

**To the Ministry of Finance**

**Recommendation**

**November 15th, 2010**

**(Unofficial English translation)**

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## UNOFFICIAL ENGLISH TRANSLATION

### 1 Introduction

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

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

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

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

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

Within this context, the Council has assessed whether it must be regarded as grossly unethical for companies to purchase phosphate from OCP under long-term contracts. The Council has particularly emphasized that the companies in their purchasing agreements have specified the origin of the phosphate as Western Sahara, even if there is no reason to believe that this is the

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<sup>1</sup> Potash Corporation of Saskatchewan, SEDOL: 2696980

<sup>2</sup> FMC Corporation, SEDOL: 2328603

<sup>3</sup> 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](http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277).

<sup>4</sup> Ibid, §2(3):

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

- a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation;*
- b) serious violations of the rights of individuals in situations of war or conflict;*
- c) severe environmental damage;*
- d) gross corruption;*
- e) other particularly serious violations of fundamental ethical norms.”*

only phosphate the companies could have utilized in order to fabricate their products. In addition, the relationship between the companies and OCP's activities has also been considered. The Council finds that the connection between the companies' purchase of phosphate from Western Sahara and the extraction by OCP of this is of such a nature that the companies must be said to contribute to serious violations of ethical norms.

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

## 2 Background

### 2.1 What the Council on Ethics has considered

The Council has considered whether GPFG's investments in companies that purchase phosphate that is extracted in Western Sahara may constitute a breach of the Fund's ethical guidelines. Several issues pertaining to this have been considered. The Council has considered whether the phosphate extraction *per se* should be considered grossly unethical. Furthermore, the Council has considered the form of contribution to violations of norms by companies which purchase phosphate from Western Sahara, and if there is an unacceptable risk of contribution to future violations of norms.

### 2.2 The status of Western Sahara

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

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

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

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

<sup>6</sup> The UN General Assembly has passed a series of resolutions that confirm Western Sahara's status, including A/RES/59/131, 25 January 2005; see

<http://daccessods.un.org/access.nsf/Get?Open&DS=A/RES/59/131&Lang=E>.

The issue of Western Sahara has also been treated in a number of other resolutions during recent years, such as A/RES/50/33, 6 December 1995; A/RES/52/72, 10 December 1997; A/RES/53/61, 3 December 1998; A/RES/54/84, 6 December 1999; A/RES/55/138, 8 December 2000; A/RES/56/66, 10 December 2001.

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

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

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

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

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

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<sup>8</sup> ICJ advisory opinion of 16 October 1975:

<http://www.icj-cij.org/docket/index.php?sum=323&code=sa&p1=3&p2=4&case=61&k=69&p3=5>

<sup>9</sup> S/RES 380 (1975) of 6 November 1975

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

<sup>11</sup> MINURSO website: <http://www.un.org/en/peacekeeping/missions/minurso/>

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

## 2.3 The situation of Western Sahara's population

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

Approx. 165 000 *Saharawis*, the territory's indigenous population, have been driven away to refugee camps in Algeria, where they live in dire conditions.<sup>14</sup>

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

## 2.4 More about phosphate extraction

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

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

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<sup>13</sup> *Supra* 12

<sup>14</sup> The United Nations High Commissioner for Refugees, UNHCR, Annual Report on Algeria 2009:

<http://www.unhcr.org/pages/49e485e16.html>

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

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

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

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

## Phosphate extraction – largest producing countries:<sup>19</sup>

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

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

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

### 2.5 Companies' purchase of phosphate from Western Sahara

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

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

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<sup>19</sup> US Department of the Interior – US Geological Survey: 2007 Minerals Yearbook – Phosphate Rock

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

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

### **3 Basis for the Council on Ethics' assessments**

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

#### **3.1 Survey of companies which purchase phosphate from Western Sahara**

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

#### **3.2 The Council on Ethics' contact with the companies**

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

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

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

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

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

*Further information provided by Potash Corp.*

Potash Corp. informs that one of their wholly-owned subsidiaries in the USA uses phosphate from Western Sahara for the production of phosphoric acid. The company points out that the

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<sup>21</sup> Corporate website: [http://www.ocpgroup.ma/english/jsp/qui\\_sommes/ocp\\_bref.jsp](http://www.ocpgroup.ma/english/jsp/qui_sommes/ocp_bref.jsp)



production process is sensitive to alterations in the rock source and that the company has reached the conclusion that phosphate from places other than Western Sahara is not viable.<sup>22</sup>

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

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

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

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

*Further information from FMC Corp.*

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

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

Furthermore, FMC Corp. makes reference to a report<sup>26</sup> received from the American law firm Covington & Burling LLP. This report states that '*the Kingdom of Morocco has complied with all the international legal obligations it could have as an administering power, through*

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

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

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

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

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

*the manner in which, both directly and through OCP, it has managed the phosphate resources in the Sahara region.'*

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

### **3.3 Response to the draft recommendation**

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

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

### **3.4 Meeting with representatives of OCP**

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

### **3.5 Subsequent letter on behalf of OCP**

In a subsequent letter to the Council on Ethics, Covington & Burling emphasizes some of the points that were discussed at the meeting.<sup>28</sup> The importance of OCP's activities for the local economy at Bou Craa is outlined in the letter, including the fact that the company provides jobs to support over 2000 households in the region. The significance of OCP's investments for the future economic development of the area is also highlighted. OCP's investments, it is furthermore stated, have in no way been designed to impede the process towards self-government. In conclusion, the letter expresses the hope and expectation that the Council's assessment of OCP in Bou Craa is carried out on the basis of OCP's own activities and issues within its influence.

### **3.6 Opinion submitted by the UN Legal Counsel**

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

The legal opinion is based on article 73 of the UN Charter, which obliges States that have assumed responsibilities for the administration of Non-Self-Governing Territories to manage

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<sup>27</sup> Letter from Potash Corp. to Council, dated 9 July 2010

<sup>28</sup> Letter from Covington & Burling LLP to Council on Ethics, dated 13 September 2010

the resources of these in accordance with the interests of the local population. This principle is established in a number of UN resolutions.

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

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

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

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

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

### **3.7 The UN's assessment of the conflict pertaining to mineral resource exploitation in Namibia**

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

*"The General Assembly [...] Reaffirms that, by their depletive exploitation of natural resources, the continued accumulation and repatriation of huge profits and the use of those*

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

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

<sup>31</sup> 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>

*profits for the enrichment of foreign settlers and the entrenchment of colonial domination over the Territories, the activities of foreign economic, financial and other interests operating at present in the colonial Territories, particularly in southern Africa, constitute a major obstacle to political independence and to the enjoyment of the natural resources of those Territories by the indigenous inhabitants [...]*<sup>32</sup>

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

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

### **3.8 The Fisheries Partnership Agreement (FPA) between the EU and Morocco**

The demarcation of the FPA’s<sup>33</sup> scope is controversial because it includes waters under Moroccan “*sovereignty or jurisdiction*”.<sup>34</sup> Apart from this, the waters off Western Sahara are not specifically mentioned in the agreement.

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

The legal opinion concludes:

*“In the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resource, principles which the Community is bound to respect, the Community*

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

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

<sup>34</sup> Ibid, art. 2(a): “*Moroccan fishing zone’ means the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco*”

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

*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.”*<sup>36</sup>

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

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

*“Under all circumstances I would have thought that it was obvious that an agreement of this kind that does not make a distinction between the waters adjacent to Western Sahara and the waters adjacent to the territory of Morocco would violate international law.”*<sup>38</sup>

### **3.9 The Free Trade Agreement between the USA and Morocco**

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

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<sup>36</sup> Ibid, article 38(9)

<sup>37</sup> European Parliament, Parliamentary questions, 22 July 2010, E-5723/2010, Question for written answer to the Commission: “[...]In what ways, and when, has the Commission requested information on how the exploration and exploitation activities have been carried out in accordance with the interests and wishes of the people of Western Sahara, according to their will and in consultation with their representatives?”

<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2010-5723&language=EN>

European Parliament, Parliamentary questions, 12 October 2010, E-5723/2010, Answer given by Ms Damanaki on behalf of the Commission : “The Commission has used every possible official and unofficial occasion to solicit relevant information from the Moroccan authorities. If and when such information becomes available, it will be carefully scrutinised by the Commission to determine whether entering into negotiations for a new protocol to the Fisheries Partnership Agreement (FPA) is justified. For the time being, the Commission is not taking any steps which might pre-empt a decision on the future of this Agreement.”

<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-5723&language=EN>

<sup>38</sup> Supra 31: “It has been suggested to me that the legal opinion delivered in 2002 had been invoked by the European Commission in support of the Fisheries Partnership Agreement. I do not know if this is true. But if it is, I find it incomprehensible that the Commission could find any such support in the legal opinion, unless of course the Commission had ascertained that the people of Western Sahara had been consulted, had accepted the agreement and the manner in which the profits from the activity was to benefit them. [...] As a European I feel embarrassed. Surely, one would expect Europe and the European Commission – of all – to set an example by applying the highest possible international legal standards in matters of this nature.”

<sup>39</sup> Office of the United States Trade Representative, Morocco Free Trade Agreement:

<http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text>

<sup>40</sup> Congressman Diaz-Balart, “We must understand that Morocco’s insistence upon its territorial integrity and its refusal to accept a terrorist state in the Western Sahara is critically important not only for the national security of Morocco but also for the security of the United States and of our European allies.”

[http://www.ustr.gov/sites/default/files/uploads/speeches/2004/asset\\_upload\\_file409\\_3734.pdf](http://www.ustr.gov/sites/default/files/uploads/speeches/2004/asset_upload_file409_3734.pdf)

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

### 3.10 Preparatory work for the GPFG's ethical guidelines

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

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

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

### 3.11 Previous statements made by the Council on Ethics

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

*"The framework of international law, including the UN Charter and the Convention on the Law of the Sea, lay down that economic activity which involves exploitation of natural resources in occupied or Non-Self-Governed Territories must be exercised in cooperation with the people inhabiting those territories. The local population also has a right to the potential profits of such activities."<sup>43</sup> 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*

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<sup>41</sup> "The Administration's position on Western Sahara is clear: sovereignty of Western Sahara is in dispute, and the United States fully supports the United Nations' effort to resolve this issue. The United States and many other countries do not recognize Moroccan sovereignty over Western Sahara and have consistently urged the parties to work with the United Nations to resolve the conflict by peaceful means.

The FTA will cover trade and investment in the territory of Morocco as recognized internationally, and will not include Western Sahara. As our Harmonized Tariff Schedule makes clear, for U.S. Customs purposes, the United States treats imports from Western Sahara and Morocco differently." ('FTA' is short for Free Trade Agreement). United States Trade Representative Robert Zoellic, 20 July 2004, quoted here:

[HTTP://WWW.HOUSE.GOV/PITTS/PRESS/SPEECHES/040722S-MOROCCOETA.HTM](http://www.house.gov/pitts/press/speeches/040722s-moroccoeta.htm)

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

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

*seeks to make it unlawful to benefit economically from exploitation of natural resources, if such exploitation has been based on occupation.”*<sup>44</sup>

### **3.12 NBIM’s exercise of ownership rights in this case**

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

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

## **4 The Council on Ethics’ assessments**

### **4.1 Preliminary considerations**

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

The framework of international law obliges administering Powers of Non-Self-Governing Territories to manage these areas in accordance with the interests of the local inhabitants. Since the UN does not recognize Morocco as the rightful administering Power of Western Sahara, it may be objected that these rules do not apply to the situation in Western Sahara. Seeing as Morocco occupies Western Sahara and unlawfully claims the sovereignty over a large part of the territory, Moroccan mineral resource exploitation in Western Sahara could alternatively be assessed on the basis of the rights and duties of occupying powers. In its assessments, the Council will take as a point of departure that resource exploitation in Western Sahara may be acceptable if the interests of the local population are safeguarded. This approach is in line with the view taken by the UN Legal Counsel in 2002<sup>46</sup> and by the European Parliament’s Legal Service in 2009. It should also be mentioned that Norwegian authorities advise against actions that may be interpreted as a legitimization of the situation in Western Sahara.<sup>47</sup>

It is not the Council on Ethics’ task to consider the legality of Morocco’s mineral resource exploitation in Western Sahara or other legal issues that this case may raise. In the case at hand, the Council will assess whether it may be deemed grossly unethical for companies to purchase phosphate mined in Western Sahara by a state-owned Moroccan company, provided that the companies have contractually specified the phosphate’s origin. In order to establish

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

<sup>45</sup> E-mail from NBIM to Council on Ethics, 27 October 2009.

<sup>46</sup> *Supra* 29

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

this, several factors must be taken into account. First, one must assess whether OCP's phosphate extraction in Western Sahara should be considered grossly unethical. Second, there must be an assessment of the degree of contribution to OCP's violations of norms by companies that purchase the phosphate mined by OCP in Western Sahara.

## **4.2 The significance of phosphate extraction for Morocco's presence in Western Sahara**

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

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

## **4.3 Considerations regarding Western Sahara's local population**

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

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

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

The legal opinion provided by the European Parliament's Legal Service (2009) on the Fisheries Partnership Agreement between the EU and Morocco makes it unequivocally clear that the local population whose interests are to be considered, are the Saharawi population, even if

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<sup>48</sup> *Supra* 29

<sup>49</sup> *Supra* 10



many of these are displaced and live outside Morocco. This legal opinion does not provide any description of *how* their interests are to be safeguarded either. The thought is that it is the obligation of Morocco to ensure that the interests of the Saharawi population, both those within Moroccan territory and those who have been displaced, are actually respected in connection with natural resource exploitation in Western Sahara.

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

#### **4.4 Assessment of violations of norms by OCP**

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

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

The two companies which this recommendation concerns point out that OCP's activities serve the local community of the areas where the company operates, arguing that for instance some of OCP's employees in Western Sahara are Saharawi. In the Council on Ethics' opinion this cannot be regarded as sufficient to satisfy the requirement that resource exploitation in Non-Self-Governing Territories must occur in accordance with the interests of the local peoples and that it must benefit them. OCP's employment of some Saharawi does not compensate for the fact that the territory is being depleted of its resources and that the great majority of the Saharawi population is not benefiting from this. Since this concerns non-renewable resources, these will be lost to the exiled local population, even if the territory's status at some time in the future should change and the exiled local population is able to return.

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

#### **4.5 Evaluation of the companies' contribution to OCP's violations of norms**

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

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

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

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

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

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

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

Another company in the GPFG portfolio which also imports phosphate from Western Sahara, the Australian company Wesfarmers Ltd., has nevertheless committed itself to making the necessary changes in its production process so that the need to buy phosphate from Western Sahara will be eliminated.<sup>52</sup> The company's decision is, as far as the Council on Ethics understands, the result of a dialogue between the company, some of its investors<sup>53</sup> and interest

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<sup>50</sup> *Supra* 24

<sup>51</sup> *Supra* 31 and 38

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

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

groups. This recommendation regarding the exclusion of companies does not, therefore, include Wesfarmers Ltd.

Global phosphate production is around 156 million tonnes/year, of which the phosphate mined in Western Sahara makes up approx. 3 million tonnes/year. This in itself indicates that it is quite feasible to produce fertilizers and chemicals without buying phosphate from Western Sahara, as most of such production takes place without this particular raw material anyway. Besides, production at Bou Craa in Western Sahara only started in the 1970s. A number of companies manufactured fertilizers and chemicals made from phosphate also before that time. It is therefore difficult to imagine that it should not be possible to produce fertilizers and chemicals today without access to phosphate from Western Sahara.

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

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

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

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

## 5 Recommendation

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

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|---------------------------------|------------------------------|---------------------------|-----------------------|--------------------------|
| Gro Nystuen<br>Chair<br>(sign.) | Andreas Føllesdal<br>(sign.) | Anne Lill Gade<br>(sign.) | Ola Mestad<br>(sign.) | Ylva Lindberg<br>(sign.) |
|---------------------------------|------------------------------|---------------------------|-----------------------|--------------------------|