

LETTER FROM THE MINISTRY OF FINANCE TO THE COUNCIL ON ETHICS, 7  
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**Recommendation of exclusion**

We refer to the letter from the Council on Ethics of 15 November 2010 advising that the companies Potash Corporation of Saskatchewan and FMC Corporation should be excluded from the GPFG. The recommendation is based on the assessment that there is an unacceptable risk of the companies contributing to particularly gross breaches of fundamental ethical standards.

Potash and FMC purchase phosphate extracted in Western Sahara, through the Moroccan state-owned company Office Cherifien des Phosphates (OCP). The Council on Ethics takes the view that the interests of the local population are not served by OCP's operations. This constitutes the core of the breach of standards which underpins the assessment of the Council on Ethics in the present case. The Council on Ethics has emphasised that the companies purchase phosphate under long-term contracts with OCP, and that they have no plans to terminate these. The Council has assumed that OCP's revenues largely fall to the Moroccan state. In the opinion of the Council on Ethics, OCP's extraction of phosphate resources constitutes a gross breach of standards, both because the local population (the Sahrawi people) does not benefit and because the resource extraction helps to maintain an unclear situation and thus Morocco's presence in the territory. In the view of the Council of Ethics, a concrete relationship of mutual benefit exists between OCP's breaches of standards and the companies' purchases of phosphate from Western Sahara.

This is the first case in which the Council on Ethics has recommended the exclusion of a purchaser based solely on the conduct of the seller. The threshold for excluding companies is generally high. The Graver committee drew up rather strict conditions for contributory liability in general: "... *exclusions should be limited to the most serious cases, where the company in which the Petroleum Fund has invested is directly responsible for unacceptable breaches of standards and the practice is not expected to cease.*" The present case relates to an underlying set of circumstances which primarily

rests on the actions of a state, in this case those of Morocco. The Graver committee laid down the following guidelines for the assessment of companies which themselves have operations in territories which are disputed, occupied or not self-governed: *“Moreover, questions can be asked about the desirability of investments in companies with operations in territories which are disputed, occupied or not self-governed. Based on a concrete assessment of the territory and the type of operation, there may be reason to exercise caution with regard to such investments. For example, in one specific instance, the Ministry of Foreign Affairs has advised against investments in companies with operations on the continental shelf off Western Sahara.”* As the Council has pointed out, however, the present recommendation does not concern companies which are themselves extracting natural resources, but rather companies which *purchase* mineral resources extracted in a territory which is not self-governed. The situation concerning the purchase of natural resources is not discussed in greater detail in the Graver report.

The Graver committee also discussed customer-supplier relationships and the degree of contribution in that context. The committee stated, among other things, that: *“Even if a company has unethical sub-contractors, it may [...] be sensible not to withdraw unless there is a pattern of the company using sub-contractors which employ dubious practices without seeking to do anything about the matter. The relationship will approach contribution if the customer relationship is long-term or repeated after the unethical matters are uncovered.”*

Accordingly, the ministry would ask the Council on Ethics to expand on its understanding regarding the limits of the contribution concept in a purchase situation, and to comment on some questions related to the present case, including the degree of influence the companies can be said to have over the situation.

#### *General comments on the term “contribution” and the purchase of unethical products*

The ministry would ask the Council on Ethics to expand on its view regarding situations where a company trades with another company which is involved in unethical business operations, and in which cases the Council may deem this a direct contribution to the unethical operations. In a previous case, the Council assessed a company’s liability for matters which are the responsibility of the company’s sub-contractors, i.e. the manufacturers of goods which the company in question purchases for sale in the course of its business. In that case, the Council emphasised that the company had a real influence on the circumstances at the production sites of its manufacturers, many of which supplied only the company in question. The Council also emphasised that the company itself acknowledged that it had such influence by virtue of having adopted and imposed its own guidelines on its supply chain. In another previous case, in which the actual breach of standards was committed by a state, the Council emphasised the importance of a company’s contribution in supporting and maintaining the breach of standards of the state in question. The ministry would ask the Council on Ethics, in view of these previous cases, to clarify its understanding regarding what may normally be deemed to constitute contribution in a purchase situation, including the degree of dependence which should exist between the purchaser and the seller and the real opportunity which the purchaser should have to influence the situation of the seller. The ministry would also ask the Council on Ethics to comment on whether the seriousness of the underlying unethical action or situation may affect the care standard by reference to which companies are assessed, for example in cases where the products which are purchased come from occupied territories.

*The degree of contribution in the present case*

In previous cases, the Council on Ethics, when assessing companies' possible contribution to grossly unethical activities, has emphasised factors such as the company's proximity to the breach of standards, the company's own profits and the company's opportunity to influence the situation. This case relates to purchasers of natural resources extracted in a territory which is not self-governed, a fact which by its very nature creates a certain distance between the company and the breach of standards. In the ministry's view, an important question is therefore to what degree these purchasers can be said to have influence over the underlying ethical situation, or whether the situation has a certain probability of continuing regardless of whether the companies continue to purchase under long-term contracts. In this connection, the ministry would ask the Council on Ethics to comment on whether it believes that OCP's extraction of phosphate in Western Sahara would cease if the contracts for regular deliveries were not maintained. Further, the ministry would request a more detailed assessment of the degree of influence over the underlying situation – i.e. that the Sahrawi people do not benefit and that Morocco's claim of sovereignty over the territory is strengthened – which companies that purchase phosphate sporadically from Western Sahara must be deemed to have compared to companies which receive regular deliveries over time.

Yours sincerely

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