

COUNCIL ON ETHICS

THE GOVERNMENT PENSION FUND GLOBAL

To Norges Bank

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UNOFFICIAL ENGLISH TRANSLATION

**Recommendation to exclude Delek Group Ltd from investment by
the Norwegian Government Pension Fund Global (GPF)**

Summary

The Council on Ethics recommends that Delek Group Ltd be excluded from the Government Pension Fund Global because the company is responsible for a serious violation of fundamental ethical norms. The background is the company's petroleum prospecting offshore Western Sahara.

At the end of 2022, the GPFG held shares in the company to the value of NOK 600 million, corresponding to three per cent ownership. Delek Group is an Israeli company, listed on the Tel Aviv stock exchange. Delek Group's wholly owned subsidiary NewMed Energy is involved in exploration, extraction and production of natural gas and condensate.

The company has entered into an agreement with Moroccan authorities for petroleum exploration offshore Western Sahara. Morocco does not have legal, sovereign rights over this area's natural resources.

The Council has considered that Delek Group's exploration activities offshore Western Sahara must be considered a serious violation of fundamental ethical norms as per the Fund's ethical guidelines, as the activity is not conducted in accordance with the wishes and interests of the people of Western Sahara, and because it contributes to maintain an unresolved situation for the area. With regard to the risk of future violations, the Council points out that the exploration agreement has a term of up to eight years.

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1 Introduction

The Council on Ethics for the Norwegian Government Pension Fund Global (GPF) has assessed the Fund's investment in Delek Group Ltd¹ (Delek Group) against the Guidelines for Observation and Exclusion of Companies from the Government Pension Fund Global (the ethical guidelines).² The Council's purpose has been to determine whether there is an unacceptable risk that Delek Group is contributing to particularly serious violations of fundamental ethical norms pursuant to section 4 (h) of the GPF's ethical guidelines.

At the close of 2022, the GPF owned 3 per cent of the company's shares, to the value of NOK 600 million.

Delek Group is an Israeli company listed on the Tel Aviv Stock Exchange. The company engages in hydrocarbon exploration and production.

In a notice to the Tel Aviv stock exchange published in December 2022 by group subsidiary NewMed Energy, the company announced that it had, in partnership with another company, signed an exploration agreement with authorities in Morocco to prospect for petroleum deposits in the *Boujdour Atlantique* bloc offshore Western Sahara.³ NewMed Energy and the company Adarco Energy each own 37.5 per cent of the exploration licence, while the remaining 25 per cent will be owned by the Moroccan state oil company ONHYM. The exploration agreement has a maximum duration of eight years, divided into several activities, each lasting two to three years.

¹ Issuer ID: 1404334

² Guidelines for Observation and Exclusion of Companies from the Government Pension Fund Global:

https://www.regjeringen.no/contentassets/9d68c55c272c41e99f0bf45d24397d8c/2022.09.05_gpf_guidelines_observation_exclusion.pdf

³ The stock exchange notice is available here:

https://vest-sahara.s3.amazonaws.com/wsrw/feature-images/File/1182/63a6cb3372d9d_NewMed_Release-06.12.2022.pdf

Exploration activities will be carried out by NewMed Energy⁴, formerly Delek Drilling, a wholly owned subsidiary of Delek Group Ltd.⁵

1.1 What the Council has considered

In this case, the Council has assessed whether there is an unacceptable risk that Delek Group, by undertaking prospecting activities offshore Western Sahara on behalf of the Moroccan authorities, is contributing to particularly serious violations of fundamental ethical norms pursuant to section 4 (h) of the GPFG's ethical guidelines.

The starting point for the Council's assessment is that Morocco does not have legal sovereignty over the natural resources situated in Western Sahara's territorial waters. The Council takes the position that Morocco's petroleum prospecting in the area may nevertheless be acceptable if it accords with the wishes and interests of the Western Saharan people. One matter to be assessed in this case is the extent to which this condition has been met. The Council has further assessed whether the company's operations are contributing to maintain the area's unresolved situation.

1.2 Sources

This recommendation rests largely on information provided by the company, the Moroccan authorities, Polisario, as well as various UN documents.⁶

⁴ NewMed Energy's website: <https://newmedenergy.com/>

⁵ Delek Group's website: <https://www.delek-group.com/>

⁶ Polisario was designated as the representative of the people of Western Sahara in UN Resolution 34/37 (1978): *"The General Assembly [...] recommends to that end that the Frente Popular para la Liberacion de Saguia el-Hamra y de Rio de Orom [i.e., Polisario], the representative of the people of Western Sahara, should participate fully in any search for a just, lasting and definitive lasting solution of the question of Western Sahara."*

<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/376/64/IMG/NR037664.pdf?OpenElement>

2 Background

2.1 Previous cases relating to Western Sahara

In 2005, Kerr McGee Corp was excluded from investment by the GPFG at the Council's recommendation on the grounds of the company's exploration activities offshore Western Sahara.⁷ Kosmos Energy and Cairn Energy were excluded from the GPFG on the same basis in 2016.⁸

In these cases, the Council emphasised two factors:

- It could not be substantiated that the exploration activity was being undertaken in accordance with the wishes and interests of the people of Western Sahara.
- The prospecting activity helped to maintain the area's unresolved situation.

The Council has also issued recommendations to exclude companies which have entered into long-term purchasing agreements for phosphate minerals extracted in Western Sahara.⁹

2.2 The situation in Western Sahara

The Council has described the situation in Western Sahara in its previous recommendations, as mentioned above. The fundamental conditions in the area have not changed since these recommendations were made.

⁷ The Council's recommendation to exclude KerrMcGee Corp, April 2005:

<https://etikkradet.no/kerr-mcgee-corp-2/>

⁸ The Council's recommendation to exclude Kosmos Energy Ltd and Cairn Energy Plc, February 2016: <https://etikkradet.no/kosmos-energy-ltd-and-cairn-energy-plc/>

⁹ Recommendations in 2010 and 2011 concerning the exclusion of FMC Corporation and Potash Corporation of Saskatchewan: <https://etikkradet.no/fmc-corporation-and-potash-corporation-of-saskatchewan/>

Recommendation dated 26 September 2014 concerning the exclusion of Innophos Holdings Inc: <https://etikkradet.no/innophos-holdings-inc-2/>

Western Sahara has the UN status of being a non-self-governing territory.¹⁰ Unlike other such territories, however, Western Sahara does not have a recognised Administering Power.

Although Morocco has *de facto* control over most of the territory of Western Sahara, no UN body has recognised neither Morocco's sovereignty over Western Sahara nor Morocco as the lawful Administering Power in the area. Nonetheless, Morocco refers to Western Sahara as a Moroccan province, claiming sovereignty over most of the area.

The territory of Western Sahara, which became a Spanish protectorate in 1884, was established as a Non-Self-Governing Territory in 1963 in accordance with the provisions of the UN Charter. Simultaneously, Spain was appointed the Administering Power of what was then called Spanish Sahara.

In 1973, the organisation *Polisario* was formed with the aim of making Western Sahara an independent state. Polisario initiated an armed insurgency against the Spanish administration. In 1975, the International Court of Justice in the Hague (ICJ) rejected the claims of Morocco and Mauritania to sovereignty over respective parts of Western Sahara. Following this ruling, Morocco immediately invaded parts of Western Sahara, provoking strong condemnation by the UN Security Council. Later that year, Spain signed an agreement with Mauritania and Morocco (the *Madrid Accords*) with respect to the transfer of administrative authority in Western Sahara. The Madrid Accords confirmed Spain's intention to support the decolonisation of Western Sahara and transfer its duties as the Administering Power to Morocco and Mauritania. However, Spain did not have sovereignty over the area and was therefore not in a position to cede sovereignty to Morocco and Mauritania. Nor did the Madrid Accords alter Western Sahara's status as a non-self-governing territory under the UN Charter. The Spanish authorities presumed that a referendum would be held in Western Sahara regarding the territory's future status. In 1976, Morocco and Mauritania agreed to divide Western Sahara between themselves. However, Mauritania withdrew from this agreement in 1979.

Morocco has administered most of the territory since 1979 without being the Administering Power pursuant to the provisions of the UN Charter. No referendum on the future status of the territory has been held.

¹⁰ UN list of non-self-governing territories:

<http://www.un.org/en/events/nonselfgoverning/nonselfgoverning.shtml>

In 1991 a ceasefire was signed, bringing the armed conflict between Polisario and Morocco to an end. The UN peacekeeping force MINURSO is monitoring the ceasefire and was originally meant to monitor the referendum on the territory's future.¹¹

Since the 1990s, several initiatives have been launched under the auspices of the UN with the aim of holding such a referendum. Moroccan authorities and Polisario resumed talks in April 2007. These have broken down several times and little progress has been made. In 2007, Morocco presented a proposal conferring limited autonomy on the area under Moroccan sovereignty. Polisario maintains its demand for a referendum that includes the option of full independence.

Today, Western Sahara is populated largely by people of Moroccan origin who moved to the area after 1979. Currently, Western Sahara has around 550,000 inhabitants. It is estimated that over 170,000 of Western Sahara's indigenous people, the *Saharawi*, have been displaced to refugee camps in Algeria, where they live in very difficult conditions.¹²

2.3 Provisions of international law

2.3.1 Article 73 of the UN Charter

Chapter XI of the UN Charter pertains to non-self-governing territories. According to Article 73, states which have or assume responsibility for the administration of such territories have a duty *"to ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment and their protection against abuses."* They also have a duty *"to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive*

¹¹ United Nations Mission for the Referendum in Western Sahara:

<https://minurso.unmissions.org/>

¹² ACAPS, 2022: *"Over 173,000 Sahrawi refugees are estimated to live in five camps in Tindouf province, Algeria, on the border between Mauritania, Morocco, and Western Sahara. Refugees face harsh desert conditions and rely almost fully on humanitarian assistance to meet their basic needs. The exact number of refugees in the camps is not known, mainly because of political disputes between Morocco and the Sahrawi authorities on the number of eligible voters for the referendum."*

https://www.acaps.org/sites/acaps/files/products/files/20220119_acaps_briefing_note_algeria_sahrawi_refugees_in_tindouf.pdf

development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.”¹³

Article 73 stipulates that economic and political developments in such areas must take place in accordance with the local people’s wishes and interests. As regards Western Sahara, this principle has been confirmed in a number of UN resolutions.¹⁴

2.3.2 UN Convention on the Law of the Sea (UNCLOS)

In principle, coastal states have sovereign rights over natural resources on the continental shelves off their land territories. This principle is enshrined in the UN Convention on the Law of the Sea and international jurisprudence.¹⁵

Morocco does not have sovereignty over Western Sahara’s land territory and is as such not entitled to utilise the resources on Western Sahara’s continental shelf. Article 73 of the UN Charter and General Assembly resolutions all stipulate that natural resources in non-self-governing territories may be exploited only in accordance with the wishes and interests of the people in the area. This is reiterated in the UN Convention on the Law of the Sea.

¹³ The UN Charter, 1945:

<http://www.un.org/en/sections/un-charter/chapter-xi/index.html>

¹⁴ Inter alia, General Assembly RES 3458 (XXV) of 10 December 1975, which establishes *“the right of the people of the Spanish Sahara to self-determination, in accordance with General Assembly Resolution 1514 (XV).”* <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/001/71/IMG/NR000171.pdf?OpenElement>.

Western Sahara has otherwise been dealt with in a number of other resolutions over the past years, including 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, A/RES/ 63/102, 18 December 2008, A/RES/65/119, 10 December 2010, and in Security Council Resolutions such as 1754 (2007), 1783 (2007), 1813 (2008), 1871 (2009), 1920 (2010), 1979 (2011), 2044 (2012), 2099 (2013), and 2152 (2014).

¹⁵ United Nations Convention on the Law of the Sea, 1982 (UNCLOS), including Articles 76 and 77,

http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm

Resolution III, which forms an annex to the Convention, states:

*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.*¹⁶

This provision covers Western Sahara as a non-self-governing territory.

Resolution III further states that when a dispute arises regarding the rights to natural resources in a non-self-governing territory, the parties shall hold consultations in which “[...] *the interests of the people of the territory concerned shall be a fundamental consideration.*” In addition, the states concerned are obliged not to “*jeopardize or hamper the reaching of a final settlement of the dispute.*”

Article 77(1) of the Convention on the Law of the Sea also states that: “*The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.*”

It is thus worth noting that, according to Article 77(1), the rights to the continental shelf, which in this case belong to the people of Western Sahara in accordance with the above-mentioned provision in Resolution III, include both “*exploring*” and “*exploiting*”.

2.3.3 Legal opinion from the UN’s legal advisor (2002 UN Legal Opinion)

A legal opinion prepared by a UN legal advisor in 2002 reviews the legality of extracting mineral resources in non-self-governing territories in general and provides an assessment of the particular situation in Western Sahara.

According to the legal opinion, not all forms of economic activity in non-self-governing territories can be regarded as problematic. Reference is made to several UN resolutions which draw a distinction between economic activity in non-self-governing territories that is detrimental to the interests of the local people, and economic activity that benefits the local people:

¹⁶ Resolution III annexed to the Final Act of the Third United Nations Conference on the Law of the Sea, <http://legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html>

*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.*¹⁷

The 2002 UN legal Opinion therefore takes the position that the extraction of mineral resources in non-self-governing territories is acceptable only if it takes place in accordance with the wishes and interests of the local people.

2.3.4 Legal opinion from the African Union's legal advisor, 2015

A legal opinion published by a legal adviser to the African Union in 2015 regarding the legality of Morocco prospecting for and exploiting natural resources in Western Sahara concludes that all such activity in the area is unlawful and an impediment to a peaceful solution to the conflict regarding the area:

*Any exploration and exploitation of natural resources by Morocco is illegal as it violates international law and resolutions of the UN and the AU relating to the right to self-determination and permanent sovereignty of the people of Western Sahara over their natural resources. In addition, the exploration and exploitation seriously undermines the efforts and negotiations for a just and peaceful settlement over Western Sahara.*¹⁸

¹⁷ Letter from the UN Legal Office to the UN Security Council (S/2002/161), 12 February 2002, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/249/87/PDF/N0224987.pdf?OpenElement>

¹⁸ Legal Opinion, the Office of the Legal Counsel and Directorate for Legal Affairs of the African Union Commission. This document is undated but was published on 14 October 2015: <http://legal.au.int/en/sites/default/files/The%20Legal%20Opinion%20%28final%20for%20posting%20on%20the%20website%29.pdf>

2.4 The Council's meetings with Moroccan authorities

On two occasions, in 2014 and 2015, the Council has met with Moroccan authorities. Morocco's starting point for these conversations was that Western Sahara is Moroccan. As regards the question of safeguarding the wishes and interests of the people in the area, Morocco's position was that the authorities safeguard everyone's interests through democratic processes. It was also asserted that Morocco had made considerable investments in the area in recent decades and that the standards of living had been greatly improved. These state-funded investments in the area were far greater than the value of the natural resources extracted from the area. In addition, a regional development plan had been established for the area which would increase investments and further reinforce this development.

2.5 The Council's meetings with Polisario

The Council met Polisario's Nordic envoy in May 2015 and representatives of Polisario's leadership in 2016.

In both meetings Polisario expressed the view that the petroleum prospecting activities Morocco was undertaking at that time offshore Western Sahara were unlawful and that the activities could only be lawful if Polisario, being the legitimate, recognised representative of the people of Western Sahara, had given its consent. Polisario, however, had not been consulted.

Moreover, Polisario expressed concern that petroleum prospecting and any potential Moroccan oil and gas production in the area could lead to a higher level of conflict and reduce the possibility of a negotiated solution. Polisario expressed that it supported foreign investment, the extraction of natural resources and the economic development of the area, but that this must take place in the proper order, i.e. after the question of the area's future status had been resolved. In Polisario's opinion, any chance of Morocco relinquishing the area would disappear if viable oil or gas reserves were discovered there.

In January 2015, Polisario sent a letter to the UN Security Council protesting against Morocco's prospecting operations off the coast of Western Sahara.¹⁹

3 Information from the company

The Council contacted Delek Group in January this year to request information about its prospecting activities, including whether the company had taken steps to ensure that any exploration takes place in accordance with the wishes and interests of the people of Western Sahara.²⁰

In a reply to the Council, Delek Group confirmed that its subsidiary, NewMed Energy, is involved in the prospecting activities detailed above.²¹ The company stated that it was aware that Western Sahara's territorial status remained unclarified and pointed out that this was a matter on which opinions differed. The company underlined that it would engage only in prospecting activities in the area – not production. The sole purpose of the prospecting activities was to identify potential resources, not to exploit them. In conclusion, Delek Group wrote that if viable discoveries were made, the company would endeavour to ensure that its further activities would comply with international rules and regulations.

A draft of this recommendation has been submitted to Delek Group, with an invitation to give any remarks the company may have. The company has not responded to this.²²

4 The Council's assessment

The Council on Ethics takes as its starting point that Morocco does not have legal, sovereign rights over the natural resources on Western Sahara's continental shelf. It is not within the Council's remit to conclude on the legality of Morocco's petroleum prospecting activities in the area or on the future status that the disputed area should have. The Council only considers whether, under the present circumstances, it can be regarded as

¹⁹ Letter from the Permanent Representative of South Africa to the United Nations addressed to the Secretary-General, dated 19 October 2015:

<https://digitallibrary.un.org/record/808955?ln=en>

²⁰ Letter from the Council on Ethics to Delek Group, dated 13 January 2023.

²¹ Letter from Delek Group to the Council on Ethics, dated 8 March 2023.

²² Letters from the Council on Ethics to Delek Group, dated April 4 and May 8, 2023.

a serious violation of fundamental ethical norms, pursuant the GPFG's ethical guidelines, for Delek Group to engage in prospecting in the area on behalf of the Moroccan authorities.

As in the Kerr McGee and the Kosmos/Cairn cases, the Council does not distinguish between exploration and exploitation activities. No such distinction is made in the UNCLOS, and, in any case, the aim of the exploration activities is undoubtedly exploitation.

In these previous cases, the Council attached importance to the fact that the companies' exploration activities were not in accordance with the wishes and interests of Western Sahara's people, and that they contributed to maintain in the area's unresolved situation. The Council makes the same considerations in its assessment of this case.

The situation in Western Sahara is unique in the sense that it is the only non-self-governing territory without a recognised Administering Power. There are no clear rules on the exploitation of natural resources in such an area. Under the framework of international law, the administering powers of non-self-governing territories are under an obligation to manage the territories in accordance with the wishes and interests of the people of the area. Since the UN does not recognise Morocco as the lawful administering power for Western Sahara, it could be argued that the rules established for non-self-governing territories do not apply in this situation. The legal opinion issued by the UN legal advisor in 2002 is based on an *analogy* with the obligations of administering powers of non-self-governing territories. An alternative approach could be an assessment based on international humanitarian law. This would probably impose even stricter limitations on companies' operations in the area, as the legal opinion from the African Union's legal advisor (2015) concludes.

The Council can give no weight to the company's assertion that, if viable discoveries are made in the area, it would seek to conduct its operations such that its continued activities would comply with applicable international regulations and standards. In the Council's view, if viable discoveries are made in the area, the damage would already have been done, in the sense that the chances of reaching a negotiated solution to the area's future would be further diminished.

When the UN Charter and UN Convention on the Law at Sea state that exploitation of the natural resources in non-self-governing territories must be carried out in interaction with the people of the area, it is precisely because disagreement about access to natural resources can be a driver for conflicts. As long as there is no political solution for the area and one of the parties is expressly opposing the exploration activity, warning that it

could lead to an escalation of the conflict, it is reasonable to assume that such activity is, at the very least, contributing to maintain an unresolved situation in the area and may even contribute to its deterioration.

In the Council's view, Delek Group's prospecting activities off the coast of Western Sahara must be regarded as a serious violation of ethical norms, pursuant to section 4 (h) of the GPFG's ethical guidelines, because they are not being conducted in accordance with the wishes and interests of the people of the area, and because they contribute to maintain an unresolved situation in the area. With respect to the future risk of norm violations, the Council points out that the prospecting agreement has a term of up to eight years.

Based on the above, the Council recommends that Delek Group be excluded from the GPFG, and that the exclusion is maintained for as long as the company is involved in the exploration activities in the relevant area.

5 Recommendation

The Council recommends that Delek Group Ltd be excluded from the Government Pension Fund Global.

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Johan H.
Andresen
Chair

Svein Richard
Brandtzæg

Cecilie
Hellestveit

Vigdis Vandvik

Siv Helen Rygh
Torstensen

(Sign.)

(Sign.)

(Sign.)

(Sign.)

(Sign.)