conclusion that the best way to form a basis for the legal opinion was to make an analysis by analogy taking as a point of departure the competence of an administering Power. Any limitation of the powers of such entity acting in good faith would certainly apply a fortiori to an entity that did not qualify as an administering Power but de facto administered the Territory.”¹⁷

4.5 MEETING WITH OCP REPRESENTATIVES

Representatives from OCP and the US law firm Covington & Burling LLP met with the Council on Ethics in Oslo in August 2010. At the meeting, OCP and Covington & Burling discussed OCP’s activities in Western Sahara.

In a subsequent letter to the Council on Ethics, Covington & Burling expanded on some of the points discussed at the meeting.¹⁸ The importance of OCP’s activities for the local economy at Bou Craa was emphasised in the letter, including the fact that OCP provides employment income for over 2,000 households in the region. The significance of OCP’s investments to the future economic development of the area was also highlighted. OCP’s investments at Bou Craa, it was also stated, had in no way been designed to influence or impede the development of territorial self-government. In conclusion, the letter expressed the hope that OCP’s activities at Bou Craa would be assessed on the basis of OCP’s own actions and matters under its control.

4.6 PREVIOUS CASES

In 2005, in a recommendation to exclude a company based on its activities in connection with Western Sahara, the Council on Ethics stated, among other things:

“The framework of international law, including the UN Charter and the Convention on the Law of the Sea, lay down that economic activity which involves exploitation of natural resources in occupied or Non-Self-Governed Territories must be exercised in cooperation with the people inhabiting those territories. The local population also has a right to the potential profits of such activities. 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.”¹⁹

In 2010, the Council on Ethics recommended the exclusion of two companies that were purchasing phosphate extracted in Western Sahara. In that case, the Council on Ethics emphasised that the companies had concluded long-term delivery contracts with OCP, and that the companies had explicitly ordered phosphate extracted in Western Sahara. The Council on Ethics considered this grossly unethical because it could not be proven that the phosphate extraction operation respected the good of the local population and, moreover, because the operation was contributing to the continuance of the unresolved situation in the area.

In the 2010 recommendation, the Council on Ethics also referred to a legal opinion (2009) from the European Parliament’s Legal Service concerning the then-current fisheries agreement between the EU and Morocco. The opinion stated that the demography of the region had been substantially modified by Moroccan immigration to Western Sahara following Morocco’s occupation. It also stated that large parts of the population, the Saharawi, were not integrated and living under difficult conditions, in some cases outside Western Sahara (e.g. in Algeria).²⁰ The opinion pointed out that if the fisheries agreement failed to safeguard the interests of the Saharawi, EU vessels should only fish in undisputed Moroccan waters.²¹ In other words, it was concluded that resource exploitation in Western Sahara is only acceptable if the interests of the local population are respected, and it was emphasised that the local population in this context means the Saharawi.

In a subsequent letter (2011) to the Ministry of Finance, the Council on Ethics expanded on certain points in the 2010 recommendation. Among other things, the Council on Ethics wrote:

“In cases where the buyer’s unethical behaviour is a result of the seller’s lack of legitimate rights to the resources that are being sold, one issue for the Council on Ethics to assess may be whether the agreement between buyer and seller is comparable to commissioned theft when the buyer, being fully aware of the conditions related to the production, specifies the origin of the product.”²²

5 The Council on Ethics' assessment

5.1 PRELIMINARY CONSIDERATIONS

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

The framework of international law requires the administering powers of Non-Self-Governing Territories to manage the territories in accordance with the wishes and interests of the local inhabitants. Since the UN does not recognise Morocco as the rightful administrative power of Western Sahara, it may be objected that these rules do not apply to the situation in Western Sahara. Nevertheless, in its assessment, the Council on Ethics will adopt the starting point that Morocco's resource extraction in Western Sahara may be acceptable if the wishes and interests of the local population are safeguarded as envisaged by, for example, UN Legal Counsel in its 2002 opinion. The European Parliament's Legal Service took the same view in its 2009 opinion on the fisheries agreement between the EU and Morocco. The Council on Ethics has also proceeded on this basis in previous recommendations.

The Council on Ethics is not tasked with considering the legality of Morocco's mineral resource extraction in Western Sahara or other legal issues that this case may raise. In the present case, the Council will only decide whether it may be regarded as grossly unethical for companies to purchase phosphate extracted in Western Sahara by a state-owned Moroccan company when the companies have specified in their purchase contracts that the phosphate must come from the Moroccan-controlled parts of Western Sahara. In order to decide this, several factors must be taken into account. First, the Council must assess whether OCP's phosphate extraction in Western Sahara must be considered grossly unethical. Second, an assessment must be undertaken of the degree to which companies that purchase phosphate extracted by OCP in Western Sahara contribute to any violations of norms by OCP.

5.2 THE SIGNIFICANCE OF PHOSPHATE EXTRACTION AS REGARDS MOROCCO'S PRESENCE IN WESTERN SAHARA

Phosphate extraction in Western Sahara accounts for a limited proportion (less than 10 per cent), of Morocco total phosphate extraction. It is difficult to determine the extent to which the profitability of the operation influences Morocco's presence in the area. On a general basis, the Council would assume that the basis for a state's claim to territorial sovereignty is strengthened if it maintains a presence in the territory, for example in the form of commercial operations. The activities of the state-owned Moroccan company OCP in Western Sahara constitute a form of presence that may support Morocco's claim to the territory. Accordingly, Morocco's phosphate extraction operation in Western Sahara may be more important as a component of its sovereignty claim than as a source of revenue.

5.3 THE INTERESTS OF THE LOCAL POPULATION IN WESTERN SAHARA

Since the Council on Ethics has concluded that Morocco's extraction of mineral resources in Western Sahara is grossly unethical if the activity does not benefit the local population, the Council must assess to what extent the local population actually benefits from extraction. A key question in this context is *who* comprises the local population.

The legal opinion from UN Legal Counsel (2002) stated that the wishes and interests of the local population should be safeguarded in connection with the extraction of natural resources in Western Sahara, but did not explicitly discuss who this population comprises. However, the legal opinion provided by the European Parliament's Legal Service on the fisheries agreement between the EU and Morocco stated that the local population whose interests are to be protected are the Saharawi, even though many have been displaced and live outside Morocco. On the other hand, the opinion did not provide any description of how their interests should be respected.

5.4 ASSESSMENT OF VIOLATIONS OF NORMS BY OCP

In the view of the Council on Ethics, the problematic aspects of OCP's phosphate extraction in Western Sahara are not connected to the company's conduct towards its employees or in the local community in which it operates. Nor does the Council assume that OCP's activities have by themselves caused the displacement of the local population, or that this displacement has taken place to accommodate the company's activities. The main question in the present case is whether the state-owned Moroccan company OCP is engaging in mineral extraction in a territory outside Moroccan sovereignty, without adequately respecting the wishes and interests of the local population.

As regards the original inhabitants of Western Sahara, these have largely been displaced from the territory and are living under very difficult conditions in refugee camps in Algeria. They cannot be said to be receiving any benefit from the ongoing economic activity in Western Sahara.

OCP has previously stated to the Council that its activities serve the local community in which it operates, pointing out that some of its employees in Western Sahara are Saharawi. In the Council's opinion, this cannot be regarded as sufficient to satisfy the requirement that resource exploitation in Non-Self-Governing Territories must occur in accordance with the wishes and interests of the local population. The matter concerns the extraction of a limited deposit of non-renewable mineral resources. OCP's employment of some Saharawi does not compensate for the fact that the territory is being depleted of its natural resources and that a large proportion of the Saharawi population is not benefiting.

The Council has therefore concluded that OCP's activities in Western Sahara must be considered grossly unethical.

5.5 ASSESSMENT OF THE COMPANY'S CONTRIBUTION TO OCP'S VIOLATIONS OF NORMS

The company has not replied to any of the Council on Ethics' enquiries in 2010 or 2014 asking whether it purchases phosphate from OCP that is extracted in Western Sahara. In

its 2013 annual report, the company stated that, prior to 2010 it purchased phosphate for its plant at Coatzacoalcos, Mexico, solely from OCP. The company now primarily uses two suppliers to this plant, but has not identified them or where the phosphate stems from.

The report on ship arrivals in 2013 shows that at least some of the phosphate delivered to the company is extracted by OCP in Western Sahara. The Council on Ethics concludes that the company most likely has a long-term agreement with OCP for the delivery of phosphate extracted in Western Sahara.

In previous, similar cases, the Council on Ethics has also considered additional factors such as the company's knowledge and specification of the phosphate's origin, the phosphate's substitutability and the contractual relationship between the company and OCP. Since the company has not replied to the Council's enquiries, the Council has been unable to give these factors detailed consideration.

In any event, companies buying phosphate from Western Sahara are in reality supporting Morocco's presence in the territory, since the phosphate is sold by the state-owned Moroccan company OCP and it must be assumed that the revenues generated by the operation largely flow to the Moroccan State. In its present form, OCP's extraction of phosphate resources in Western Sahara constitutes a serious violation of norms. This is due both to the fact that the wishes and interests of the local population are not being respected and to the fact that the operation is contributing to the continuance of the unresolved international legal situation, and thus Morocco's presence and resource exploitation in a territory over which it does not have legitimate sovereignty. In the view of the Council on Ethics, a concrete, mutually beneficial relationship exists between OCP's violations of norms and companies' purchases of phosphate from Western Sahara.

The fact that Innophos has purchased phosphate minerals from Western Sahara over several years establishes closer ties with OCP than an occasional buyer of phosphate, and strengthens their degree of contribution to OCP's violations of norms. Such long-term contracts also increase the risk that the company may contribute to future violations of norms.

Based on the above, the Council on Ethics has concluded that Innophos should be excluded from the GPFG.

6 Recommendation

The Council on Ethics recommends the exclusion of the company Innophos Holdings Inc. from the investment universe of the Government Pension Fund Global due to an unacceptable risk of the company contributing to particularly serious violations of fundamental ethical norms.

Ola Mestad
Chair
(Signature)

Dag Olav Hessen
(Signature)

Ylva Lindberg
(Signature)

Marianne Olsson
(Signature)

Bente Rathe
(Signature)

Notes

- 1 The company has the Issuer Id: 10938508.
- 2 http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277.
- 3 The Council on Ethics' recommendation (2010) and subsequent correspondence with the Ministry of Finance: http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/Recommendations-on-other-particular-serious-violation-of-fundamental-ethical-norms/recommendation-of-november-15th-2010-on-.html?id=665562.
- 4 UN Security Council resolution 2152 (2014)
- 5 UN World Statistics Yearbook 2011, <http://unstats.un.org/>.
- 6 Most inorganic fertilisers contain a mixture of nitrogen (N), phosphorus (P) and potassium (K) and are referred to as NPK or compound fertilisers.
- 7 US Department of the Interior – US Geological Survey: Phosphate Rock Statistical Compendium (2000).
- 8 US Department of the Interior – US Geological Survey: Mineral Commodity Summaries, February 2014.
- 9 US Department of the Interior – US Geological Survey: 2010 Minerals Yearbook – Morocco and Western Sahara. (Published August 2012.)
- 10 Bou Craa (alternative spellings: Boucraa, Bu Craa, Boukra), location 26° 19' 22" N, 12° 50' 59" W, is OCP's only phosphate mine in Western Sahara.
- 11 The company's website: <http://www.ocpgroup.ma/>.
- 12 OCP Annual Report 2012, page 17: <http://www.ocpgroup.ma/sites/default/files/alldocs/OCP-Annual-Report-2012.pdf>.
- 13 Innophos Holdings Inc. Annual Report 2013 (10-K): <http://ir.innophos.com/secfiling.cfm?filingID=1364099-14-6>.
- 14 The Ocean Prince departed El Aaiun on 14 September 2012 and arrived in Coatzacoalcos on 18 September 2012. The Sunrise Sky departed El Aaiun on 5 April 2013 and arrived in Coatzacoalcos on 19 May 2013. The Coral Queen departed El Aaiun on 24 July 2013 and arrived in Coatzacoalcos on 7 August 2013. The Maritime Prosperity departed El Aaiun on 21 September 2013 and arrived in Coatzacoalcos on 7 October 2013. The Liberty Grace departed El Aaiun on 2 December 2013 and arrived in Coatzacoalcos on 16 December 2013. All of the ships carried phosphate from Bou Craa that was delivered to Innophos. WSRW Report, June 2014: *Morocco's exports of phosphates from occupied Western Sahara, 2012 & 2013*.
- 15 Letter from the UN Under-Secretary-General for Legal Affairs to the Security Council (S/2002/161).
- 16 Ambassador Corell left his UN post in 2004, and was speaking in a private capacity in 2008.
- 17 Ambassador Hans Corell, *Conference on Multilateralism and International Law with Western Sahara as a Case Study*, 5 December 2008, page 7, see <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>.
- 18 Letter from Covington & Burling LLP to the Council on Ethics, dated 13 September 2010.
- 19 Council on Ethics, 12 April 2005: http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/Recommendations-on-other-particular-serious-violation-of-fundamental-ethical-norms/Recommendation-of-April-12-2005-on-exclu.html?id=425309.
- 20 European Parliament's Legal Service, Legal Opinion, 13 July 2009, paragraph 29: "*In this framework the Legal Service considers that it is appropriate to recall a few elements that seem undisputed: [...] b) Following Morocco's occupation, the demography of the region has been substantially modified due to the fact that Moroccan people have been settling in the region. On the other side, the Saharawi population is reported to be not integrated and to live in precarious conditions in camps, even outside the territory of Western Sahara (for instance the Tindouf camp in Algeria). The situation concerning the respect of the human rights of the Saharawi population (including freedom of movement) has been the subject of concern, in particular by the European Parliament.*"
- 21 Ibid, paragraph 37: "*In the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resources, principles which the Community is bound to respect, the Community should refrain from allowing vessels to fish in the waters off Western Sahara by requesting fishing licences only for fishing zones that are situated in the waters off Morocco.*" ("FPA" stands for Fisheries Partnership Agreement.)
- 22 The Council on Ethics, 15 November 2010, and subsequent correspondence: http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/Recommendations/Recommendations/Recommendations-on-other-particular-serious-violation-of-fundamental-ethical-norms/recommendation-of-november-15th-2010-on-.html?id=665562.

To The Ministry of Finance

9 October 2014

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

On 6 December 2011, in response to the Council on Ethics' recommendation of 1 December 2010 to exclude Alstom SA, the Ministry of Finance decided to place the company under observation for up to four years. The Council is required to keep Alstom under special observation during this period, and to monitor the company's anti-corruption efforts and development of an anti-corruption system. The Council is also required to monitor how the company handles investigations into acts of corruption that happened in the past as well as monitor whether allegations of new cases of corruption arise. The Council is required to report annually to the Ministry of Finance on the status of the observation.

In April 2014, the Council on Ethics met Alstom to discuss the Council's observation of the company and the company's anti-corruption efforts. The company has also been given an opportunity to comment on a draft of this report.

This is the Council's third annual report on the matter to the Ministry of Finance.

Key developments since the annual report was submitted in June 2013

In the reports submitted in June 2012 and 2013, the Council on Ethics described ongoing corruption investigations in the United Kingdom, USA, Brazil, Latvia, Poland, Malaysia and Slovenia. As far as the Council is aware, only the UK investigation and some parts of the US investigation have been concluded thus far. Alstom is now also under investigation in France.

On 24 July 2014, the UK Serious Fraud Office announced the conclusion of the UK investigation into Alstom. As a result of the investigation, Alstom Network UK Ltd – formerly called Alstom International Ltd, a UK subsidiary of Alstom – has been charged with corruption. According to the indictment, individuals are alleged to have paid bribes totalling USD 8.5 million on the company's behalf between 1 June 2000 and 30 November 2006. The bribes related to large, public transport projects in India, Poland and Tunisia. The first hearing in the case took place on 9 September 2014 at Westminster Magistrates' Court.¹ The Serious Fraud Office has also indicated to Alstom that an indictment will be issued against Alstom Power Ltd in October 2014 based on alleged corruption in Lithuania. Alstom does not accept liability in respect of any of these allegations.²

In the observation letter of June 2013, the Council on Ethics noted that the US authorities had published indictments against several current and former employees of a US Alstom subsidiary. In total, four persons have apparently been charged. Three managers at Alstom's subsidiary in Connecticut have now admitted paying bribes on behalf of the company in connection with a contract on Sumatra valued at USD 118 million. The

contract concerned a joint venture between Alstom and the Japanese Marubeni Corp. in 2007, the so-called Taharan project. In mid-March 2014, Marubeni also accepted liability for the fact that individuals acting on behalf of the company had paid bribes to win this tender. A corporate penalty of USD 88 million was imposed on the company.³ The fourth Alstom employee associated with the Taharan project and charged with corruption is awaiting trial on criminal charges in the US.⁴ Alstom does not accept liability for the alleged corruption on Sumatra.

According to a news article dated 27 March 2014, court documents from the case against the former employees at Alstom's Connecticut office show that it was discovered during the investigation of the Taharan case in the US that a former Alstom manager attempted to bribe public officials in Indonesia, India and China to secure awards of public contracts to the company.⁵ Alstom has stated that the company is unaware of these allegations.⁶ As regards the alleged corruption in Indonesia, Alstom has stated that it is aware that the Indonesian authorities are investigating the same actions as have been investigated by the US authorities.⁷

According to a news article, on 22 January 2014 the Governor of Sao Paulo requested that an investigation into Alstom be launched in response to allegations of corruption. The request was occasioned by the apparent statement by a former Alstom manager to a French court that Alstom paid bribes to Brazilian officials in 1998 in the form of commissions amounting to 15% of a contract worth USD 45.7 million. According to *Estado de Sao Paulo*, certain Alstom managers are among 10 persons now risking criminal prosecution in connection with these events. It is alleged that the company used three shell companies in Uruguay to channel bribes to Brazilian officials.⁸ However, Alstom has denied any involvement in these allegations, pointing out that the investigation in Brazil does not concern corruption but rather suspicions of other forms of financial crime.⁹

In its communications with the Council on Ethics, Alstom has stated that the company is under investigation in Poland and France, but that no indictments have been issued thus far.¹⁰

The Council on Ethics has not received further information on the investigation in Malaysia.

In its 2013 report to the Ministry of Finance, the Council on Ethics also noted a settlement reached by Alstom with the World Bank in February 2012.¹¹ In response to irregular payments made in connection with a hydropower plant in Zambia in 2002, Alstom Hydro France and Alstom Network Schweiz AG were excluded from participation in projects funded by the World Bank, the Asian Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank for a period of three years. The exclusion could have been reduced to 21 months if the company complied with the conditions in the settlement agreement. The parent company, Alstom SA, was not excluded on the condition that it would implement a compliance system acceptable to the World Bank during the three-year period.¹² Alstom has emphasised to the Council that it continues to cooperate with the World Bank. Measures include the engagement of an external law firm to assess – on behalf of the World Bank – the steps taken by Alstom to strengthen its compliance system and to propose changes to the system.¹³

Alstom's anti-corruption work since 2013

Considerable emphasis has been given to Alstom's compliance system in the Council's recommendation and subsequent observation letters. The purpose of a corporate compliance system is to prevent, uncover and penalise breaches of laws and regulations. Such a system may give an indication regarding the risk of future corruption.

Since 2010, Alstom has made various changes to improve internal compliance systems and anti-corruption procedures throughout its entire operation. According to the company, all improvements proposed by the independent monitor as part of the World Bank process have been implemented.¹⁴ Further, in the autumn of 2013, Alstom established an external whistleblowing channel through which anyone may report corruption and other regulatory breaches anonymously. The US company Navex Global receives these reports on the Alstom's behalf.

The company has stated that it invests considerable resources in its compliance and anti-corruption work. According to the company, the most important anti-corruption measures implemented in its operation in the past year are that it no longer engages consultants on "success fees" (since January 2014), that all monetary transfers pass through its head office in Paris and are audited closely, and that the management communicates very clearly that corruption is unacceptable. The company has also referred to the success of its ongoing cooperation with the World Bank.

General Electric's offer to acquire parts of Alstom's operation

In June, the Council on Ethics was informed that General Electric had made an acquisition and merger offer to Alstom. The offer encompasses the three Alstom divisions *Thermal Power, Renewable Energy* and *Grid*. Although the board of directors has decided to recommend acceptance of the offer, no final agreement has yet been signed. According to Alstom, a final agreement will be concluded in 2015. Until the merger, Alstom will continue to operate as at present.¹⁵

The Council's assessment

The sectors in which Alstom primarily operates carry a high risk of corruption. This is evidenced by the corruption allegations made against the company in the international press, which have also resulted in formal investigations. Several former employees of the company have been charged with corruption in the US, and the company has itself been charged with corruption in England. Several corruption allegations remain under investigation.

Over the past few years, Alstom has implemented a range of measures to establish strong corruption-prevention procedures. Alstom also continues to work with the World Bank on the development of internal compliance systems. This signals that active efforts are being made to prevent corruption in the business, thus reducing the risk of future regulatory

breaches. However, it is important that the company continues to give priority to anti-corruption efforts and that procedures are utilised and continuously monitored and improved.

The company itself, certain of its employees and some of its consultants remain under investigation, suspected of corruption. Since the previous report to the Ministry, the press has reported on new investigations into instances of corruption, i.e. corruption allegations in Indonesia, China, India and Brazil. The company has itself also stated that an investigation has been launched in France. The basis for all of these allegations is however unclear, as is when the investigation will be completed. It should also be noted that Alstom does not accept liability in respect of any of the allegations, and that many of the allegations have been made in the press without the Council on Ethics being able to obtain further information on them.

The Council on Ethics will continue its observation of Alstom's anti-corruption work, including through dialogue with the company. The Council will also maintain contact with other sources, follow the ongoing case in England and be alert to information on new instances of gross corruption in the company. Moreover, the Council will monitor how the anti-corruption procedures are implemented in all parts of the operation, and how they are monitored and evaluated.

Yours sincerely



Ola Mestad

Chair of the Council on Ethics

Notes

- 1 See <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/criminal-charges-against-alstom-in-the-uk.aspx> (18 August 2014).
- 2 Email and letter from Alstom to the Council on Ethics, 10 September 2014.
- 3 See press release of 19 March 2014, US Department of Justice, <http://www.justice.gov/opa/pr/2014/March/14-crm-290.html> (18 August 2014), <http://www.justice.gov/opa/pr/2013/April/13-crm-434.html> (18 August 2014), and concerning the non-prosecution agreement between the US Department of Justice and Marubeni, see <http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni-corp/marubeni-corp-plea-agreement.pdf> (18 August 2014).
- 4 See <http://www.fcpablog.com/blog/2014/7/17/third-alstom-exec-pleads-guilty-for-indonesia-bribes.html> (18 August 2014).
- 5 See <http://www.bloomberg.com/news/2014-03-27/alstom-said-to-face-wider-bribery-probe-and-record-fine.html> (18 August 2014), and <http://www.reuters.com/article/2014/03/27/us-alstom-investigation-idUSBRE-A2Q1NX20140327> (18 August 2014).
- 6 Meeting between Alstom and the Council on Ethics, 30 April 2014, and email from Alstom to the Council on Ethics, 10 September 2014.
- 7 Email and letter from Alstom to the Council on Ethics, 10 September 2014.
- 8 <https://au.finance.yahoo.com/news/french-firm-alstom-brazil-corruption-133324579.html>.
- 9 Meeting between the Council on Ethics and Alstom, 30 April 2014, and email and letter to the Council on Ethics, 30 September 2014.
- 10 Email and letter from Alstom to the Council on Ethics, 10 September 2014.
- 11 <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:23123315~pagePK:64257043~piPK:437376~theSitePK:4607,00.html%20http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:23123315~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>.
- 12 <http://web.worldbank.org/external/default/main?contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&querycontentMDK=64069700&theSitePK=84266#cross>.
- 13 Meeting between the Council on Ethics and Alstom, 30 April 2014.
- 14 Meeting between the Council on Ethics and Alstom, 30 April 2014.
- 15 Email and letter from Alstom to the Council on Ethics, 10 September 2014.

To the Ministry of Finance

10 October 2014

Recommendation to exclude China Railway Group Ltd. from the investment universe of the Government Pension Fund Global (GPF Global)

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1 Summary

The Council on Ethics recommends the exclusion of China Railway Group Ltd.¹ (CRG) due to an unacceptable risk of the company being responsible for gross corruption. At the end of 2013, the GPFG owned shares in the company worth NOK 306 million, equivalent to a 0.47 per cent stake in the company.

CRG is one of the largest companies in China's building and construction industry. It has extensive domestic operations and it had operations in 68 countries outside China in 2013. The company has been responsible for developing a number of large railway, road and real-estate projects.

According to information obtained by the Council on Ethics, including information relating to legal rulings and internal disciplinary processes in the Communist Party published in the Chinese press, it is highly likely that CRG has been involved in gross corruption. CRG and one of its subsidiaries have apparently bribed civil servants to secure contracts to build railways and housing projects. This is reflected in two Chinese legal rulings relating to the recipients of the bribes. In addition, the parent company has apparently bribed China's former railway minister in order to secure major contracts for CRG. In June 2013, the railway minister was convicted in China of taking bribes to award contracts to individual companies for a number of years. The Council on Ethics assumes that CRG knew about its parent company's bribes. This assumption is substantiated by, among other things, the close ties between the parent company and CRG. Reports in the Chinese press also refer to the parent company being one of the companies that have been investigated and sanctioned internally by the Communist Party for having paid bribes.

The Council on Ethics has written to CRG asking for its comments on the accusations and for a report on how it is trying to prevent future violations. The Council has also asked for a meeting with the company in connection with the fact that it held meetings with other companies in Beijing. CRG has confirmed receipt of these requests but has not answered any of them. Nor does the Council have any other information about how the company has reacted to the accusations.

CRG operates in countries and sectors that are known to have a high risk of corruption. The building and construction industry, where large public contracts are common, exposes the company to a considerable risk of corruption. It is the Council's opinion that a company in this given situation is required to have solid systems and measures in place to prevent corruption.

Based on the available information, the Council cannot see that CRG's internal measures for preventing future violations meet such requirements. The systems appear to be defective, among other things because it is unclear which parts of the operations are covered by internal controls intended to reveal dishonest acts. In addition, the systems seem to be insufficient in that several important measures are only aimed at managers and not all employees and that the consequences for employees who contravene laws and internal guidelines are unclear. Nor has CRG established a whistleblowing mechanism that allows all employees to give notice of corruption incidents anonymously and without the risk of subsequent sanctions. Other Chinese companies in the same industry seem to

place greater emphasis on good compliance systems.

The company's management is to a large extent the same now as when the acts of corruption took place. Numerous members of the board and group management have held management positions in CRG since 2007 and several of them also held senior management positions in the parent company at the time when the acts of corruption apparently took place.

The Council further assumes that the recent and extensive anti-corruption initiatives in China may play an important role in preventing corruption in Chinese companies. This recommendation concludes nonetheless that there is an unacceptable future risk of corruption in CRG mainly based on the fact that the Council places more weight on the company's reactions to the acts of corruption revealed as well as on the measures that the company has implemented to prevent future corruption.

Based on the information available, the Council finds it highly likely that CRG has been involved in gross corruption and that the company does not meet national or international standards regarding compliance and anti-corruption. The Council therefore recommends excluding CRG from the investment universe of the GPFG.

2 Introduction

In 2012, the Council on Ethics conducted a study of countries and sectors with the objective of identifying companies with a special risk of corruption in the GPFG's portfolio. The study is based on international corruption indices, including Transparency International's (TI) *Bribe Payer Index*,² TI's *Global Perception Index*³ and the World Bank's *Worldwide Governance Indicators*.⁴ These findings formed the basis for more detailed examinations. According to the *Bribe Payer Index*, which ranks 28 leading export countries according to the likelihood of their companies having corrupt operations abroad, Russia and China came last, followed by Indonesia and Mexico. The building and construction industry is also regarded as the sector that is most exposed to corruption. The same countries also came last in the *Global Perception Index* and *Worldwide Governance Indicators*.

Based on the country and sector study, the Council on Ethics identified all the portfolio companies with building and construction operations that are registered in China, Russia, Indonesia and Mexico, as well as all the companies in the GPFG portfolio with operations in the same sector and countries, a total of 365 companies. A limited number of companies, including CRG, were examined in further detail based on specific accusations of corruption.

At the end of 2013, the GPFG owned shares in CRG worth NOK 306 million equivalent to a 0.47 per cent stake in the company.⁵

2.1 WHAT THE COUNCIL HAS CONSIDERED

The accusations of corruption against CRG and its subsidiary relate to the bribing of civil servants to secure construction contracts in China. The Council on Ethics has considered whether there is an unacceptable risk of CRG being responsible for gross corruption according to section 2, subsection 3, letter d) of the ethical guidelines.⁶

The Council has previously adopted the following definition for its assessments of the concept of gross corruption:⁷

Gross corruption exists if a company, through its representatives,

- a) gives or offers an advantage – or attempts to do so – in order to unduly influence:*
 - i) a public official in the performance of public duties or in decisions that may confer an advantage on the company; or*
 - ii) a person in the private sector who makes decisions or exerts influence over decisions that may confer an advantage on the company,*
- and*
- b) the corrupt practices as mentioned under paragraph (a) are carried out in a systematic or extensive way.*

The Council first considered whether it is highly likely that CRG has committed acts that comprise gross corruption according to the above definition. Thereafter, the Council considered whether there is an unacceptable risk of the use of gross corruption continuing. Both these conditions must be met in order for the Council to recommend the exclusion of a company under the corruption criterion.

In its overall assessment, the Council has placed emphasis on the company's previous involvement in acts of corruption, the scope of the corruption and the company's reactions to the accusations of corruption. Emphasis has also been placed on the company's internal compliance systems.⁸ The objective of a company's compliance system is to prevent, discover and penalise breaches of internal and external laws and regulations. The internal compliance system can therefore say something about the risk of unlawful acts continuing in the future. This forms one of several elements in the assessment of whether there is a future risk of continued corruption. In this case, the Council has also placed emphasis on risk elements such as the countries and sectors in which the company operates.

2.2 SOURCES

There is less publicly available information in this case than in previous cases in which the Council on Ethics has recommended the exclusion of companies responsible for gross corruption.

The information that has been obtained comes from the Chinese and international press as well as from the company's annual report and website.⁹ The publicly available information that exists often comprises quite general references to the corruption cases. The Council has therefore conducted two extensive investigations of accusations that have appeared in the press. It has also obtained information from persons who have had direct access to criminal cases and the disciplinary sanction processes that the Communist Party has conducted in relation to the parent company.

The assessment of the company's compliance systems is based on information that is published on CRG's own website or has been obtained through the Council's own investigations. The Council has also consulted other sources in China, Germany and the UK in order

to obtain information on specific cases and general information on the anti-corruption work in the building and construction sector and state-owned companies in China.¹⁰

The Council has asked CRG for information several times, among other things about whether the Council on Ethics' information on the company's involvement in corruption in China is correct and about any measures that have been implemented to prevent future violations. The Council has also requested a meeting with CRG but this has not come about.

3 Background

3.1 ABOUT CRG

CRG is a subsidiary of the state-owned China Railway Engineering Corporation (CREC).¹¹ It was established in 2007 and is currently listed on the Shanghai and Hong Kong stock exchanges.¹² As one of the largest companies in the building and construction sector in China, most of its operations are related to the building of railways and motorways. The company also has property-development operations, consultancy operations and mining operations in some African countries. In 2013, the company reported total revenues equivalent to NOK 540 billion of which NOK 456 billion came from infrastructure projects.¹³

Most of the operations are carried out in China, but in 2013 the company also reported having operations in 68 other countries.¹⁴ In December 2013, the company had almost 290,000 employees. CRG has 46 subsidiaries.

4 Accusations of corruption

4.1 CRG INVOLVED IN ONE OF CHINA'S BIGGEST CORRUPTION CASES

In July 2011, a disastrous accident took place involving high-speed trains in Wenzhou. Forty people died in a collision between two trains. The investigation into the accident revealed what in 2003 was called the biggest corruption case in China. Key to the case were three people with close ties to each other who were prosecuted for corruption. These were Luo Jinbao, the former chair of the boards of China Railway Container Transport and China Railway Tielong Container Logistics Co., Liu Zhijun, China's Minister of Railways from 2003 to 2011, and Ding Shumiao, an agent for the companies. CRG was apparently involved in all the cases.

In 2012, Luo Jinbao was accused of corruption in that, between 2005 and 2010, he had apparently received monetary amounts equal to around NOK 47 million from several companies, including CRG and its subsidiary China CREC Railway Electrification Bureau Group. The acts of corruption relate to the award of railway contracts in the Chinese provinces of Xinjiang and Inner Mongolia.¹⁵ The court case is apparently now over but there is no publicly available information on the outcome.

The largest case concerned Liu Zhijun. On 8 June 2013, he was convicted of having taken the equivalent of NOK 64 million in bribes in return for awarding railway contracts to specific companies. During the main hearing at No. 2 Beijing Intermediate People's Court, Liu pleaded guilty.¹⁶ Shortly afterwards, he was sentenced to death for corruption and the abuse of power. This sentence was later commuted to lifelong imprisonment.

Liu was the driving force behind the modernisation of China's railway system. During the five-year period from 2005 to 2010, he managed a budget equivalent to NOK 1,900 billion. In comparison, the budget was NOK 18.3 billion for the 1992-1998 period and NOK 29.4 billion for the 1998-2003 period.¹⁷ In 2005, public tendering requirements were introduced in the railway sector. It is assumed that this, together with the huge increase in the budgets, may have created the basis for widespread corruption.

As a result of the corruption case against Liu Zhijun, the Ministry of Railways was dissolved in 2013 and its operations were placed under other bodies.¹⁸

The payment of bribes

Several Chinese press articles refer to the fact that CRG is involved in Liu's corruption case.¹⁹ The parent company, CREC, is apparently one of the companies that paid him bribes through the agent Ding Shumiao with the aim of securing contracts for CRG. The parent company is also one of several companies that have apparently been investigated and penalised internally by the Communist Party for having bribed Liu.²⁰ During Liu's time, at least 80 per cent of all the railway contracts were apparently awarded to CRG and China Railway Construction Corporation. The other contracts were awarded to China Communications Construction Co., China Construction Group and a couple of local construction companies.²¹ Liu is assumed to have received in total a far higher amount in bribes than those he was convicted for.²²

The last of the three big corruption cases concerned Ding Shumiao, a business-woman who in September 2013 was tried at No. 2 Beijing Intermediate People's Court. Apparently, she was for many years the "middleman" between the Ministry of Railways (i.e. Liu Zhijun) and several companies that submitted tenders for railway projects. The prosecutor presented documentation showing that, through her company Beijing Boyou Investment Management Co, she had paid Liu Zhijun around NOK 48 million in return for him awarding railway contracts to companies that she recommended. During the court case, it was confirmed that she was Liu's middleman and that she was the person who, on behalf of the companies, personally paid most of the bribes to Liu.²³ Her company is assumed to have earned NOK 3 billion on illegal services, including "consultancy fees" for railway projects awarded by high-ranking civil servants like Liu.²⁴

The managers hold positions in both CRG and the parent company

The management of CRG apparently also knew about the bribes from the parent company. This is supported by the fact that the current CEOs and legal director, as well as several other key managers in CRG, also held important positions in the parent company during the years when the acts of corruption apparently took place. Several of these, in addition to the company's former president, held key positions in the parent company

even before the acts are alleged to have taken place. The company's annual report for 2013 states that:

- CRG's president until 2014 was a vice executive president of the parent company from 2006 to 2007.
- CRG's current chair of the board, who is also the CEO, has held both positions in CRG in parallel since 2010. From 2002 until 2006, he was the deputy CEO of the parent company. From 2006 until 2010, he was a director of the parent company. He has been the chair of the parent company's board since 2010 and the CEO of the parent company from June 2010 until March 2013.
- The deputy chair of CRG's board, who is also the CEO, has held management positions in CRG since 2007.²⁵ From 2006 to 2008, he was the director of the Labour Union in the parent company. In 2010, he also became the deputy chair and was appointed to another management position in the parent company, and since 2013 he has been the General Manager of the parent company.
- The legal director in CRG since 2014 was the secretary of CRG's board from 2010 to 2014. He held management positions in the parent company from 2000 to 2007.²⁶

4.2 OTHER ACCUSATIONS OF CORRUPTION WITH LINKS TO CRG

On 1 November 2012, a high-ranking civil servant in Hainan Province was sentenced to life imprisonment for having received more than NOK 16 million in bribes from CRG. Up to the date of his arrest, the company had allegedly paid state employees a total of NOK 20 million in illegal kick-backs to secure contracts relating to a housing project with an estimated value of NOK 770 million.²⁷

4.3 ACCUSATIONS OF TAKING BRIBES

There are several legal rulings against CRG employees which state that the parties involved have taken bribes. Ten of CRG's subsidiaries have allegedly received a total of NOK 660,000 in bribes from Sany Heavy Industry.²⁸ In May 2012, Chen Tongzhou, a former deputy CEO of CRG's wholly owned subsidiary China Railway and Aviation Construction Group Corporation, was sentenced to 11 years' imprisonment for taking bribes.²⁹ In May 2010, Tang Yongjie, the former head of a construction project carried out by CRG's subsidiary China Railway First Group Construction Installation Engineering Co. Ltd, was sentenced by the Intermediate People's Court in Shenyang in Liaoning province to five years' imprisonment for taking bribes.³⁰

5 Chinese and international anti-corruption standards

The existing anti-corruption regime in China is complex due to the overlapping of the state measures to prevent corruption and the Communist Party's own anti-corruption disciplinary system. The state combats corruption by prohibiting corruption in legislation, by the police and courts investigating cases,³¹ and by the courts imposing sentences. The

Communist Party has a parallel system for legislation, investigation and the imposition of disciplinary sanctions when rules are violated.

During the past few decades, increasingly stringent anti-corruption requirements for state-owned and private companies have emerged. This applies both within China and internationally.³² While all civilians and legal entities are subject to state regulation and control, all Communist Party members are also subject to the Party's control system. In that anyone in a key position in a state-owned company is a member of the Communist Party, the Party's control and sanction system is probably the most important anti-corruption tool in China.³³

The information obtained by the Council on Ethics shows that corporate governance and internal control requirements have been introduced in order to strengthen the companies' internal anti-corruption procedures. A state-owned company is generally expected to focus on integrity and morals as well as on anti-corruption procedures. In order to achieve control, anti-corruption training is to be carried out, among other things. It is normal practice to have a policy for building a good internal corporate culture. In addition, many companies have their own tendering strategy based on national tendering rules. Many companies have also established an advisory body or expert group that advises on how the anti-corruption work should be implemented in the company's operations. In addition, an audit is to be conducted in the normal way and, to ensure independence, the companies should use an external auditor. Many companies, especially the state-owned ones, have established procedures to make managers responsible for any failure to implement anti-corruption laws and regulations.

Whistleblowing channels are regarded as an important part of a company's anti-corruption system in order to reveal acts of corruption. Most private and state-owned companies in China have established whistleblowing systems such as a *hotline*, other anonymous notification channels, online whistleblowing centres and internal complaints systems for employees. In order to adapt to international compliance standards, most state-owned companies have also established an internal legal advice group to ensure the correct implementation of and checks on anti-corruption rules in the company.³⁴

State-owned companies are obliged to establish a Communist Party organisation within the company that functions as a supervisory body. All state-owned companies are also monitored externally by the *Central Commission for Discipline Inspection* (CCDI), which is the supreme body for monitoring the Party's disciplinary system.³⁵ The objective is to limit extravagance, the abuse of power and corruption. It has also become more common for companies to publish internal anti-corruption procedures on their websites.³⁶ In 2011, a new penal provision was introduced prohibiting foreign bribery. The *Ministry of Commerce* published supplementary guidelines to the Act in 2013.³⁷

The state-run State-Asset Supervision and Administration Commission (SASAC) is responsible for managing the state-owned companies, including ensuring that the appointment of managers complies with laws and regulations. The SASAC conducts regular checks in large state-owned companies. According to Chinese law, a company may be held liable for acts of corruption committed by its managers, employees or others acting on behalf of the company and be subjected to criminal-law, civil-law and administrative sanctions.³⁸

The main features of international standards for companies' anti-corruption and compliance systems are that the management must clearly and expressly show that the company may not take part in corrupt acts and that any kind of corruption is prohibited. An anti-corruption programme must be established aimed at ensuring the company's operations comply with relevant anti-corruption laws and regulations. The compliance systems must be adapted to the company, i.e. its size, local and regional conditions and the sector in which the company operates. In order to ensure that the procedures are implemented, the company must among other things have a training programme for all employees and everyone must be informed about the consequences of violating the rules. An external whistleblowing channel should be established so that all employees can freely give notice of possible violations. Non-conformances must be logged and reported to the management – and dealt with. The company's attitude to anti-corruption should also be communicated to third parties. The procedures should be monitored by an independent body and evaluated and improved regularly.³⁹

6 Information from CRG

6.1 CRG'S COMPLIANCE SYSTEMS

The information that the Council on Ethics has about CRG's internal compliance and anti-corruption procedures is to a large extent based on a working paper dated 28 December 2011 and written by Wang Qiuming, the head of the *CRG Supervision Department*.⁴⁰ In addition, the company's CSR reports for 2012 and 2013 to some extent refer to compliance and anti-corruption procedures.⁴¹

As a partly state-owned company and in accordance with Chinese law, CRG has apparently established two bodies to provide advice on preventing corruption and handling violations in the company. These are the *CRG Supervision Department* and *Discipline Inspection Commission of the Party Committee*. The former is responsible for giving advice and investigating and handling any breach of laws or regulations. The latter is responsible for providing advice and investigating and handling any breach of the Communist Party's disciplinary rules.

According to Wang's working paper prepared in 2011, the company has established internal anti-corruption systems to ensure that the state's anti-corruption provisions and the political disciplinary rules are complied with. The working paper mentions several documents relating to internal control mechanisms, but these documents are either not published in full or are internal procedures that have not been fully established and implemented.⁴² Based on regulations issued by the CCDI, the company agreed on *CRG Detailed Rules for the Implementation of the Regulations on Probity and Self-discipline for the CRG Leaders* in 2008.⁴³ These rules prohibit corruption and state five definitions of corruption. However the rules only apply to employees above the middle-management level in CRG and its subsidiaries. To ensure that the rules are implemented, the company has issued five supporting documents.⁴⁴ Another set of rules, called *CRG Interim Provisions on the Implementation of the Accountability System for CRG Leaders*, has been issued by the *CRG Party Committee* and also only applies to managers in CRG as well as managers of wholly

owned and direct subsidiaries. This set of rules defines the responsibility for the choice of employees, project management and the use of money, production accidents, failure to implement CRG's provisions, orders and other acts that affect the state's, company's and employees' interests. However no specific sanction procedures are stipulated for any breach of the rules.⁴⁵

Wang's work report also states that, from 2006 to 2011, the company established various anti-corruption measures, including an online training base and interviews with managers. The report states that there is a system for the periodic anti-corruption training of all employees but this is not specified in any greater detail. It also states that CRG conducts inspections of all subsidiaries and major projects in CRG.⁴⁶

In the CSR reports for 2012 and 2013, CRG writes that it operates "in accordance with national rules". Reference is made to several national and international anti-corruption guidelines on which the company bases its operations.⁴⁷ However, the reports contain no information on how these guidelines are applied in the company's internal management. The reports also have a separate chapter on internal controls and supervision, but do not state which parts of the operations that are controlled and supervised or how this is carried out. CRG introduced separate rules for public procurements ("*Bidding Law*") in 2012. In the 2013 report, the company writes that: "*In 2013, CREC has strictly implemented the Bidding Law during the market exploring and operating, taken part in hundreds of bid-dings all year around, without one case of unhealthy operating behaviour*".⁴⁸

According to Wang's working paper prepared in 2011, there are procedures for implementing internal anti-corruption measures. The company has prepared a *CRG Interim Provisions* responsibility procedure. This is used by the *Supervision Department* and *Discipline Inspection Commission* to discover which manager is responsible for an assumed violation. However, no reference is made to procedures for holding individuals responsible. The document also states that the company aims to establish whistleblowing procedures,⁴⁹ but this has not yet been done. There is no further information on the implementation of internal anti-corruption measures.

On 12 June 2013, the SASAC carried out its fourth check on CRG. The main objective of this was to inspect the implementation of the Party's disciplinary and anti-corruption measures in CRG and to provide advice on these questions.⁵⁰ Neither the SASAC nor CRG has published the inspection report.

6.2 THE COUNCIL ON ETHICS' CONTACT WITH CRG

The Council on Ethics sent CRG a letter on 23 July 2013 asking the company to comment on the specific accusations of corruption involving CRG. The company was also asked to provide information on its internal anti-corruption and compliance systems. CRG has also had an opportunity to comment on the draft of this recommendation. The company has confirmed receipt of the enquiries but has not replied.

In June 2014, the Council on Ethics held meetings in Beijing with two of the other companies that the sector study considered to have a particularly high risk of corruption and CRG was contacted in order to arrange a meeting. This request also remained unanswered.

7 The Council on Ethics' assessment

Based on the existing documentation, the Council has considered whether CRG should be excluded based on the corruption criterion in the GPFG ethical guidelines.

The Council starts off by deciding whether it is highly likely that the company has committed acts which, according to the guidelines, comprise gross corruption, including whether the corruption has been carried out in an extensive and/or systematic way. The Council's assessments take into account the fact that corporate penalties exist in China but have not been applied to CRG.

Based on the criminal cases involving CRG and its subsidiary China CREC Railway Electrification Bureau Group, the Council believes it is highly likely that CRG has committed acts that must be counted as gross corruption. It has not been possible for the Council on Ethics to obtain access to information on specific details in the corruption cases, among other things because judgments are not published. However, several cases of corruption are publicly known and have been referred to in the Chinese press, including the *Jiefang Daily*, which is the official newspaper for the Shanghai Department of the Communist Party. Based on the available information, the Council on Ethics finds that both CRG and its parent company have bribed civil servants to secure railway contracts for CRG and that CRG has in at least one case bribed civil servants to secure a construction contract in connection with a housing project. The Council also finds that the subsidiary, China CREC Railway Electrification Bureau Group, has bribed civil servants to secure a public railway contract.

The size of the amounts indicates that CRG's management knew or ought to have known about all these payments. In the two court decisions from 2012 that the Council knows about, the corruption amounts appear to be high. The same is true for the corruption amounts that were paid to the former railway minister. The Council does not know the exact size of the amounts or the number of times he was bribed by the parent company. However, based on the information stated in references to the criminal case against Liu Zijun and Ding Shumiao, including the fact that these concerned public contracts of considerable value that were awarded from 2005 to 2011, the Council believes it is highly likely that the bribes were large and paid over a lengthy period of time. The Council therefore believes that the acts must be characterised as both extensive and systematic.

The next item to be considered by the Council is whether there is an unacceptable risk that the company's use of gross corruption will continue.

The Chinese authorities have come down hard on corruption recently. An aggressive anti-corruption campaign has been implemented to combat corruption, primarily in state bodies, and the authorities have stated they will target both "tigers and flies". As part of an attempt to eradicate corruption in the railway sector, the Ministry of Railways was reorganised in 2013. In addition, there is now a statutory prohibition against foreign bribery. The Council believes that, seen in isolation, these important, authority-initiated measures indicate that the risk of extensive and/or systematic corruption has been reduced in companies like CRG. However, the conclusion of this recommendation is nonetheless that there is an unacceptable future risk of corruption in CRG because the Council places

more emphasis on the way that the company has responded to the acts of corruption which have been revealed in the company and on the measures that the company has implemented to prevent future corruption.

Three elements have together been crucial to the Council's assessment. The first is that CRG does not seem to be doing enough to prevent future violations. The second is that the people who managed the company when the acts of corruption took place are still managing the company. The third is the level of corruption in the countries and sectors in which CRG operates.

Based on the actual acts of corruption and Chinese and international anti-corruption standards, the company should be expected to state, in a dialogue with the Council or in some other way, that corruption within CRG is unacceptable. In the same way, the company should be expected to clearly state that it has implemented or is making efforts to implement measures to prevent corruption. However, there is not enough publicly available information about the company's internal anti-corruption procedures to ascertain that CRG is doing this, and in addition the company has refused to reply to the Council's request for information on these issues.

Based on the available information, the Council cannot see that CRG's internal anti-corruption measures contain the elements that it is reasonable to expect of a large company operating in countries and sectors that are particularly vulnerable to corruption. The current management's attitude to corruption is unclear to the Council. CRG also seems to have anti-corruption procedures but it is not fully known what these comprise and how they are implemented, monitored and evaluated.

The internal compliance systems seem to be insufficient, especially because it is unclear which parts of the operations are covered by internal controls aimed at revealing dishonest acts. It also seems to be insufficient that several important measures are only aimed at managers and not at all employees and that the consequences for employees of contravening laws and internal guidelines are unclear. Nor has CRG established a whistleblowing mechanism that allows all employees to give notice of acts of corruption anonymously and without any risk of subsequent sanctions. Such a whistleblowing procedure is internationally regarded as being a key anti-corruption measure and an important way to improve and further develop internal procedures so as to prevent future rule violations. Whistleblowing procedures appear to be becoming increasingly common in companies like CRG in China too.

In addition, it appears that the main elements of the company's anti-corruption procedures were established before 2011. The Council on Ethics notes that the prevailing measures have not prevented CRG from becoming involved in corruption cases. This indicates that the measures were not sufficiently suitable for preventing corruption. A few more elements seem to have been added, such as the rules for tenders referred to in the CRS reports for 2012 and 2013, but it is difficult to place particular emphasis on this when there is little indication that the compliance procedures were satisfactory to start with. Other Chinese companies in the same industry seem to place greater emphasis on good compliance systems. They state that they not only prioritise the implementation of extensive, targeted and efficient preventive measures but also believe it is important to show the world that they have such procedures.

The second element that contributes to future risk is that the company's management is to a large extent the same now as it was when the acts of corruption took place. The senior management on the board and in the group have held management positions since CRG was listed on the stock exchange in 2007 and many have had various management jobs within the company during these years. The Council also places emphasis on the fact that several members of the board and group management also held senior management positions in the parent company while the acts of corruption were taking place. The management's attitudes are generally regarded as being very important for preventing corruption. When no managers are replaced after a company has been involved in serious corruption cases, the Council believes that this sends a signal that the company is not taking the necessary measures to prevent future violations.

In addition, CRG's operations are in a sector that is known to be vulnerable to corruption. The building and construction industry, where large public contracts are common, exposes the company to a considerable risk of corruption. Although the risk of corruption in this sector has probably been reduced in China due to the measures implemented by the authorities, the company operates in a number of other countries with a considerable risk of corruption. For example, the CSR report for 2013 mentions that the company exports to, among other countries, Venezuela, Cambodia, Congo (DR) and Sierra Leone. According to Transparency International's *Corruption Perception Index* published in 2013, Venezuela and Cambodia are in joint 160th place out of 175 countries when it comes to the risk of corruption. Congo and Sierra Leone are ranked as number 119 and 116 respectively. The Council has noted that China adopted legislation prohibiting foreign bribery in 2011 and that this was expanded in 2013. However, good legislation is in itself not enough to prevent future rule violations. What is crucial is that the companies themselves have procedures to reveal corruption and prevent future breaches of the anti-corruption legislation. When CRG's compliance systems do not seem to meet the requirements normally stipulated for such systems, it is difficult to see that the risk of corruption has been significantly reduced.

In its overall assessment of the future risk, the Council also places emphasis on the fact that CRG has not replied to the Council's repeated requests. This weakens the basis for assessing the specific acts and compliance systems and increases the risk of future acts of corruption. In accordance with that stated in White Paper No. 20 (2008-2009), the Council on Ethics has in this case placed emphasis on the fact that *"lack of information on a company's conduct and, not least, the company's lack of willingness to provide information, can in itself contribute to the risk of participation in unethical conduct being regarded as unacceptably high."*⁵¹

In that CRG is involved in one of the most serious corruption cases in China, is still managed by the same people who managed it when the acts of corruption took place and who knew or ought to have known about the acts, and is still operating in countries heavily exposed to corruption without at the same time making it clear that it is trying to prevent future violations, the Council believes there is an unacceptable risk of CRG being involved in future cases of gross corruption.

8 Recommendation

The Council on Ethics recommends the exclusion of China Railway Group Ltd. from the investment universe of the Government Pension Fund Global due to the unacceptable risk of the company being responsible for gross corruption.

Ola Mestad Chair (Signature)	Dag Olav Hessen (Signature)	Ylva Lindberg (Signature)	Marianne Olsson (Signature)	Bente Rathe (Signature)
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Notes

- The company has Issuer Id: 13437313.
- The most recent report was published in 2011 and is available at <http://bpi.transparency.org/bpi2011/results/> (13 August 2014).
- The report for 2013 is available at <http://www.transparency.org/cpi2013/results> (13 August 2014).
- The indicators for 2014 are available at <http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=Worldwide-Governance-Indicators> (13 August 2014).
- Available at <http://www.nbim.no/fondet/beholdninger/beholdninger/> (13 August 2014).
- Section 2, subsection 3 of the guidelines states: “(3) The Ministry of Finance may, on the advice of the Council on Ethics, exclude companies from the investment universe of the Fund if there is an unacceptable risk that the company contributes to or is responsible for: d) gross corruption...”.
- Refer to the Council on Ethics’ recommendation to exclude French company Alstom SA, 1 October 2010, http://www.regjeringen.no/upload/FIN/etik/2011/Alstom_norsk.pdf.
- Etterlevelsessystemer (in Norwegian) means the same as *compliance* systems.
- The Council has been unable to obtain copies of court rulings or other public documents linked to the corruption cases in which CRG, its subsidiary or their employees have been involved since these documents have not been made public.
- This applies to persons with links to recognised international voluntary organisations, academics and journalists.
- The parent company is China Railway Engineering Corporation (CREC). CREC runs its operations through its main subsidiary, which is CRG – refer, for instance, to http://www.hoovers.com/company-information/cs/company-profile.China_Railway_Engineering_Corporation.4792a5ba04ae896a.html. CREC owns 56.1 per cent of the shares in CRG. HKSCC Nominees owns 19.45 per cent, while the other shares are owned by a large number of small shareholders, refer to www.sina.com and www.ifeng.com (Phoenix).
- Shanghai Stock Exchange stock code 601390 and Hong Kong Stock Exchange stock code 390.
- CRG Annual Report* 2013, http://www.mzcan.com/china/601390/financial/13/EN/2013_per_cent20Annual_per_cent20Report_pDn9t62criDI.pdf.
- In its CSR report for 2013, the company states it has operations in 68 countries, and also writes: “At present, 338 overseas construction projects have been involved in railways, highways, bridges, tunnels, housing construction, urban rail, municipal engineering, water conservancy, port construction and other fields in 59 countries and regions of South America, Eastern Europe, Africa, South-Pacific, Southeast Asia, the Middle East etc. Company’s products of turnouts, the steels structures and others are exported to 20 countries and regions of the United States, Canada, Denmark, Germany, New Zealand, Hong Kong, Indonesia, Sri Lanka, Cambodia, Thailand, Vietnam, Sierra Leone, Venezuela, Bengal, Zambia, Scotland, India, Thailand, South Korea, Laos, and others. In addition, the company invested in Mali textile mills and Ivory Coast pharmaceuticals overseas, and also developed the business of real estate in South Africa, and project of mineral resource exchanging for infrastructure in Africa such as Congo-Kinshasa and so on. It not only promoted local economy development, but also provided employment service to some extent for the local people.” The report is also available at <http://www.crecg.com/tabid/383/Default.aspx>. In its annual report for 2013, the company also states it has operations in Ethiopia, Congo (DR), Georgia and Malaysia, refer to the CRG Annual Report 2013, available at http://www.mzcan.com/china/601390/financial/13/EN/2013_per_cent20Annual_per_cent20Report_pDn9t62criDI.pdf.
- Refer to the *Caixin Online* article dated 27 December 2012, available at <http://english.caixin.com/2012-12-27/100477785.html>, and the *South China Morning Post*, 30 December 2012, available at <http://www.scmp.com/news/china/article/1115500/state-firms-paid-half-bribes-rail-executive-luo-jinbao-received>. There is no publicly available information on the outcome of the court case.

- 16 Refer to the *South China Morning Post*, 9 June 2013, <http://www.scmp.com/news/china/article/1256996/graft-trial-begins-former-china-railways-chief-liu-zhijun>.
- 17 A consultant's report dated 28 March 2014. For a description of the developments in the former Ministry of Railways, refer to <http://www.softwaretesting.no/chinarail/chinarailinfo/chinarailstatistics.html>, and [http://site-resources.worldbank.org/INTTRANSPORT/Resources/336291-1152714163458/2744896-1152794646430/zhang-
jp-mor.pdf](http://site-resources.worldbank.org/INTTRANSPORT/Resources/336291-1152714163458/2744896-1152794646430/zhang-
jp-mor.pdf)
- 18 The functions relating to *safety and regulation* were transferred to the Ministry of Transport, while the *construction and rail-management* functions were taken over by a new company, China Railway Corporation (CRC). The new State Railway Administration is responsible for supervising CRC.
- 19 Refer, among other things, to the *Jiefang Daily*, 9 August 2012, <http://data.jfdaily.com/a/3741795.htm>, <http://cnnews.people.com.cn/n/2012/0809/c141677-18701508.html>; *Caixin Online*, 5 August 2012, <http://companies.caixin.com/2012-08-05/100419665.html>, *South China Morning Post*, 9 June 2013, <http://www.scmp.com/news/china/article/1256996/graft-trial-begins-former-china-railways-chief-liu-zhijun>, *The Guardian*, 8 July 2013, <http://www.theguardian.com/world/2013/jul/08/liu-zhijun-sentenced-death-corruption>, and *www.todayonline* 8 July 2013, <http://www.todayonline.com/china/india/china/liu-zhijun-chinas-ex-railway-minister-sentenced-death-corruption>.
- 20 *Jiefang Daily*, 9 August 2012, <http://data.jfdaily.com/a/3741795.htm>, *Caixin Online*, 5 August 2012, <http://companies.caixin.com/2012-08-05/100419665.html>, *Xinua*, 6 August 2012, http://news.xinhuanet.com/legal/2012-08/06/c_123535746_2.htm. According to experts on China, the report on, for instance, CRG's parent company in these press articles clearly refers to internal sanction processes in the Party.
- 21 Refer to *Caixin Online*, 2 March 2011, <http://english.caixin.com/2011-03-02/100231179.html?p1>.
- 22 Refer, for instance, to *The Guardian*, 8 July 2013, <http://www.theguardian.com/world/2013/jul/08/liu-zhijun-sentenced-death-corruption> (13 August 2014).
- 23 Refer to the *China Daily*, 25 September 2013, http://europe.chinadaily.com.cn/china/2013-09/25/content_16991631.htm.
- 24 Refer to *Caixin Online*, 9 September 2013, <http://english.caixin.com/2013-09-09/100579840.html>.
- 25 CRG's annual report for 2013 states that the company has two CEOs, referred to as "overlapping executive directors" – see the *CRG Annual Report 2013*, [http://www.mzcan.com/china/601390/financial/13/EN/2013 per cent20Annual per cent20Report_pDn9t62criDI.pdf](http://www.mzcan.com/china/601390/financial/13/EN/2013%20Annual%20Report_pDn9t62criDI.pdf).
- 26 The chair of CRG's *Supervisory Committee* since 2010 has held other management positions in CRG since 2007. He also held management positions as the *Deputy Chief Economist* in the parent company from 2004 to 2006 and was among other things the secretary of the parent company's *Disciplinary Committee* from 2006 to 2013. An adviser to the company (*Supervisor*) was the head of the *Audit Department* in CRG from 2007 to 2013 and was at the same time a key adviser to the parent company from 2007 to 2014. Four other persons that have held vice president positions in CRG since 2007 held management positions in the parent company between 1997 and 2008. Refer to the company's annual report published in 2013, *CRG Annual Report 2012*, page 30 et seq, available at [http://www.mzcan.com/china/601390/financial/11/EN/2012 per cent20Annual per cent20Report_A2RNi1FLC7l7.pdf](http://www.mzcan.com/china/601390/financial/11/EN/2012%20Annual%20Report_A2RNi1FLC7l7.pdf).
- 27 Refer to the *21st Century Business Herald*, 1 November 2012, only available in Chinese, <http://money.163.com/12/1101/11/8F7LRI6900253B0H.html>.
- 28 Refer to the *China Economic News*, 27 April 2011, only available in Chinese, http://news.xinhuanet.com/fortune/2011-04/27/c_121351988.htm.
- 29 Refer to the *Beijing Times*, 28 May 2012, only available in Chinese.
- 30 See *Xinhua*, 24 May 2010, and the *Liaoning Evening News*, 20 May 2010, only available in Chinese.
- 31 Chinese criminal procedures are based on inquisitorial principles. It is common for the judge assigned to prepare a case for trial to be in charge of the investigation in a serious criminal case.
- 32 For international standards on compliance and anti-corruption measures, refer to the general principles stated in the UN *Global Compact* and *OECD guidelines for multinational companies* and the standards based on national legislation, especially the *US Foreign Corruption Prevention Act* (FCPA) and *UK Bribery Act*, refer to footnote 39.
- 33 Important national anti-corruption legislation and regulations are stated in *PRC Criminal Law* (refer, for example, to article 393 regarding corporate penalties, which also covers state-owned companies that offer bribes), *PRC Company Law*, and *Interpretations issued by the Supreme People's Court, the Supreme People's Procuratorate, or the State Administration for Industry and Commerce*. In addition, the *Rules Governing the Listing of Stocks on the Shanghai and Shenzhen Stock Exchange*, which are intended to clarify the individual anti-corruption rules in *PRC Company Law*, also apply. According to these rules, listed companies must, within a reasonable period, announce any crimes committed by directors, advisers or senior employees. The *PRC Bidding Law* also applies and, among other things, stipulates that all major public contracts must be awarded following prior competitive tendering and that bribes given for the award of contracts are prohibited, cf. 32. Contraventions that qualify as crimes are to be prosecuted in accordance with the penal code, cf. Article 53. On 25 December 2013, the General Office of the CPC Central Committee issued a *Plan for Establishing and Improving the Work of Punishing and Preventing Corruption*

(2013-2017) (“2013-2017 Work Plan”) in order to strengthen the Party organisation at all levels, establish internal anti-corruption systems and improve compliance. Normally, key companies (*key State Owned Enterprises*) publish their internal anti-corruption procedures (i.e. proposed internal anti-corruption rules and mechanisms) based on the newest version of the Work Plans. CRG has not yet published any timetable for implementing the 2013-2017 Work Plan.

- 34 This was introduced with the *Notification on Further Accomplishing the Experimental Work for Enterprises’ General Legal Advisers* and associated statements. A *General Legal Adviser* is to help the company correctly implement state rules and regulations, take part in decision-making procedures, provide legal opinions on how legislation is to be interpreted, be responsible for legal issues by monitoring or taking part in the company’s largest financial activities, be in charge of the company’s legal units, handle tendering processes and court cases, train legal advisers in the company and propose corrections and sanctions if laws or regulations are contravened in other company departments.
- 35 CCDI is authorised to investigate and impose sanctions regarding all anti-corruption rules in China. The sanctions for contravening the Party’s disciplinary rules are warnings, loss of title and exclusion from the Party. If there is a breach of the penal code, the case may be transferred to the courts for ordinary prosecution. Whether or not this is done depends on the circumstances. In addition to the CCDI, there are a number of state bodies in China that monitor and check that the prevailing regulations are complied with and investigate assumed crimes. These include the *Party’s Central Commission for Discipline Inspection* (political body), *National People’s Congress* (legislative body), *People’s Courts and People’s Procuratorates* (bodies connected with the courts), *Ministry of Supervision* (administrative supervisory body) and *National Bureau of Corruption Prevention* (anti-corruption body). Relevant rules applicable to the Party’s disciplinary system are *Various Rules on Probity in Governance for Member Leaders and Cadres of the Communist Party of China* and *Measures for the Implementation of the Guidelines of Communist Party and China for Party-member leading Cadres to Perform Official Duties with Integrity*. The first guidelines, which entered into force on 18 January 2010, contain a number of definitions of corrupt actions. The second guidelines, which entered into force on 22 March 2011, provide detailed sanctions for breaches of the rules.
- 36 The company that can be regarded as the most comparable with CRG in China as regards size and sector has, for example, published detailed information on its internal anti-corruption system on its website.
- 37 Chinese multinational companies and their employees are subject to China’s penal code, which is explicitly referred to in the 2011 supplements to *PRC Criminal Law*. Article 164, which was revised on 25 February 2011, prohibits any kind of corruption relating to Chinese citizens and other legal entities operating in China or abroad. The article’s second subsection specifies that anyone who gives an asset to an employee abroad or an employee of a public organisation in order to achieve “*any improper commercial benefit*” is to be punished for corruption. The Ministry of Commerce also agreed on the following guidelines – *Key Points of the Ministry of Commerce on Regulating the Overseas Business Operations of Enterprises and Preventing and Controlling Overseas Commercial Bribery* – on 27 February 2013. Since the law is relatively new, there have until now been few cases in China relating to foreign bribery.
- 38 Refer to article 30 of PRC Criminal Law which also refers to Chinese Supreme Court law, cf. article 43, cf. article 63 of the General Principles of the Civil Law of PRC, and cf. the Interim Regulations of the State Administration for Industry and Commerce on Prohibition of Commercial Bribery issued by the SAIC, refer to <http://www.nortonrosefulbright.com/files/anti-corruption-laws-in-asia-pacific-63559.pdf>. The law allows it to be decided only to prosecute individuals and not companies, based on the need to protect jobs and the local economy.
- 39 Reference is made to the general principles stipulated in *The OECD Guidelines for Multinational Enterprises*, <http://www.oecd.org/daf/inv/mne/48004323.pdf>. The *UK Bribery Act* and *Foreign Corruption Prevention Act (FCPA)* have also provided guidance for international standards relating to the prevention of corruption in companies. In 2011, the UK Ministry of Justice published a guide on how companies should act to avoid criminal liability pursuant to the UK Bribery Act. This guide is available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. In 2012, the US Department of Justice (DoJ) and US Securities and Exchange Commission (SEC) published a guide on how companies should act to avoid criminal liability pursuant to the FCPA, and this is available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.
- 40 The working memo is available from the *Party Construction Website* for Chinese companies, <http://www.qiyedangjian.com/html/dangqunhuiyi/dangdaihui/2012/0112/10613.html> (it was available in Chinese until May 2014).
- 41 The report for 2012 was probably the first CSR report published by CRG.
- 42 In 2010, for example, the company apparently carried out a project relating to an internal anti-corruption manual, called the *Project Anti-Corruption Manual*, but there is no publicly available information about this apart from it being mentioned in Wang’s working paper. The same applies to the *Notice of CRG on Measures for Establishing and Improving the Education, System, and Supervision of Punishing and Preventing Corruption*.
- 43 Available at <http://www.crecg.com/tabid/461/InfoID/10410/fritid/424/Default.aspx> (14 August 2014).
- 44 These are the Interim Measures on Probation Period of CRG Leaders, Interim Measures on Term of Office of CRG Leaders, Interim Measures on Elimination of Incompetent CRG Leaders, Provisions Against Monetary Income Except for Annual Salary of CRG Leaders and Provisions Against the Purchase of Service Cars. However, Wang’s

working paper from 2011 only refers to the titles of these documents and the Council on Ethics has not managed to obtain any additional information about the more detailed content in any other way.

- 45 In that all the key positions in CRG are, in accordance with the Chinese constitution, held by members of the Communist Party, all these managers are to be appointed and managed by the *Party Committee* in the company.
- 46 According to Wang's working report, the *CRG Supervision Department* also published an anti-corruption manual in 2009, the *Alarm Bell*, which presents 29 different corruption cases. However, the full wording of the anti-corruption manual is not publicly available, and the manual is only referred to in the working report. The same applies to the *CRG Anti-corruption Manual*, which is another manual and applies to the entire CRG Group, including subsidiaries. Its main objective is to strengthen the employees' attitude to corruption. This document is not publicly available either.
- 47 These are the United Nations Global Compact, The Global Reporting Initiative (GRI), Social Accountability International (SAI), China CSR Reporting Guidelines (CASS-CSR2.0), Guide on Social Responsibility for Chinese International Contractors and Relevant requirements of the SASAC - refer to the CSR reports for 2012 and 2013.
- 48 Refer to the *CSR Report* 2013, page 21. Refer also to the *CSR Report* 2012, page 21 - both reports are available at <http://www.crecg.com/tabid/383/Default.aspx> (14 August 2014).
- 49 Refer to Doc88 Database, <http://www.doc88.com/p-9488732954371.html> (only in Chinese, 14 August 2014).
- 50 Refer to <http://www.crecg.com/tabid/461/infoid/22998/frtid/111/default.aspx>.
- 51 St. meld. Nr. 20 (2008-2009) (Report to the Storting (white paper)), page 125, text box 4.6, <http://www.regjeringen.no/pages/2172105/PDFS/STM200820090020000DDDDPDFS.pdf>, refer also to the Council on Ethics' recommendation to exclude Zijin Mining Group Co. Ltd, 18 June 2012, available at http://www.regjeringen.no/pages/38494095/Tilr_Zijin_2012.pdf.

To the Ministry of Finance

3 December 2014

Recommendation to exclude National Thermal Power Company Ltd. from the investment universe of the Government Pension Fund Global

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1 Summary

The Council on Ethics recommends the exclusion of National Thermal Power Company Ltd. (NTPC) from the Government Pension Fund Global (GPF) due to an unacceptable risk of the company contributing to severe environmental damage through its operation in Khulna, Bangladesh.

In the form of a *joint venture* with Bangladesh Power Development Board, NTPC has established a company to build a large coal-fired power plant in southern Bangladesh. NTPC will be responsible for planning, building and operating the plant.

The power plant is to be constructed near the border of the Sundarbans national conservation area, the world's largest mangrove forest. The area is rich in biodiversity and contains substantial conservation values, including Bengal tigers and river dolphins. The conservation area also encompasses two world heritage sites, as well as a further world heritage site on the Indian side of the border. Three factors mean that the project carries a substantial risk of environmental damage.

Both coal and other materials needed during construction and operation will be shipped to the power plant through the Sundarbans. Waste from the power plant will be removed along the same route. The sailing route to the anchorage and transshipping area is very close to the border of a world heritage site. Anchorage and transshipping operations will raise the risk of mishaps and accidents involving emissions very close to vulnerable areas. This risk is a direct consequence of the power plant's construction and placement.

The power plant will produce more than one million tonnes of ash annually, which will have to be either securely stored or bound, for example in cement. Several of the proposed uses carry a high risk of emissions of unwanted substances like mercury, arsenic and other metals into the environment and drinking water, either through their use and storage or through accidents during transportation. Many of the metals accumulate in organisms, and will be concentrated up the food chain. Some substances, like arsenic, may seriously threaten the health of the local population.

The third risk relates to the extensive dredging of riverbed and seabed areas. When large volumes are removed from the riverbed or dumped, the volume of particles transported by the river increases substantially. There is a high risk that this activity may place further strain on the already endangered mangrove forest and life in the river and appurtenant marine areas, which are also important to the local population.

The Council on Ethics initially contacted NTPC in March 2014, and has had some communications with the company since then. The company takes the view that, in assessing the power plant project, emphasis must be given to Bangladesh's status as a poor country with a great need for electricity, and that the distance to the world heritage site indicates that the project does not present a particular risk of environmental damage.

The Council on Ethics considers it highly unlikely that a coal-fired power plant can be constructed at this location without the construction itself constituting a high risk of severe environmental damage, even if extensive additional measures are implemented. In the present case, the company has also failed to give sufficient consideration to what needs to be done to protect the environment. Further, various factors relating to transportation

and waste management have not been addressed and handled satisfactorily. Overall, this suggests a significantly increased risk of unwanted incidents in a unique, highly vulnerable area. The Council has also given considerable weight to the strong concern expressed by UNESCO regarding the risks associated with the project, and the fact that the IFC recommendations on such situations have not been followed

Based on an overall assessment in which consideration has been given to all of the discussed matters, the Council on Ethics has concluded that there is an unacceptable risk that NTPC will contribute to severe environmental damage through the building and operation of the power plant at Rampal, including related transportation services.

2 Introduction

In March 2014, the Council on Ethics decided to assess the GPFG's investment in NTPC¹ by reference to the guidelines for observation and exclusion from the Fund's investment universe (the ethical guidelines).² The reason for this decision was information on the planning and building of the coal-fired power plant in Rampal, southern Bangladesh, near the Sundarbans mangrove area. NTPC is a partner in the joint venture that owns the power plant, and will be the plant operator³.

As at the end of December 2013, the GPFG owned shares in the company valued at NOK 423 million, corresponding to an ownership interest of 0.38% of the shares in the company.

2.1 WHAT THE COUNCIL HAS CONSIDERED

The Council on Ethics has considered whether there is an unacceptable risk that NTPC may be responsible for or contribute to severe environmental damage contrary to section 2(3)(c) of the ethical guidelines.

In other cases where the Council on Ethics has considered exclusion under this criterion, the Council has given particular emphasis to whether:

- the damage is significant;
- the damage has irreversible or long-term effects; and
- the damage has a considerable negative impact on human life and health, and then assessed whether:
 - the damage is a result of violations of national laws or international norms;
 - the company has neglected to act to prevent the damage;
 - the company has not implemented adequate measures to rectify the damage; and
 - it is probable that the company's unacceptable practice will continue.

The Council on Ethics' guidelines state that material weight shall be given to the risk of future damage. This recommendation concerns future risks associated with both construction and operation. Construction has commenced, while ordinary operation is expected to begin in 2016/2017.

The coal-fired power plant planned for Rampal is being built in a unique and

vulnerable natural area. Transport to the plant in the course of construction and operation will occur by boat, through this vulnerable area. The Council on Ethics has therefore also examined the impact of transportation and other activities occurring outside the construction site. Since these activities will be organised by other companies to some degree, the Council has also considered whether NTPC may be held responsible for them.

2.2 SOURCES

In addition to open sources, this recommendation is largely based on two analyses of the company:

- *“Final Report on Environmental Impact Assessment of 2x(500-660) MW Coal Based Thermal Power Plant to be Constructed at the Location of Khulna”*, prepared by the Center for Environmental and Geographic Information Services (CEGIS), dated January 2013.
- *“Final Report On Consulting Services on Coal Sourcing, Transportation and Handling of (2x660) MW Coal Based Thermal Power Plants at Chittagong and Khulna, and 8320 MW LNG and Coal Based at Maheshkhali”*, prepared by CEGIS, dated November 2012.

Both reports were commissioned by the “Government of the Peoples Republic of Bangladesh, Ministry of Power, Energy & Mineral Resources, Bangladesh Power Development Board”. As described below, the Bangladesh Power Development Board is one of the two joint venture partners.

The first report is an environmental impact assessment (EIA), which has been approved by the Bangladeshi environmental authorities and forms the basis for the issued permits.

The company has provided some general information, but has made limited replies to questions from the Council on Ethics relating to issues not covered by the reports. The company has also commented on a draft of this recommendation.

3 Background

NTPC is a partly state-owned Indian energy company established in 1975 to develop India’s energy sector. The company is involved in the entire energy-sector value chain. As at 31 March 2013,⁴ the Indian state owned 75% of the shares in the company.

NTPC has entered into a 50:50 joint venture agreement with the Bangladesh Power Development Board for the construction of a coal-fired power plant at Rampal in the Khulna district of Bangladesh. A joint venture company was established for this purpose: Bangladesh-India Friendship Power Company Pvt. Ltd. Under the joint venture agreement, NTPC is responsible for planning, building and operating the power plant.

The planned power plant is large, featuring two units totalling 1,320 MW, and is substantially bigger than any existing power plant in Bangladesh, irrespective of energy source. The power plant will be fired with sub-bituminous coal, and be fitted with ordinary equipment for flue gas purification, including desulphurisation. The power plant will

be situated on the site in such a way that further units can be added at a later date.

The power plant is to be built near the Sundarbans conservation area. There are different estimates of the distance between the power plant and the conservation area. The company has stated that the site lies 14 km from the edge of the forest, while other sources state that it is located between five and nine kilometres from where the forest edge was when the Sundarbans national conservation area was established. The difference between the estimates is probably due to the subsequent construction of settlements in the border zone and a resulting increase in the real distance between the site and the edge of the forest.

Under Bangladeshi law, no such plants may be built within 10 km of a forest area.

Bangladesh has a considerable electricity deficit. Nevertheless, the project agreement provides that some of the electricity produced will be fed into the Indian grid.

3.1 MANGROVE FOREST

Mangrove forests are a topographical feature of the intertidal zone which connects land and marine environments. Mangrove forests are declining markedly, and are thought to be shrinking more quickly than rainforests. They are characterised by numerous species of mangrove tree and bushes with a high salt tolerance, and have complex interdependencies with many other species. Mangrove forests are ordinarily highly productive.

Mangrove forest vegetation is highly specialised. It is not only required to tolerate very high salinity, but its roots normally grow in mud containing almost no oxygen. As a result, mangrove trees often have special aerial roots that reach up into the air at low tide. Alternatively, air is absorbed by special pores in the tree's bark.

Mangrove forests bind mud carried by rivers to vegetation, creating new land. Accordingly, mangrove forests are not as old and stable as, for example, rainforests. Rather, they are dynamic and vulnerable to external influences.

Mangrove forests offer good hiding places and an excellent growth substrate for numerous species, and transport easily accessible nutrients from land to marine environments. A very large number of specialised microorganisms ensure the conversion of nutrient-rich and frequently oxygen-poor mud into a more accessible form for organisms higher up the food chain. This makes mangrove forests a vitally important spawning and development environment, with a high density of marine species. Such forests are also home to many plants and animals with specialised modes of living.

The EIA for the project shows that there is great biodiversity in the immediate proximity of the plant (the "study area", with a radius of approximately 10 km), with a large number of plants and animals. More than 150 bird species were registered during the impact assessment. The study area as defined in the EIA lies largely outside the Sundarbans. The biodiversity figures for the Sundarbans are far higher. A number of species in the study area are listed as endangered or critically endangered, including tigers, Ganges river dolphins, fishing cats and several types of turtle.⁵

Bangladesh has a population of approximately 160 million people, living on an area one-third the size of Norway. It faces one of the world's highest flood risks, and primarily comprises mud deposits made by three large rivers on their way from the Himalayas to the sea. Bangladesh suffers flooding and cyclones, which at times flood more than half the

country. The mangrove belt between land areas and the sea plays a critical role in limiting erosion by the sea, in slowing storm surges, and in bonding mud from rivers to expand the land area.

3.2 THE SUNDARBANS

According to the IUCN (The International Union for the Conservation of Nature), the Sundarbans are the world's largest mangrove area and largest Bengal tiger habitat, as well as the only mangrove area in which tigers are found.⁶ The Sundarbans region as a whole constitutes a national conservation area in Bangladesh, and contains two world heritage sites.⁷ Further, the entire forest has been designated a Ramsar⁸ and Biosphere⁹ area. Approximately one-third of the Sundarbans lies in India, and contains a third world heritage site. The entire Indian part of the mangrove forest is a Biosphere area.

The area is species-rich and ecologically highly special. It also constitutes a habitat for the only two remaining river dolphins in Asia – the Ganges dolphin and the Irrawaddy dolphin. Both species are classified as globally endangered. The Bengal authorities have established several conservation areas for these whales, including in the part of the Pashur River along which transportation to the power plant is to occur.¹⁰

In its 2014 review of world heritage sites, UNESCO evaluated the overall situation in the Sundarbans.¹¹ The review was highly critical of the power plant project, stating that its construction was of direct relevance to the world heritage site. The review identified transportation and dredging as problematic, expressed strong concern about the establishment of new settlements in the area as a consequence of the power plant's construction, and criticised the weaknesses in or lack of impact assessments.

The UNESCO World Heritage Committee described the situation relating to the world heritage site as follows in its review:

“4. Notes with concern that the indirect impacts on the property of the construction of a coal fired power plant at Khulna do not appear to have been assessed, considers that increased navigation on the Pashur River and the required dredging are likely to have a significant adverse impact on the property's Outstanding Universal Value (OUV)...”¹²

“The Committee is recommended to regret that the State Party did not submit a report on the state of conservation of the property as per Decision 35 COM 7B.11 and to express its concern about the construction of the coal-fired power plant in Khulna (Rampal). IUCN considers that the EIA of the power plant, published in January 2013, did not adequately consider potential impacts of the plant on the property's OUV. While the State Party has responded that the Sundarbans as a whole including the property were considered in the EIA, an assessment of the specific impact on the property's OUV should nonetheless have been carried out, in conformity with IUCN's World Heritage Advice Note on Environmental Assessment.

Furthermore, while the power plant will be located about 65km away from the property and local air and water pollution can potentially be mitigated sufficiently, the dredging of the Pashur River to facilitate the transport of coal to the plant, as well as the coal dust released into the environment during transport and transfer, are likely to adversely impact the property. The EIA for the plant does not consider the impact of dredging in the rivers adjacent to the property. Only limited consideration has been given to the transport and transfer of coal in

*close distance to the property and no mitigation efforts beyond already existing regulations are known. The dredging necessary to keep the channels of the Pashur River open for navigation is likely to alter the morphology of the river channels, which, in combination with erosion and sedimentation caused by the wakes of large vessels, would be likely to affect priority habitat for freshwater dolphins and other aquatic species, such as the critically endangered Batagur turtle (*Batagur baska*) and vulnerable small clawed otter (*Aonyx cinerea*). Coal dust released into the environment during transport and transfer is likely to have a significant direct adverse impact on mangroves, fish, and probably freshwater dolphins, amongst other endangered species.*

While the State Party notes that an EIA for the dredging activities will be carried out before these will start and that experts from the World Heritage Centre and IUCN will be able to contribute to this process, the impacts of dredging should have been included in the EIA for the power plant, given that dredging to keep the rivers open for navigation is directly linked to the feasibility of the power plant. There is concern that indirect and cumulative impacts from the power plant, related activities to facilitate navigation, and other infrastructure and industrial developments do not appear to have been assessed. Therefore, the Committee is recommended to request the State Party to undertake a comprehensive Strategic Environmental Assessment (SEA) of development in the Sundarbans and its immediate vicinity, including a specific assessment of potential impacts on the OUV of the property, in conformity with IUCN's World Heritage Advice Note on Environmental Assessment."

The area is not only associated with substantial conservation values, but is also highly important to the local population, which meets two-thirds of its animal protein needs by fishing in the river system.

As a result of human activity, the Sundarbans mangrove area has shrunk by approximately two-thirds in the past 150–200 years. This has particularly impacted animal species that require large habitats, such as tigers and river dolphins, and undermined the area's flood protection function.

The population in fringe areas is growing, and large volumes of timber and fuel, as well as food resources, are being taken from the forest. Increased construction of roads and other infrastructure will further increase the pressure on the natural resources in the Sundarbans.

It is estimated that around 200,000 people regularly harvest different resources in the Sundarbans. Around 70 percent of these harvest food resources from the rivers.

Inland and coastal fish stocks are declining. The World Bank has stated that the primary threat to stocks is human activity which disrupts and destroys fish habitats.¹³

4 Environmental risk resulting from the company's activities

Three factors in the project present a considerable risk of environment damage: dredging, transportation and handling of ash from the power plant.

The development and the transportation of coal have been examined in two impact assessments providing large amounts of factual information. The project has also been widely criticised on various websites. We have primarily taken our figures from the company's two impact assessments, and based our risk specifications on those documents to some degree. We have also used information from UNESCO on the status of the conservation areas, as well as information from IFC (International Finance Corporation) concerning expectations of the company with regard to biodiversity.

4.1 PLACEMENT

The plant is situated on the eastern bank of the Pashur River, north of the city of Mongla, which has a port. There is reason to believe that the choice of location is linked to its proximity to the Indian electricity grid.

The EIA estimates that approximately 150 families lived and pursued their livelihoods – primarily rice cultivation and shrimp farming – on what has now become the power plant site. The surrounding area comprises relatively densely populated agricultural land.

The construction site lies in what is described as the “*wind risk zone of Bangladesh*”,¹⁴ and is vulnerable to cyclones and storm surge. General figures on high water incidents during cyclones show that the water level along the coast has risen by more than eight metres on at least three occasions since 1960.¹⁵ Not least due to the reducing effect of the mangrove forest, the flood level is lower in inland areas. Although the power plant site is located approximately 70 km from the coast, it is to be built up using dredged material because it lies just 1.5–2 metres above sea level. The water level on the site is estimated to have risen by 4.47 metres during the last major cyclone – Aila – in May 2009.

The EIA refers to research documenting an increase in sea temperatures off Bangladesh. Sea temperatures have a direct impact on the occurrence of tropical hurricanes. At the same time, the number of the most powerful cyclones has increased, although the total number of cyclones has not. The height of storm surges is therefore expected to rise materially in the years ahead, even if sea levels do not rise.



Figure 1 Map showing the Sundarbans and world heritage sites, anchorage area and power plant.

<http://archive.thedailystar.net/beta2/news/coal-dust-a-big-concern/>

In India, corresponding projects (in terms of size and proximity to conservation areas), are in principle not generally approved. In their “Technical EIA Guidance manual for Thermal Power Plants”, the Indian environmental authorities have specified a minimum distance of 25 km from valuable natural areas.¹⁶

The river courses in a mangrove forest change, and are vulnerable to erosion. A large increase in shipping traffic and extensive dredging will necessarily alter the erosion pattern.

On 29 January 2012, parts of the Pashur River along which transportation is to occur were officially declared a “dolphin sanctuary”. The environmental impact assessment specified four “Important Dolphin area along the coal transportation route”, one of which is the anchorage area at Akram Point. The three others are located higher up the river system.¹⁷

The EIA also stated that the globally endangered freshwater dolphins and other endangered species live in the Pashur river system, “...and hence it is important that utmost care and stringent conditions be laid down for the safety and sustenance of this unique ecosystem...”.¹⁸

4.2 TRANSPORT AND DREDGING

Coal is to be transported up the Pashur River, and will have to be reloaded onto smaller vessels along the way. Some of this transportation has to occur along the border of the world heritage site, and the planned anchorage and reloading area lies just a few kilometres upstream of the world heritage site. External companies are to be used for the transport operation, and will run five vessels along the river almost continuously.

An anchorage area is planned at Akram Point, where coal is to be transferred to somewhat smaller boats. These boats, with a capacity of around 10,000 tonnes, will operate a shuttle service between Akram Point and the power plant, making a total of 400–500 trips a year.

It is likely that large volumes of ash from the power plant, potentially totalling up to one million tonnes annually, will be transported by boat. It is also probable that extensive boat transport will be required in connection with the operation and maintenance of the plant and the construction of electricity infrastructure like pylons, transformers, etc. in the area.

These transport operations will necessitate extensive dredging of the river and in the anchorage area, and will mean substantial traffic involving large vessels. The development of an anchorage area at Akram Point involves the planned dredging of 30 million cubic metres of fill. This corresponds approximately to an volume measuring 200 football fields, 30 metres deep. In addition, the EIA pointed out the need to dredge parts of the river course leading up to the power plant¹⁹, i.e. the dredging of approximately 2.1 million cubic metres in the upper part (approximately 16 km) of the river.

When a river is dredged, the volume of mud carried by the river increases greatly, due to the agitation of light riverbed sediments. It is known that dredging can cause acidification and altered water chemistry due to the very low oxygen content of these sediments.²⁰ The conditions on the riverbed already impose such a strain on plants that most mangrove species compensate by absorbing oxygen directly through pores in the bark and aerial roots. These trees are adapted to the normal level of mud transportation, and are vulnerable to mud build-up in the intertidal zone in the event of increased mud transportation.

4.3 ACUTE POLLUTION CONTINGENCY PLANS

Accidents occur in all shipping operations, particularly in coastal waters subject to rapid changes in weather conditions and narrow waterways presenting challenging navigational conditions. The shipping lane leading to the power plant is narrow and features shifting sandbanks and currents, which vary in accordance with the rate of flow and tides. Even minor navigational errors, poor communication with other vessels or brief technical problems may cause an accident.

Commercial shipping currently docks at the port of Mongla near the power plant. This is the only port of notable size in the area. Based on information on the website of the local port authority, less than one ship per day passed through the area on randomly selected days in the spring of 2014.

The environmental impact assessment pointed out that 153 vessels docked in the port in the period 2010–2011, and that currently 1.6 million tonnes pass through the port every year. The transportation of coal through more than 400 trips upriver every year will thus greatly multiply the number of journeys, and the shipped tonnage will also increase many times over. The risk and consequences of accidents will also increase because the vessels shipping the coal will be far larger than those normally navigating the river system.

There is reason to believe that large volumes of ash may be transported along the river. In the event of an accident, the ash will be spread and partly dissolved in the water, and will be impossible to gather in again.

Although the environmental impact assessment contains a brief chapter on measures to control the impact at ecosystem level in the “*Environmental Management Plan*”, the chapter does not mention unexpected accidents such as shipwrecks. Accordingly, no measures are proposed beyond the enforcement of existing rules. The analysis splits responsibility for following up on these points between various official bodies and companies, but does not refer to the company’s responsibility specifically, or state whether anyone has coordination responsibility.²¹

Based on the information available to us, it appears that no resources are available for dealing with mishaps and accidents during transportation in the mangrove belt. The environmental impact assessment and coal transport analysis describe no existing or planned resources for preventing the spread of pollution in the event of an accident.

Bangladesh has ratified the relevant IMO (International Maritime Organisation) and MARPOL (International Convention for the Prevention of Pollution From Ships) conventions. Under these, shipping companies bear legal liability for the consequences of accidents at sea. This is most relevant in terms of compensation. Shipping companies also have a responsibility to prevent situations presenting a risk of an accident.

Ships that sink are not expected to take effective steps to prevent environment damage. It is therefore normal for coastal states to establish a contingency function to deal with acute pollution at sea. This normally comprises a warning system, equipment, crews and other resources that are tested, maintained and given regular, focused training. For example, the IMO convention imposes clear requirements on coastal states that have ratified the relevant agreements:

“States which are party to the OPRC Convention and OPRC-HNS Protocol are required to establish a national system for responding to oil and HNS pollution incidents, including a designated national authority, a national operational contact point and a national contingency plan. This needs to be backstopped by a minimum level of response equipment, communications plans, regular training and exercises.”²²

The entire system is normally based on a thorough risk analysis in which incidents with an impact on the design are identified. The system is then designed accordingly. The most important factor is the required response time, i.e. the design must enable crews and resources to be on site to prevent the most serious consequences of an accident. In unpopulated coastal and upriver areas, it is unrealistic to have such resources in place on time under all conditions. Moreover, it is difficult to establish contingency systems featuring depots, crews, vessels and exercises without negatively impacting surrounding areas.

The power plant and transportation to it will alter the risk profile materially, all the way from the open sea to the port. Any risk analysis and contingency system based on the current risk profile will have to be reviewed if the risk profile changes. Nothing has been said about either state or in-house contingency plans or related risk assessments in the documents describing environmental risk and transport solutions. However, the company’s letter did mention that a consultant with logistics expertise had been hired to examine the contingency planning situation.

4.4 WASTE: FLY ASH

When coal is burned, a non-combustible residue remains, primarily comprising fine silicate particles and metal compounds. These are largely captured by a purification device, normally an electrofilter. Some ash also remains in the combustion chamber, and is referred to as bottom ash. The ash content of coal varies, from 12–15 percent for some coal types to more than 40 percent for some Indian coal types, for example. In other words, a large power plant produces very substantial amounts of waste.

In total, the power plant will produce about 940,000 tonnes of ash per year. No final decision has been made on disposal of the ash, but the EIA proposed several alternatives, including use as an additive in cement production, use as fertiliser, use as an additive in brick production, etc. At present, ash from the other, far smaller coal-fired power plants in Bangladesh is not fully re-used, and only a limited proportion of the ash produced by coal-fired power plants in India is re-used. In the USA, around 45 percent of fly ash is used in cement, bricks, etc., while the remainder is generally stored.²³

The metal content of the ash will normally comprise a concentration of the metals originally present in the coal. Depending on the purification technology used, some mercury, and a smaller amount of cadmium, may pass through the purification devices and accompany the emitted gases. The concentration of metals in the ash varies in line with coal quality. Typically, the mercury content is slightly less than 1 ppm (part per million), hypothetically equating to as much as 940 kilogrammes per year in the case of this particular power plant. The concentration of arsenic in different types of coal in general ranges from 10 to 80 times the mercury concentration, corresponding to 10 to 50 tonnes or more per year. The corresponding figure for cadmium is approximately 10 tonnes per year.

Under certain conditions, the metal compounds in the ash will be mobilised and carried in rainwater or groundwater. Some of these are damaging to the environment, even in low concentrations. For example, there may be relatively large volumes of arsenic compounds, barium, hexavalent chromium, lead, mercury, cadmium, thallium, etc. Some of these, like arsenic, are carcinogens. Several of the most environmentally harmful metals can accumulate in organisms. This means that they remain in the ecosystem and are concentrated up the food chain with the result that top predators – in this case normally tigers, birds of prey and dolphins – may develop very high blood and tissue concentrations.

Metals that are soluble in water will be carried by the water out of the disposal site, into the ground, groundwater or river system. Very effective barrier and drainage systems will be required to prevent mobile metals in stored ash from ending up in the river system and groundwater.

The company has proposed the temporary storage of ash until final disposal is decided. There are also plans to build up the low-lying area around the plant, which measures 1,414 acres or 5.72 km² and is vulnerable to flooding, with the ash as part of “land development”.²⁴ The aim is to build up height for a potential second stage of development at the power plant. The use of ash for this purpose will carry a high risk of the ash coming into contact with water, and the resulting leaking of metals.

The US Environmental Protection Agency (EPA) has found that emissions from leaky ash storage sites into drinking water increase the risk of illness.²⁵

Bangladesh has suffered widespread problems as a result of arsenic poisoning following the establishment of a large number of groundwater wells from around 1970 onwards. These wells extracted water from shallow deposits that also contained mobile arsenic. It is estimated that several tens of millions of people have been exposed to arsenic concentrations in drinking water that have affected their health. Several sources have described the situation as the largest mass poisoning of all time,²⁶ and it is estimated that the number of resulting annual mortalities may number several tens of thousands.

Nevertheless, the available materials do not describe how a large volume of fly ash containing relatively high concentrations of arsenic should be treated to avoid further contributing to the arsenic load in the area. On the contrary, one proposed use for the ash is as a fertiliser. This would make many of the components in the ash, including arsenic, available for absorption into plants. Rice in particular absorbs large amounts of arsenic,²⁷ and is a very important dietary element in Bangladesh. There is a widespread view that arsenic in the food chain may in future become as serious a problem as arsenic in drinking water.²⁸

Arsenic arises in different forms. Several of these are acutely poisonous or cause cancer even in very low concentrations.

The mercury in the fly ash will constitute a particular risk in this area, since the chemical conditions in the river will, to a greater extent than elsewhere, transform mercury into a form (methylmercury) that is very easily absorbed and concentrated up the food chain. The population eats large amounts of fish from the river, and is thus vulnerable.

4.5 THE IMPACT ASSESSMENTS

The true status of the reports is unclear in certain respects. In most countries, companies intending to establish an operation are responsible for commissioning environmental impact reports that provide thorough descriptions of measures to reduce risks. Such environmental impact reports are generally not prepared by the companies themselves, but by consultants. However, the companies are responsible for ensuring that those who draft the reports are experts, and that the reports cover all relevant environmental risks. Further, the companies own the reports and are responsible for implementing proposed measures. The authorities may impose requirements on the companies based on, among other things, such reports, and may subsequently take steps vis-à-vis the company if a report is inadequate.

CEGIS, which drafted the reports, is stated to be “*a public trust under the Ministry of Water Resources*”, and thus also represents the authorities. It is unclear whether NTPC or the joint venture company can in fact be responsible for a report prepared by the authorities, or whether a party representing the authorities has prepared and is in practice responsible for an environmental impact assessment that in turn forms the basis for the authorities’ own operational requirements specification.

The Ministry of Energy’s subordinate agency has commissioned a report prepared by a subordinate agency of the Ministry of Water Resources that constitutes the expert

basis for the Ministry of Environment and Forest's imposition of requirements on a joint venture company in which the governments of both India and Bangladesh are involved as owners.

The Ministry of Environment has also been responsible for approving the report.

This makes it difficult to understand who is, and who is regarded as, responsible for the EIA's content, assessments and potential deficiencies. This undermines confidence that the EIA provides an objective, comprehensive analysis.

The structure and content of the environmental impact assessment is not entirely consistent with, for example, the World Bank's customary EIA design, as regards both the balanced presentation of pros and cons and the specification of technical measures.

Repeated use is made of expressions like "*little amount of leacheate might be leaching to the ground*" and "*Dredging activities may have impacts on the river water quality*", and there are few descriptions of the evidence in support of these statements and what is needed to limit such effects.

Inadequate information is available on environmental monitoring plans, and on what baseline is to be adopted in these plans. Moreover, the cost-benefit analysis appears to be very brief.

Both the "Environmental Monitoring Plan" and the "Cost and Benefit Assessment" are listed in the table of contents, but there is no text in the document. We nevertheless assume that they have been described but that, based on the specified page numbers, they are very brief.

5 Information from the company

The company was initially contacted by letter of 20 March 2014. It has replied to all enquiries, but The Council of Ethics have received limited replies to specific questions going beyond the content of the EIA. The company has also received a draft of the recommendation for comment.

The company's primary concerns have been Bangladesh's substantial need for stable electricity supplies and that any disadvantages of the project must be weighed against the situation in the country, which suffers from extensive poverty and a lack of energy. Barely 60 percent of the population has access to electricity. In its letter of 1 September 2014, the company wrote:

"Each country is blessed with certain characteristics such as physiography, natural resources, ecology, human population and needs etc. and we have to strike the balance between the environment and development based on our local conditions. With that perspective in mind, we feel that Govt. of Bangladesh has taken a conscious decision to go ahead with the project, and their decision, as a sovereign country needs to be respected."

The company disagrees with the Council on Ethics' assessment of the environmental impacts, and that it is unfortunate that an official body has prepared the environment impact assessments on which the permits granted for the project are based. The company wrote:

“In our opinion, an EIA undertaken by a Govt. Entity adds to the credibility over an EIA undertaken by a private consultant, which is again accused to be biased, as the same is funded by project proponent. Further, the responsibility for further studies and mitigation always lies with the Joint Venture Company setting up the project, according to the environmental clearance granted.”

In its comments on the draft recommendation, the company pointed out that ship transport is the most common form of transport in a country like Bangladesh, both due to natural conditions and because poor countries often have poorly developed infrastructure. The company pointed out that Mongla is Bangladesh’s second-largest port, and stated that the river system will be dredged in any event, because it is a “declared waterway”. The company also gave notice of future measures relating to transport:

“...BIFPLC has engaged another consulting firm of international repute through global tendering process for a detailed coal sourcing and logistics study. The Emergency situations and requisite response systems associated to this coal transportation shall be studied by the Consultant and based on the recommendations of the consultant, an elaborate emergency response system for coal transportation will be developed.”

The company has also emphasised that the distance between the world heritage site and the power plant will be approximately 70 km.

Overall, the company is of the opinion that the expected environmental impact and accident risk are acceptable, given the measures the company plans to implement.

6 The Council on Ethics’ assessment

The Council on Ethics has concluded that there is no doubt that the entire Sundarbans have unique environmental qualities, and that there is a special need to protect the mangrove forest in the Sundarbans generally and the world heritage sites and globally endangered animal species in particular. The Council has concluded that it is correct to regard the national conservation area as a necessary buffer zone around the world heritage site, and that the large numbers of animals such as river dolphins and tigers in the buffer zone document the special conservation values in the entire area. The Council considers there to be an unacceptable risk of severe environmental damage to both the world heritage sites and the conservation areas surrounding them as a result of the power plant and transport to it. The Sundarbans are a dynamic mangrove area that is under severe pressure, and the effects of the intervention in and damage to such systems is often irreversible. Further, a significant risk of serious negative environmental and health effects is presented by the dissemination of metals, particularly arsenic, in ash produced by the power plant.

The Council on Ethics has assessed the present case as a project that has been launched but not yet begun operating. The Council has therefore been unable to refer to operational experience, and has relied more on risk assessments as the foundation for its conclusion. The Council sees reason to emphasise that its mandate is precisely to evaluate future risk. In its recommendation, the Council has given weight, for example, to the risks associated with preparations and construction, and it would therefore be pointless

to conduct the assessment once the project period is over and the plant is in operation. Emphasis has also been given to the risk of unforeseen situations and accidents.

The Council on Ethics considers it unlikely that the disruption and accident risk connected to transportation will be reduced without extensive analysis and measures. Moreover, even if further measures were to be implemented, it is unlikely that risk can be reduced to an acceptable level. Given the large volumes of mud transported by the river, there will be a recurring need for dredging. The leakage of metals will be a constant risk if the proposals in the environmental impact assessment are adopted. Each of the factors – transportation, dredging and ash disposal – constitutes a significant environmental risk.

NTPC bears operator responsibility in the joint venture company, and is thus also responsible for design, construction and operation. It is also the company partner with the most practical experience of such projects. In most countries, it is customary for the operating company to be responsible for commissioning an analysis of risk factors and measures to avert project risk (an EIA). In the present project, an official body has drafted the EIA. The EIA clearly states that very many considerations have to be taken into account to prevent environmental damage, that the conservation values are substantial, and that many authorities are involved. The EIA describes measures that, in principle, appear relevant. However, it contains no, or few, descriptions of what is required to avoid damaging the environment, and does not assess whether the proposed measures will be adequate. Nor does it draw on international experience relating to leakages from storage sites, measures to prevent sludge loss, comparable contingency systems or the risk of shipwreck. It is therefore impossible to assess whether the environment will be sufficiently protected if the company's proposals are adopted. The Council has concluded that this constitutes a clear additional risk which the company has not taken adequate steps to investigate.

Further, the EIA does not deal with the consequences of failing to comply with the regulations. This renders the identification of relevant, adequate measures difficult. If adequate environmental protection requires full compliance with all regulations, an analysis will be required of whether this is achievable, or whether additional systems have to be introduced to discover or reduce the effects of deviations. For example, although it is in principle impermissible to pollute in connection with a shipwreck, realistically this will occasionally happen in difficult waters and under difficult weather conditions.

NTPC is a large company with previous experience indicating that stricter requirements are sometimes also imposed in cases where no world heritage sites are among the likely injured parties. Even though the authorities in Bangladesh have been more involved in analysing risks and specifying suitable risk-alleviation measures (since an official body has actually prepared the EIA), the generally accepted principle nevertheless applies that the company itself is responsible for identifying risk factors and implementing adequate measures.

This has been emphasised by, for example, the World Bank/IFC (International Finance Corporation), which in its Performance Standard 6 on biodiversity²⁹ has imposed very strict requirements regarding the potential consequences of interventions, and regarding biodiversity monitoring and evaluation programmes in areas classified as critical

habitats, i.e. world heritage sites, most Ramsar and Biosphere areas, and areas home to endangered or critically endangered species. The power plant's impact zone is covered by all of these criteria, even though the power plant site is located outside and upstream. UNESCO also gives emphasis to activities outside world heritage sites that may impact conservation values.

The Council on Ethics has concluded that, in the present case, it is correct to examine the environmental values where environmental damage may arise, and that the conservation values correspond to those listed in the "critical habitats" category in IFC Performance Standard 6. There, the IFC stated:

"17. In areas of critical habitat, the client will not implement any project activities unless all of the following are demonstrated:

- *No other viable alternatives within the region exist for development of the project on modified or natural habitats that are not critical;*
- *The project does not lead to measurable adverse impacts on those biodiversity values for which the critical habitat was designated, and on the ecological processes supporting those biodiversity values;*
- *The project does not lead to a net reduction in the global and/or national/regional population of any Critically Endangered or Endangered species over a reasonable period of time;*
- *A robust, appropriately designed, and long-term biodiversity monitoring and evaluation program is integrated into the client's management program;"*³⁰

This implies that the standard applied to the company by the Council on Ethics in the present case largely corresponds to the expectations the IFC has of companies establishing operations that will impact critical habitats.

Sea and river transportation, contingency planning and dredging

The transport route passes along the border of the world heritage site, and through the Sundarbans. The entire transport route until just south of Mongla lies within the Ramsar area.

The company intends to purchase boat-based transportation services. The vessels will be constructed specifically for this assignment, and will have few or no other customers. The transportation of coal and construction materials must be regarded as part of the project, and a matter to which the company must give consideration in its overall plan for dealing with the environmental challenges. There is therefore no doubt that the company shares responsibility for, and is a participant in the creation of, all risks arising in connection with transportation.

The EIA states, by way of summary, that this highly valuable area will suffer in the absence of the strictest attention and requirements. At the same time, it is unclear whether the requirements that will be imposed will be adequate, whether it will be possible to comply with the requirements at all times, and how compliance will be monitored.

The Council on Ethics has concluded that the activities associated with thousands of trips to and through this area constitute a material risk to the protected areas and the values they contain.

In a country with limited national shipping legislation, the legal responsibility of vessels will be defined by the International Maritime Organisation (IMO). The IMO requires those responsible on a vessel to liaise with any national contingency organisation.

No such national contingency resource is mentioned in the EIA. We therefore have to assume that no adequate resource of this kind exists. The company must be aware of this deficiency, and has an independent responsibility to ensure that its activities and those of its suppliers do not constitute an unacceptable risk.

The proximity to the Sundarbans in general and the world heritage site in particular mean that accidents involving vessels may have unacceptable consequences.

Over a ten-year period, ships will make approximately 1,000 trips passing close by the world heritage site, and there will be around 10,000 trips up or down the upstream river system in an area which is vulnerable to monsoons, storm surge and flooding and highly challenging in navigational terms. A single accident that is not handled quickly and correctly may be sufficient to cause great damage to the Sundarbans and the world heritage sites. Statistically, there is a greater risk of such accidents occurring in poor weather and difficult sailing conditions. This underlines that contingency plans and measures cannot be based on what is possible under normal circumstances.

The company has noted that transportation in itself constitutes an additional burden, as it has stated that noise, light at night, erosion due to increased shipping traffic, general pollution from boats (such as oil-polluted water, sewage and other waste), represent a challenge, and that these matters must be regulated. Several measures have been proposed to reduce the extensive disruption to animal life caused by the transport operations, such as limited use of lighting in connection with night sailing, etc., but no analyses have been undertaken of whether the measures are adequate or of how the company considers that compliance with any requirements should be monitored.

The transport operations constitute a significant risk to the mangrove forest and its ecosystem, and mean extensive disruption to animal life, changes to mud transportation with an effect on plant life and animals in the river, and erosional changes affecting both vegetation and animal life. The overall result may be lasting changes to the ecosystem.

The EIA summarised this issue as follows: *“If navigational, spillages, noise, speed, lighting, waste disposal rules regulations are not properly maintained, it may impact the Sundarbans ecosystem especially Royal Bengal Tiger, deer, crocodile, dolphins, mangroves, etc.”*³¹. However, there is no statement on the basis on which it has been concluded that these rules are adequate, or on how compliance with the rules is to be ensured.

As stated, the joint venture company has engaged a consultant to assess the logistics of the coal-transport operation. The consultant is also to propose contingency measures. This is positive, and may reduce the risk somewhat.

Even if a light contingency system were to be established, for example based on alarm notification systems between the boats and with equipment installed on them, such a short time would pass between the occurrence of an accident and the time pollution in the form of oil, ash or other materials reaches land or other marine areas that it is unrealistic to expect such a system to alleviate the situation significantly. Accordingly, the Council on Ethics has concluded that the scope of transportation and the circumstances under

which it is to occur indicate that the risk of severe environmental damage is unacceptably high.

The Council on Ethics is not aware of any thorough evaluation examining whether increased mud transportation will affect the protected areas. Rivers naturally carry large numbers of particles, and local species are therefore adapted to this, but there is great uncertainty about what a potentially large increase would mean. Locally, and in the short term, there will obviously be a major impact on fishing, a nutritional and financial lifeline in the area. However, fish can migrate, and may return once conditions have improved. Local plant life, and particularly mangrove species, lack this ability to relocate quickly.

The company has stated that the river will be dredged in any event, since it is an important transport route in the area. This is probably correct, but the need for dredging will nevertheless increase significantly as a result of the power plant. The lack of an analysis of the problem of increased mud transportation in connection with dredging, and particularly the lack of a plan for environmentally sound implementation of the extensive dredging work at Akram Point and in the riverbed leading up to the power plant, creates great uncertainty about the company's plans for necessary environmental measures and their effect. The Council on Ethics is of the opinion that it is particularly important not to risk unwanted environmental consequences in such a vulnerable area.

Ash disposal

Flue gas contains large numbers of particles with environmentally hazardous properties. To avoid dissemination in the environment, large volumes of these are removed from the air stream in highly efficient air treatment plants. However, several of the proposed uses will constitute a real risk of dissemination through incorrect handling of the ash. This applies to use as fertiliser, storage without the adoption of adequate measures in an area vulnerable to flooding, and use as a fill material in area in which the groundwater table is likely to be close to the surface for parts of the year. The Council on Ethics has found no information indicating that the company has concrete plans for proper on-site disposal, and is of the opinion that consideration is being given to disposal methods carrying an unacceptably high risk that pollution removed from the air stream will be reintroduced to a vulnerable environment. This also applies to the risks associated with potential transportation of ash by boat.

The EIA proposed different disposal methods, but did not evaluate the potential health effects of arsenic dissemination in an environment that is already overloaded. This will expose the local population and the environment to an unacceptable risk which will continue to apply after any improper disposal ends.

Conclusion

It seems unlikely that a coal-fired power plant can be constructed at this location without construction itself constituting a high risk of severe environmental damage, even if extensive new measures are implemented. In the present case, the company has also failed to give sufficient consideration to what needs to be done to protect the environment. Further, various factors relating to transportation and waste management have not been

addressed and handled satisfactorily. Overall, this suggests a significantly increased risk of unwanted incidents in a unique, highly vulnerable area. The Council on Ethics has also given considerable weight to the strong concern expressed by UNESCO regarding the risks associated with the project, and the fact that the IFC recommendations on such situations have not been followed.

Based on an overall assessment in which consideration has been given to all of the discussed matters, the Council on Ethics has concluded that there is an unacceptable risk that NTPC will contribute to severe environmental damage through the building and operation of the power plant at Rampal, including related transportation services.

7 Recommendation

The Council on Ethics recommends the exclusion of the company NTPC Ltd. from the investment universe of the Government Pension Fund Global due to an unacceptable risk of the company contributing to severe environmental damage.

Ola Mestad
Chair
(signature)

Dag Olav Hessen
(signature)

Ylva Lindberg
(signature)

Marianne Olsson
(signature)

Bente Rathe
(signature)

Notes

- 1 The company has *Issuer Id*: 196136 and ISIN no.: INE733E01010.
- 2 https://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines/id425277/.
- 3 http://www.ntpc.co.in/index.php?option=com_content&view=article&id=545&lang=en.
- 4 http://www.ntpc.co.in/index.php?option=com_content&view=article&id=42&Itemid=75&lang=en.
- 5 EIA, app. page XI.
- 6 <http://whc.unesco.org/en/list/798>.
- 7 “World heritage area” is the term used to describe the most unique and valuable conservation areas of significance for humanity, which are recognised and listed by UNESCO.
- 8 A Ramsar area is an area of wetlands protected under the Ramsar Convention because it contains unique natural values.
- 9 “Man and the Biosphere” is a UNESCO protection programme for areas containing unique natural conservation values. Some human activity is permitted in these areas, provided that is adapted to the area’s character and conservation needs.
- 10 EIA, page 259.
- 11 <http://whc.unesco.org/archive/2014/whc14-38com-7B-Add-en.pdf>.
- 12 <http://whc.unesco.org/en/decisions/6050/>.
- 13 World Bank: Bangladesh Environmental Analysis, 2006.
- 14 EIA, chapter 6.10, map 6.15.
- 15 EIA, tab. 6.13.
- 16 Technical EIA Guidance Manual for Thermal Power Plants, Ministry of Environment and Forests, India, August 2010. p 4-8: “Locations of thermal power stations are avoided within 25 km of the outer periphery of the following:
 - Metropolitan cities
 - National park and wildlife sanctuaries
 - Ecologically sensitive areas like tropical forest, biosphere reserve, important lake and coastal areas rich in coral formation”
- 17 EIA, map 6.18, page 208.
- 18 EIA, page 207.
- 19 EIA, page ix.
- 20 See, for example, <http://www.ajol.info/index.php/ijonas/article/view/49863>.

- 21 EIA, page 326, tab. 10.1.
- 22 International Maritime Organisation, International Convention on Oil Pollution Preparedness, Response and Cooperation.
- 23 <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/06/coal-ash-is-spilling-into-north-carolinas-river-heres-why-its-so-hard-to-regulate/>.
- 24 EIA, page 106.
- 25 USEPA, "Human and ecological risk assessment of coal combustion wastes", aug. 6, 2007.
- 26 <http://www.who.int/docstore/bulletin/pdf/2000/issue9/bu0751.pdf?ua=1>.
- 27 <http://www.plantphysiology.org/content/152/1/309.abstract>.
- 28 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2647345/>.
- 29 IFC Performance Standard 6, Biodiversity Conservation and Sustainable Management of Living Natural Resources, 1 January 2012.
- 30 http://www.ifc.org/wps/wcm/connect/bff0a28049a790d6b835faa8c6a8312a/PS6_English_2012.pdf?MOD=AJPERES.
- 31 EIA, page 268.



Guidelines

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

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

Section 1. Scope

- (1) These guidelines apply to the work of the Ministry of Finance, the Council on Ethics and Norges Bank concerning the exclusion and observation of companies.
- (2) The guidelines cover investments in the Fund's equity and fixed income portfolio, as well as instruments in the Fund's real-estate portfolio issued by companies that are listed in a regulated market.

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

- (1) The assets in the Fund shall not be invested in companies which themselves or through entities they control:
 - a) produce weapons that violate fundamental humanitarian principles through their normal use;
 - b) produce tobacco;
 - c) sell weapons or military material to states that are affected by investment restrictions on government bonds as described in the management mandate for the Government Pension Fund Global Section 3-1 (2) c.
- (2) The Ministry makes decisions on the exclusion of companies from the investment universe of the Fund as mentioned in paragraph 1 on the advice of the Council on Ethics.
- (3) The Ministry of Finance may, on the advice of the Council of Ethics, exclude companies from the investment universe of the Fund if there is an unacceptable risk that the company contributes to or is responsible for:
 - a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation;
 - b) serious violations of the rights of individuals in situations of war or conflict;
 - c) severe environmental damage;
 - d) gross corruption;
 - e) other particularly serious violations of fundamental ethical norms.
- (4) In assessing whether a company shall be excluded in accordance with paragraph 3, the Ministry may among other things consider the probability of future norm violations; the severity and extent of the violations; the connection between the norm violations and the company in which the Fund is invested; whether the company is doing what can reasonably be expected to reduce the risk of future norm violations within a reasonable time frame; the company's guidelines for, and work on, safeguarding good corporate governance, the environment and social conditions; and whether the company is making

a positive contribution for those affected, presently or in the past, by the company's behaviour.

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

Section 3. Observation of companies

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

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

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

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

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

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

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

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

Section 5. The work of the Council on Ethics

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

- (2) The Council shall obtain the information it deems necessary and ensure that the case has been properly investigated before giving advice on exclusion from the investment universe.
- (3) A company that is being considered for exclusion shall be given the opportunity to present information and viewpoints to the Council on Ethics at an early stage of the process. In this context, the Council shall clarify to the company which circumstances may form the basis for exclusion. If the Council decides to recommend exclusion, its draft recommendation shall be presented to the company for comment.
- (4) The Council shall describe the grounds for its recommendations. These grounds shall include a presentation of the case, the Council's assessment of the specific basis for exclusion and any comments on the case from the company. The description of the actual circumstances of the case shall, insofar as possible, be based on material that can be verified, and the sources shall be stated in the recommendation unless special circumstances indicate otherwise. The assessment of the specific basis for exclusion shall state relevant factual and legal sources and the aspects that the Council believes ought to be accorded weight. In cases concerning exclusion pursuant to section 2, paragraph 3, the recommendation shall, as far as is appropriate, also give an assessment of the circumstances mentioned in section 2, paragraph 4.
- (5) The Council shall routinely assess whether the basis for exclusion still exists and may, in light of new information, recommend that the Ministry of Finance reverse a ruling on exclusion.
- (6) The Council's routines for processing cases concerning the possible reversal of previous rulings on exclusion shall be publicly available. Companies that have been excluded shall be specifically informed of the routines.
- (7) The Ministry of Finance publishes the recommendations of the Council on Ethics after the securities have been sold, or after the Ministry has made a final decision not to follow the Council on Ethics' recommendation.
- (8) The Council shall submit an annual report on its activities to the Ministry of Finance.

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

- (1) The Ministry of Finance, the Council on Ethics and Norges Bank shall meet regularly to exchange information about work linked to active ownership and the Council on Ethics' monitoring of the portfolio.
- (2) The Council on Ethics and Norges Bank shall have routines to ensure coordination if they both contact the same company.
- (3) The Council on Ethics may ask Norges Bank for information about how specific companies are dealt with through active ownership. The Council on Ethics may ask Norges Bank to comment on other circumstances concerning these companies. Norges Bank may ask the Council on Ethics to make its assessments of individual companies available.

Section 7. Notification of exclusion

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

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

Section 8. List of excluded companies

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

Section 9. Entry into force

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



Print: Departementenes servicesenter - 03/2014 - opplag 75

Design: Melkeveien Designkontor as

Photo: Cover: © Reicher - Fotolia.com, © ivan_dzyuba - Fotolia.com, © elen_studio - Fotolia.com



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