

UNOFFICIAL ENGLISH TRANSLATION

To the Ministry of Finance

March 9th, 2010

The Council on Ethics for the Norwegian Government Pension Fund Global (“GPF”) makes reference to the Ministry of Finance’s letter dated February 18th 2010, where the Ministry requests additional information on some aspects concerning the Council’s recommendation to exclude the companies Africa Israel Investments Ltd (“AII”) and Danya Cebus Ktd (“DC”) from the Fund. The recommendation was submitted on November 16th, 2009.

The recommendation assesses whether companies building Israeli settlements on the West Bank should be excluded under the provision in the Fund’s ethical guidelines concerning companies which contribute to serious violations of individuals’ rights in situations of war or conflict.

In its letter, the Ministry of Finance highlights that this is the first recommendation submitted where said criterion is applied and requests further elaboration on the issues that the Council will consider in cases of this nature. The Ministry refers to the case of the company Total SA from 2005, in which the Council assessed whether the company Total SA should be excluded from the GPF because of contribution to human rights violations in connection with the company’s construction of a pipeline in Burma. In the Total case, the Council presented an overview of the various aspects it took into consideration in its assessment of whether a company should be excluded from the GPF because of its contribution to serious or systematic violations of human rights.

The point of departure for all of the Council’s recommendations is the existence of a clear connection between a company’s activities and the existing violation of norms. In the case of Total, it was not the company’s action (the construction of the pipeline) that was considered unethical *per se*, but rather the resulting violations of norms conducted by others. Conse-

quently, a thorough discussion of the extent to which a company may be held accountable for violations taking place in the area where it operates was provided. Different criteria were considered to determine the company's contribution to the violations of norms, including the company's knowledge of the violations and in whose interest these had occurred.

The Council has also used resources to assess other companies with activities in areas where violations of norms occur, such as oil companies with activities in Sudan and mining companies with activities in D.R. Congo. The subject of the Council's considerations here is similar to that of the Total-case, as it is not necessarily the companies' own activities that are problematic but rather the fact that violations take place where the companies operate. The degree to which the companies possibly contribute towards the violations of norms must be considered in each individual case.

In the case of the recommendation at hand, however, the Council considers that the contribution by the companies to the violations of norms is very direct: *the companies' own physical actions, i.e. the construction of settlements in the West Bank, is at the core of the breach of norms*. Consequently, in the view of the Council, a further, more general assessment of the companies' contribution to the violations of norms is unnecessary.

As the Ministry points out, the Council finds that if a company contributes to a State's violation of the IV Geneva Convention, this may form the basis for an exclusion from the GPF without the further identification of affected individuals. Here, the recommendation refers to the preparatory work of the Ethical Guidelines (NOU 2003: 22, appendix 7, para 3.2) which, *inter alia*, states:

“International conventions prohibiting the use of certain types of weapons and regulating the conduct of hostilities in war and conflict may provide a relevant foundation for ethical guidelines. The basis of legal constraints in the use of arms, munitions and the means through which warfare is conducted is primarily formed by humanitarian considerations. This is why this part of international law is referred to as international humanitarian law; protecting civilians and soldiers from unnecessary suffering is the reason why these rules have been developed. One can therefore view ethical considerations and legal norms as overlapping on this matter.

This legal framework – enshrined in the four Geneva Conventions of 1949, their two additional protocols of 1977 and a number of specific conventions regulating various types of weapons and munitions – is mainly directed towards states but also, to a certain degree, towards non-state actors in a conflict. As with other examples of international law, it is not directed towards companies. To the extent that these rules aim to protect individuals from harm, it is nevertheless possible to claim that companies should endeavor to act in such a way that they are not co-responsible for violating international humanitarian law.” [Unofficial English translation]

The requirement that individual victims be identified is not present here. Several hundred thousand of Palestinians can be said to be suffering as a result of the Israeli settlements on the West Bank. It would neither be practicable nor necessary for the Council's deliberations to refer to named individuals who are directly affected by the activity of the companies recommended for exclusion from the GPF.

The Ministry of Finance asks for a more detailed account of the extent to which the nature of the proprietor of the settlement is relevant to the Council's deliberations.

The areas of the West Bank where Israeli settlements are built are either under Israeli military control or annexed by Israel (East Jerusalem). It is not disputed that Israel is responsible for the maintenance of the provisions of the IV Geneva Convention in these areas. The Council has referred to statements from the International Court of Justice (ICJ), the UN Security Council and the International Committee of the Red Cross (ICRC) in its recommendation, all of whom have expressed that the building of Israeli settlements in the West Bank is in violation of the IV Geneva Convention. Companies undertaking the construction of said settlements are, in the Council's view, directly involved in the Israeli government's violation of norms. This applies regardless of who ordered the construction or what knowledge the companies may have of the circumstances.

Further, the Ministry asks whether it may be considered relevant to study the extent to which the activities of the company also benefit those whose rights have been violated.

When the Council has previously considered whether a company's activities can also be said to benefit those whose rights have been violated, it has not been in cases where it is the company's own activities which constitute the core of the violation. Generally, such considerations may be relevant when assessing the company's presence and activities in oppressing regimes or conflict areas, but not in cases where the company is itself directly involved in the violation of norms.

In its recommendation, the Council has referred to the UN body OCHA's report "*The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank*" (2007). The report describes, *inter alia*, how over 38% of the West Bank is comprised of Israeli settlements, outposts, military bases, infrastructure, and other areas where admission to the Palestinian population is either prohibited or tightly regulated. The settlements are connected to each other and to Israel via a network of roads to which the Palestinian population has limited access. This fragmentation of the West Bank has had severe negative economic and social consequences for the majority of the Palestinian population. The report concludes: "*The consequences of settlements and related infrastructure on Palestinian life are severe, and if current trends continue, socio-economic conditions in the West Bank are likely to worsen.*" Neither this nor any other report that the Council is aware of describes any positive contributions from the Israeli settlements in the West Bank for the Palestinian population.

The Ministry of Finance asks whether any other companies carrying out construction-related activities in connection with the building of settlements should be excluded from the GPF. In its recommendation, the Council takes the view that companies that build Israeli settlements in the West Bank may be recommended for exclusion from the Fund. Consequently, this applies to any other company with similar activities. In its assessment of a company's involvement, the Council will consider the specific actions of individual companies; a sub-contract for a construction project may be considered less significant than the main enterprise for the project.

Lastly, the Ministry of Finance enquires about the current status of AII's and DC's construction projects in the West Bank. The Council has made repeated attempts to contact the

companies via Norges Bank in order to have this clarified. The companies have not responded.

The information at hand, in the form of sales contracts and court documents, shows that the companies - at least until recently - have been, and probably still are, involved in the construction of Israeli settlements in the West Bank.

Based on the information which has been obtained on the companies' past and present construction projects in the West Bank, and considering the Israeli policy of building settlements, the Council finds that there is an unacceptable future risk that the companies will continue to carry out the construction of Israeli settlements in the West Bank.

In the view of the Council, this risk will be present as long as Israeli authorities do not halt ongoing construction projects and ban the future construction of new settlements in the West Bank and East Jerusalem or their expansion, or until the companies clarify that their role in such activities has ceased.

With regards,

Ola Mestad.
Acting Chair,
Council on Ethics,
Government Pension Fund Global