

COUNCIL ON ETHICS

THE GOVERNMENT PENSION FUND GLOBAL

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Recommendation to place Adani Ports & Special Economic Zone Ltd under observation

Summary

The Council on Ethics recommends that Adani Ports & Special Economic Zone Ltd (APSEZ) be placed under observation due to an unacceptable risk that the company is contributing to serious infringement of the rights of individuals in situations of war and conflict. The recommendation concerns APSEZ's business association with the armed forces in Myanmar.

In Myanmar, APSEZ does business through its subsidiary Adani Yangon International Terminal Company Limited. In 2019, this subsidiary signed a Build-Operate-Transfer/lease agreement with the military-owned conglomerate Myanmar Economic Corporation (MEC) to develop the Ahlon International Port Terminal in Yangon.

APSEZ is listed on the Bombay Stock Exchange and the National Stock Exchange in India. At the close of 2020, the Norwegian Government Pension Fund Global (GPF) owned 0.73 per cent of the company's shares, worth around NOK 840 million.

In February 2021, the armed forces in Myanmar staged a military coup. After the coup, armed conflicts in the country have intensified, and over 1,000 people have been killed. Assaults on the civilian population are ongoing, and there is a substantial risk that new, gross abuses will be perpetrated by the armed forces.

The Council takes the position that any company operating in an area of conflict has a duty to exercise particular care. The Council also relies on the UN's Independent International Fact-Finding Mission on Myanmar, which found that any business relationship with MEC constitutes a high risk of contributing to human rights abuses and the violation of international humanitarian law. In the Council's view, APSEZ's collaboration with MEC may contribute to strengthening the armed forces' economic and logistical capacity.

In October 2021, APSEZ announced that it was planning to exit its investment in Myanmar. In light of the situation in the country, there is significant uncertainty with respect to when such a withdrawal will be possible to implement. The Council therefore recommends that the company be placed under observation.

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1 Introduction

The Council on Ethics has assessed the investments made by the Norwegian Government Pension Fund Global (GPF) in Adani Ports & Special Economic Zone Ltd (APSEZ)¹ against the criterion in the Guidelines for Observation and Exclusion from the GPF² relating to serious violations of the rights of individuals in situations of war or conflict. The recommendation concerns APSEZ's business association with the armed forces in Myanmar.

APSEZ is an Indian logistics company, whose operations include vessel management, port services, goods handling, internal transport, storage and final transport by road and rail. The company operates nine ports, while two new ports are under construction. One of these is in Myanmar.

In Myanmar, the company operates through its subsidiary Adani Yangon International Terminal Company Limited. In 2019, this subsidiary signed a Build-Operate-Transfer (BOT)/lease agreement with the military-owned conglomerate Myanmar Economic Corporation (MEC) to develop the Ahlon International Port Terminal in Yangon.

APSEZ is headquartered in Ahmedabad, India, and has almost 2,400 employees. The company is listed on the Bombay Stock Exchange and the National Stock Exchange in India. At the close of 2020, the GPF owned 0.73 per cent of the company's shares, worth around NOK 840 million.

1.1 Matters considered by the Council

The Council on Ethics has assessed the GPF's investment in APSEZ against section 4(b) of the Guidelines for Observation and Exclusion from the GPF, which states: "Companies may be put under observation or be excluded if there is an unacceptable risk that the company contributes to or is responsible for [...] serious violations of the rights of individuals in situations of war or conflict."

Under the guidelines' section 6(5), "Companies may be placed under observation if it is uncertain whether grounds for exclusion exist or what developments may occur forward in time, or when expedient for other reasons".

Due to the high risk of contributing to serious norm violations in areas where war and conflict are taking place, the Council considers that any company operating in such an area has a duty to exercise particular care.³ Such a heightened requirement for due care follows from several international guidelines⁴ and is reiterated in the Report to the Storting (white paper) on the

¹ Issuer Id 11382823

² Guidelines for Observation and Exclusion of companies from the Government Pension Fund Global, <https://files.nettsteder.regjeringen.no/wpuploads01/sites/275/2021/11/Guidelines-for-Observation-and-Exclusion-GPF-29-November-2021.pdf>

³ Council on Ethics, Recommendation regarding Kirin Holdings Co Ltd <https://etikkradet.no/kirin-holdings-co-ltd/> and Recommendation regarding Oil & Natural Gas Corp Ltd <https://etikkradet.no/oil-natural-gas-corp-ltd/>

⁴ See, for example, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Business, human rights and conflict-affected regions: towards heightened action*, <https://undocs.org/en/A/75/212> and *Global Compact/PRI Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors*, https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FPeace_and_Business%2FGuidance_RB.pdf.

GPFPG for 2021.⁵ This enhanced duty of care means that the Council may decide there is an *unacceptable risk* of contributing to norm violations even though the company's links thereto are less direct than the Council would otherwise require to recommend exclusion or observation under the GPFPG's ethical guidelines. This approach is limited to cases involving extremely serious norm violations.

When assessing what may constitute serious violations of the rights of individuals in situations of war or conflict, the Council relies on internationally recognised conventions and authoritative interpretations thereof. Of particular importance is the shared Article 3 of the Geneva Conventions, which protects civilians in non-international armed conflict.⁶ Human rights apply irrespective of whether there is a conflict situation. Relevant provisions are Articles 6, 7, 9, 21 and 22 of the International Covenant on Civil and Political Rights, which protect the right to life, liberty and security, freedom from torture, freedom of association and freedom of expression.⁷

When assessing a company's contribution to such abuses, the Council considers that there must be a connection between the company's operations and the abuses concerned. Furthermore, the company must have either contributed actively to the norm violations or known about them without attempting to prevent them in an effective manner. If it is not possible to prevent the norm violations, the Council considers that the company must cease operating in the area. The Official Norwegian Report NOU 2020:7 Values and Responsibility, on the GPFPG's ethical framework, states that the ethical guidelines are "intended to cover contribution to serious abuses perpetrated by parties other than the company. Companies may be said to contribute to abuses through, for example, supplying goods and services to or entering into business relations with parties to a conflict who perpetrate serious abuses."⁸

The GPFPG's ethical guidelines are forward-looking, and the norm violations must therefore be ongoing or there must be an unacceptable risk that abuses may take place in the future. When assessing the risk of new abuses, previous norm violations may give an indication of future patterns of behaviour.

1.2 Sources

In relation to this case, the Council has made use of publicly available sources, including international courts of law, UN bodies, the media, civil society and public bodies. The Council has also received information from APSEZ.

⁵ Report to the Storting (white paper) No. 24 (2020–2021) on the Government Pension Fund Global 2021, p. 115 <https://www.regjeringen.no/no/dokumenter/meld.-st.-24-20202021/id2843255/>

⁶ ICRC, Treaties, States Parties and Commentaries, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>

⁷ The International Covenant on Civilian and Political Rights, and optional protocols, https://lovdata.no/dokument/NL/lov/1999-05-21-30/KAPITTEL_6#KAPITTEL_6

⁸ Official Norwegian Report, NOU 2020:7, point 13.3, <https://www.regjeringen.no/no/dokumenter/nou-2020-7/id2706536/>

2 Background

2.1 The situation in Myanmar

On 1 February 2021, the armed forces in Myanmar staged a military coup and declared that Senior General Min Aung Hlaing and the State Administrative Council had seized power in the country. Hundreds of thousands of civilians protested against the coup through a series of boycotts, strikes and demonstrations across the country. The protesters were met with a violent response by the armed forces. More than 1,000 people have been killed since the coup.⁹

In a report from September 2021, the UN High Commissioner for Human Rights described the situation in the country like this:

When nationwide peaceful protests began, military authorities initially used less-lethal weapons in an unnecessary and disproportionate manner and conducted neighbourhood raids, creating an atmosphere of terror. This evolved into systematic targeted killings and mass arrests, with torture and ill-treatment causing additional deaths in custody. Progressively, armed resistance emerged, as people formed self-defence groups or started to organize to conduct attacks against the military. Simultaneously, armed conflict in Myanmar's border areas has continued and resurged. In both contexts, the Tatmadaw has conducted both targeted and indiscriminate attacks against civilians. Combined with a freefalling economy and worsening COVID-19 pandemic, the situation in Myanmar has become a human rights catastrophe.¹⁰

For many years prior to the coup, the armed forces in Myanmar had perpetrated gross abuses against the civilian population. Reported abuses include violence against and the murder of children and adults, gang rape, torture and the torching of whole villages.¹¹ Many of the victims belong to the Rohingya ethnic minority. On the basis of these abuses, legal proceedings have been initiated in the International Court of Justice (ICJ) for violation of the Convention on the Prevention and Punishment of the Crime of Genocide¹² and in the International Criminal Court for crimes against humanity.¹³

2.2 Myanmar Economic Corporation

In the period 2017–2019, the Independent International Fact-Finding Mission on Myanmar (IFFM) investigated allegations of human rights violations in Myanmar on behalf of the United

⁹ United Nations High Commissioner for Human Rights, *Myanmar: UN report calls for urgent action to end human rights catastrophe*, 23 September 2021,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27521&LangID=E>

¹⁰ United Nations Human Rights Council, *Written updates of the Office of the United Nations High Commissioner for Human Rights on the Situation of human rights in Myanmar*, 15 September 2021,

<https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session48/Pages/ListReports.aspx>

¹¹ United Nations Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, 12 September 2018, <https://undocs.org/en/A/HRC/39/64>.

¹² International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, <https://www.icj-cij.org/en/case/178>

¹³ International Criminal Court, *Bangladesh/Myanmar, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, <https://www.icc-cpi.int/bangladesh-myanmar>

Nations Human Rights Council.¹⁴ In 2019, the FFM published a report on the armed forces' financial interests in Myanmar.¹⁵ The report examined the armed forces' economic activity through the two military-owned conglomerates Myanmar Economic Corporation (MEC) and Myanmar Economic Holdings Limited (MEHL). MEC has multiple subsidiaries, through which it engages in a variety of sectors, including banking, insurance, construction, trade, transport and mining.¹⁶ MEC is APSEZ's business partner in Myanmar.

MEC is owned and controlled by Myanmar's Ministry of Defence, which is in turn controlled by the armed forces themselves. Within the military, it is the Quartermaster General's Office, which is responsible for logistics and military procurement, that controls MEC.¹⁷ MEC's board of directors is made up of high-ranking officers. The FFM found that MEC is a direct source of revenue for the armed forces, and that MEC provides the armed forces with access to natural resources and manufactured goods. MEC does not publish financial reports.

According to the FFM, the armed forces' business activity "substantially enhances its ability to carry out gross violations of human rights with impunity".¹⁸ It also stated that "any foreign business activity involving the Tatmadaw and its conglomerates MEHL and MEC poses a high risk of contributing to, or being linked to, violations of international human rights law and international humanitarian law."¹⁹

MEC's subsidiaries are said to own vast tracts of land in Myanmar, including valuable properties that provide the armed forces with a significant revenue stream. The FFM's report included an overview of the companies which rent or lease property or land from the armed forces. In this context, APSEZ is highlighted as a "stark example".²⁰

Following the coup, MEC has been subject to sanctions imposed by the EU and the USA.²¹ The EU declared that it was imposing sanctions because "MEC and its subsidiaries generate revenue for the Tatmadaw, therefore contributing to its capabilities to carry out activities undermining democracy and the rule of law and to serious human rights violations in Myanmar/Burma."²² Several other countries, including Canada, the UK and Norway, have imposed similar sanctions.²³

¹⁴ United Nations High Commissioner for Human Rights, Independent International Fact-Finding Mission on Myanmar, <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>

¹⁵ United Nations High Commissioner for Human Rights, *Independent International Fact-Finding Mission on Myanmar, Economic interests of the Myanmar military*, 16 September 2021, <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

¹⁶ Official Journal of the European Union, 19 April 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2021:132I:FULL&from=EN>

¹⁷ United Nations High Commissioner for Human Rights, 16 September 2021, para. 55.

¹⁸ United Nations High Commissioner for Human Rights, *UN Fact-Finding Mission on Myanmar exposes military business ties, calls for targeted sanctions and arms embargoes*, 5 August 2019 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24868&LangID=E>

¹⁹ United Nations High Commissioner for Human Rights, 16 September 2021, *Executive summary and key recommendations*, para. 6 d.

²⁰ United Nations High Commissioner for Human Rights, 16 September 2021, para. 144.

²¹ US Department of State, *Sanctions on Two Burmese Entities in Connection with the Military Regime*, 25 March 2021, <https://www.state.gov/sanctions-on-two-burmese-entities-in-connection-with-the-military-regime/>

²² Official Journal of the European Union, 19 April 2021.

²³ Government of Canada, *Canadian Sanctions Related to Myanmar*, https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/myanmar.aspx?lang=eng, UK Government, *UK announces further sanctions on Myanmar military-linked companies*, <https://www.gov.uk/government/news/uk-announces-further-sanctions-on-myanmar-military-linked-companies>, Norwegian Ministry of Foreign Affairs, *Regulations relating to restrictive measures in light of the situation in Myanmar/Burma*, <https://lovdata.no/dokument/SF/forskrift/2003-07-04-895>

3 APSEZ’s business relationship with MEC

In May 2019, APSEZ’s subsidiary Adani Yangon International Terminal Company Limited signed a BOT/lease agreement to build and operate Ahlon International Port Terminal. The agreement has a term of 50 years, after which the port will revert to MEC, unless the agreement is extended by two times 10 years, which is permitted under the terms of the agreement.²⁴ The project is scheduled for completion in 2021.

According to APSEZ, the purchase of the land on which the port is to be built was facilitated by the Myanmar Investment Commission, which is the public body that has granted permission for the project to proceed. The company then signed the BOT/lease agreement with MEC for the use and development of the site, which covers 220 km². So far, the company has paid MEC USD 90 million under the agreement. The full cost of the project is put at USD 290 million.

APSEZ has explained that the only amount paid apart from the USD 90 million is an annual lease charge of USD 20,000. The last payment was made in 2020. The company will also have an obligation to pay “royalty fees” to Myanmar Port Authority once the port is planned to go into operation.

Before APSEZ signed the contract with MEC, the company met a delegation from the Myanmar armed forces, including Senior General Min Aung Hlaing, which was visiting India. The meeting took place in July 2019.²⁵ The senior general was reported to have published photos and videos of the visit to APSEZ’s headquarters on social media. The visit took place shortly after the US State Department imposed a travel ban on several military leaders, including Min Aung Hlaing, on the grounds of their “responsibility for gross human rights violations, including in extrajudicial killings in northern Rakhine State, Burma, during the ethnic cleansing of Rohingya.”²⁶

In April 2021, APSEZ was removed from the Dow Jones Sustainability Indices due to the risk associated with the company’s business relations with the Myanmar armed forces.²⁷

4 Information from the company

The Council on Ethics contacted APSEZ in April 2021 to request information about the company’s business relationship with MEC. The company provided comprehensive answers to the Council’s questions in May 2021. In June 2021, the Council also sent the company a draft of its recommendation to exclude APSEZ from investment by the GPF. Subsequent to this, there have been two meetings between the Council and the company.

²⁴ Business Standard, *Adani Ports to set up container terminal in Myanmar worth \$290 mn by 2021*, 23 May 2019 https://www.business-standard.com/article/pti-stories/adani-ports-to-set-up-first-container-terminal-outside-india-in-myanmar-119052300858_1.html

²⁵ The Australian Centre for International Justice and Justice For Myanmar 2021, *Ports of Complicity. Adani Ports in Myanmar* 19 March 2021, <https://jfm-files.s3.us-east-2.amazonaws.com/public/Port+of+Complicity+Report+-+FINAL+-+High+Resolution.pdf>

²⁶ US Department of State, *Public Designation, Due to Gross Violations of Human Rights, of Burmese Military Officials*, 16 June 2021, <https://2017-2021.state.gov/public-designation-due-to-gross-violations-of-human-rights-of-burmese-military-officials/index.html>

²⁷ S&P Dow Jones Indices, *Index announcement. Removal of Adani Ports and Special Economic Zone from the Dow Jones Sustainability Indices*, 12 April 2021, https://www.spglobal.com/spdji/en/documents/indexnews/announcements/20210412-1355163/1355163_djsi-adani-20210412.pdf

In October 2021, APSEZ announced that it had decided to pull out of Myanmar. In a stock exchange announcement the company wrote: “The Board has decided to actively work on a plan on exiting Company’s investment in Myanmar including divestment opportunities (expected to be concluded by Mar – Jun 2022).”²⁸

In previous communications with the Council, APSEZ has underlined that negotiations and payments to MEC were carried out before sanctions were imposed on MEC, and that no payments have been made after this – neither to MEC itself nor its subsidiaries. In connection with a revision of the contract with MEC, APSEZ explained that it inserted a clause to the effect that APSEZ would not make payments to entities or individuals that were under sanctions. APSEZ therefore considers that it acted in compliance with the agreement when it stopped making payments in 2020.

The company confirms that it did host a group of Myanmar military leaders when they visited India in 2019, but says that this was at the request of the Indian government and was not related to the MEC agreement. Beyond this, the company explained, it had no relationship with the armed forces in Myanmar.

5 The Council’s assessment

The Council has assessed the GPFG’s investment in APSEZ against the ethical guidelines’ criterion relating to serious violations of the rights of individuals in situations of war or conflict.

In line with previous recommendations, the Council takes the position that an armed conflict within the meaning of the ethical guidelines is taking place in Myanmar. Abuses perpetrated against the civilian population in Myanmar are well documented and constitute serious violations of humanitarian law and human rights. Since the coup, many civilians have been killed and a far larger number imprisoned. At the same time as these serious abuses have taken place, armed conflicts between the military and insurgent groups have intensified. It has also been reported that new insurgent groups and alliances between existing groups have been formed. Assaults on the civilian population are ongoing, and in light of the armed forces’ history of violence, the Council considers that there is a substantial risk of new, gross abuses being perpetrated by the military.

When assessing APSEZ’s contribution to such abuses, the Council takes the position that companies which operate in situations of war or conflict must exercise particular care. As mentioned above, this means that if there is a risk of contributing to extreme abuses, the Council may decide that the risk is unacceptable even if the company’s links to the norm violations are somewhat weaker than the Council normally requires to recommend observation or exclusion. This case relates to precisely such extremely serious norm violations.

Given the heightened level of care that a company ought to exercise in situations of war or conflict, the Council considers that APSEZ should have exercised such particular care when assessing whether to enter into a business relationship with a military-owned company in 2019. Due to the extensive coverage of the armed forces’ assaults on the civilian population in 2017 and 2018, the Council presumes that APSEZ must have been aware of them when the

²⁸ APSEZ, *Operational & Financial Highlights – H1 / FY22*, 27 October 2021 <https://www.adaniports.com/-/media/Project/Ports/Investor/Investor-Downloads/Operational-Highlights/Earnings-Presentation-H1-FY22-WL.pdf>

agreement was entered into. The Council notes in this context that APSEZ entered into the agreement less than two years after the serious abuses perpetrated against the Rohingya minority.

The Council does not consider that engaging in business operations in Myanmar is problematic per se, but shares the UN FFM’s view that having a direct business relationship with a military-owned company constitutes a high risk of contributing to serious norm violations. In the Council’s view, the company accepted this risk when it signed an agreement with MEC. The Council also attaches importance to the fact that the port in Yangon could help to boost the armed forces’ logistical capacity, and that APSEZ, through its business relationship, has helped to strengthen the armed forces financially. The port could become a long-term source of revenue for the armed forces, even if a new civilian government should be put in place.

The Council finds that APSEZ, in this case, has not exercised the particular care expected in situations of war or conflict. With respect to the risk going forward, the company’s decision to stop making payments to MEC and its announcement that it is pulling out of Myanmar are nevertheless of great importance. The company expects that such a withdrawal could be achieved by the end of the first half of 2022. In light of the situation in the country, the Council nevertheless considers that there is significant uncertainty with respect to when such a withdrawal will be possible to implement, and therefore recommends that the company be placed under observation.

6 Recommendation

The Council on Ethics recommends that Adani Ports & Special Economic Zone Ltd be placed under observation pursuant to the ethical guidelines’ criterion on the serious violation of the rights of individuals in situations of war or conflict.

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Johan H. Andresen Chair (Sign.)	Svein Richard Brandtzæg (Sign.)	Cecilie Hellestveit (Sign.)	Trude Myklebust (Sign.)	Siv Helen Rygh Torstensen (Sign.)
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