

Oslo, 11 April 2005

(Unofficial English translation)

## **Recommendation on exclusion from the Government Petroleum Fund's investment universe of the company Kerr-McGee Corporation**

### **Introduction**

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

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

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

### **Background for the case**

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

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<sup>1</sup> Letter dated 4 January, 2005.

<sup>2</sup> The Norwegian Central Bank.

<sup>3</sup> Through its subsidiary Kerr-McGee du Maroc Ltd.

<sup>4</sup> Letter from the Office of the Legal Adviser to the President of the Security Council (S/2002/161) dated 12 February 2002, para 2.

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

The liberation movement POLISARIO<sup>5</sup> was established in 1973. Its aim was to achieve independence for Western Sahara. POLISARIO started an armed uprising against the Spanish Administrative Power. In October 1975, the International Court of Justice (ICJ) rejected claims from Morocco and Mauritania regarding their alleged sovereignty over the territory.<sup>6</sup> Subsequently Morocco invaded parts of Western Sahara, which led to strong reactions from the Security Council.<sup>7</sup> Later that year, Spain entered into an agreement with Morocco and Mauritania concerning the transfer of power over Western Sahara.<sup>8</sup> In the Agreement, Spain confirmed her intentions of contributing to the decolonisation of Western Sahara, and to transfer the duties as Administrative Power to Morocco and Mauritania. The agreement thus did not transfer sovereignty over the territory, as Spain had no such sovereignty in the first place. The agreement did not alter the status of Western Sahara as Non-Self-Governing Territory under the UN. In the agreement, Spain recommended that a referendum should be held concerning the future status of Western Sahara. In 1976, however, Morocco and Mauritania agreed to divide Western Sahara between them.<sup>9</sup> In 1979, Mauritania withdrew from Western Sahara. Morocco has since occupied the whole territory.

Since 1979, Morocco has exercised de facto sovereignty over this territory without taking on the formal role as Administrative Power pursuant to the provisions of the UN Charter. Morocco would, as Administrative Power, have had an obligation to “*ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement...*” and to “*develop self-government, to take due account of the political aspirations of the peoples...*”<sup>10</sup>

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

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<sup>5</sup> (Frente) Popular para la Liberacion de Saguia el-Hamra y del Rio de Oro.

<sup>6</sup> ICJ, Advisory Opinion of 16 October 1975.

<sup>7</sup> S/RES 380 (1975), dated 6 November 1975.

<sup>8</sup> The “Madrid-Agreement”, dated 14 November 1975.

<sup>9</sup> Agreement dated 14 April 1976.

<sup>10</sup> Article 73 of the UN Charter.

<sup>11</sup> The most recent General Assembly resolution was adopted on 25 January 2005 (A/RES/59/131). Western Sahara has been subject to a number of GA resolutions over the past years, e.g. A/RES/50/33, 6 December 1995, A/RES/52/72, 10 December 1997, A/RES/53/61, 3 December 1998, A/RES/54/84, 6 December 1999, A/RES/55/138, 8 December 2000, A/RES/56/66, 10 December 2001.

<sup>12</sup> Information contained in the above mentioned letter to the Ministry of Finance from SADR's Minister for Foreign Affairs, Mohamed Salem Ould Salek.

Between 1975 and 1991 there was an armed conflict going on in Western Sahara, between POLISARIO and Morocco. In 1991, the UN managed to negotiate a cease-fire between the parties, which is still in force. In this connection, the UN peace-keeping force MINURSO<sup>13</sup> was established to oversee the cease-fire and to prepare for a referendum on the future status of Western Sahara. During the period from 1991 to 2004, the UN Envoy for Western Sahara, James Baker, put forward two proposals for peaceful settlement of the conflict. Both peace proposals were rejected. One of the difficult points has been the UN plan to determine the future status of Western Sahara through a referendum. Moroccan authorities have allegedly moved many thousand Moroccans to the territory in question, thus seeking to outnumber the original Saharawi population.<sup>14</sup> The latest peace proposal would give the SADR limited self government for the first five years, and then put the question of future status of Western Sahara up for a referendum. This proposal, even though it provided for voting rights at the referendum for everybody within the territory, irrespective of ethnic origin, was rejected by Morocco.

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

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

### **Some of the legal issues**

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

According to the UN Convention on the Law of the Sea,<sup>17</sup> the point of departure is that all coastal states have sovereign rights to the natural resources on the continental shelf outside their territory.<sup>18</sup> According to the UN, Morocco does not have sovereignty over Western Sahara, and therefore, as a point of departure, no rights to the resources in this area. Article 73 of the UN Charter as well as several General Assembly resolutions<sup>19</sup> imply that economic activities in Non-Self-Governing Territories shall not adversely affect the interests of the peoples of such territories, and may only take place subject to the consent of the local people.

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<sup>13</sup> United Nations Mission for a Referendum in Western Sahara.

<sup>14</sup> The population in Western Sahara (the Sahrawi people) counts approximately 260.000 persons. Some 165.000 of these are in refugee camps in Algeria.

<sup>15</sup> In June 2004.

<sup>16</sup> The Security Council prolonged MINURSOs mandate until 30 April 2005 in Resolution S/RES/1570 (2004).

<sup>17</sup> United Nations Convention on the Law of the Sea, 1982 (UNCLOS).

<sup>18</sup> Articles 76 and 77.

<sup>19</sup> E.g. GA RES 3458 (XXV) dated 10 December 1975 which specifies “the right of the people of the Spanish Sahara to self-determination, in accordance with General Assembly Resolution 1514 (XV)”.

The same principles are laid down in the legal framework concerning the law of the sea. Resolution III, which is annexed to the UN Convention on the Law of the Sea, says that:

*“In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.”*<sup>20</sup>

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

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

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

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

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

This thus seems to indicate a possible point of discrepancy between the legal framework concerning the law of the sea, and the legal opinion of the UN Legal Adviser. The Council on Ethics does not intend to make an attempt on deciding what the legally correct answer would be in this case. It should be pointed out, however, that in a situation of contradictory interpretations of international law, treaty law would prevail over a legal opinion. One might therefore suggest that there are sound legal arguments for arguing that not only exploitation of natural resources, but also exploration, could be deemed unlawful in the present case.

### **The arguments put forward**

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

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<sup>20</sup> Resolution III, Third United Nations Conference on the Law of the Sea.

<sup>21</sup> S/2002/161, see footnote 4.

<sup>22</sup> S/2002/161, para 25.

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

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

#### **Application of the Ethical Guidelines in this case:**

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

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

#### The risk of contributing

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

#### Legal basis for the evaluation

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

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

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

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

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

#### The Assessment of the Council on Ethics

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

The framework of international law, including the UN Charter and the Convention on the Law of the Sea, lay down that economic activity which involves exploitation of 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. As mentioned before, it is not entirely clear whether Morocco's exploration activities constitute a violation of international law, but based on the rationale behind the general rules of international law in this area, the Council on Ethics finds that the economic activities off shore Western Sahara can be considered unethical. In this connection, it should be mentioned that the *travaux preparatoire* to the Ethical Guidelines

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<sup>23</sup> The Government White Paper from the Graver-Commission, NOU 2003: 22, page 35 (unofficial translation).

<sup>24</sup> The aforementioned letter from the UN Legal Adviser, (S/2002/161), para 2.

especially mentions the dilemma related to investments in Non-Self-Governing Territories, occupied territories or otherwise legally undetermined territories, and points to the activity on the continental shelf outside Western Sahara as an example where one should show restraint with regard to investments.<sup>25</sup>

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

## **Conclusion**

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

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

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<sup>25</sup> The Government White Paper from the Graver-Commission, NOU 2003: 22, page 92 (unofficial translation).

<sup>26</sup> Resolution III, 1 (b) under the UN Convention on the Law of the Sea.