HOOVER INSTITUTION
STANFORD UNIVERSITY

...ideas defining a free society

•

ABRAHAM D. SOFAER
GEORGE P. SHULTZ SENIOR FELLOW

KOSMOS OPINION LETTER

Johan H. Andresen, Chair
Council on Ethics for the Government Pension Fund Global
P.O. Box 8008 Dep
N-0030
Oslo
Norway

22nd April, 2016

Dear Sirs:

I have been asked by Kosmos Energy, Inc. (hereinafter "Kosmos") to comment on your proposed conclusion that the Government Pension Fund (hereinafter "Fund") should divest its shares in Kosmos, because that company's exploration for hydrocarbon resources off the coast of Western Sahara is in danger of contributing to a serious violation of fundamental ethical norms.

My exposure to the Western Sahara problem began in 2005, when I was asked by an American oil and gas company other than Kosmos to prepare an opinion for its internal use on the legality under international law of conducting hydrocarbon exploration off the Western Sahara coast under a license from the government of Morocco. In 2015, Kosmos asked if I would prepare an update on the same issue, once again for internal guidance, given intervening developments that had taken place since my first opinion. I was paid for my work on both opinions.

Recently, Kosmos asked if I would provide a response to your proposed action conveyed to Kosmos in November 2015. I agreed to the request but declined any payment as I wished the views in this letter to represent my personal conclusions.

In principle, I applaud the task you have undertaken. Major funds, especially sovereign wealth funds, should avoid investing in companies that act illegally or unethically. Such companies are poor investments. I have opposed such investments as a fiduciary on corporate and foundation boards.

I also share your frustration, along with Kosmos, that the controversy over the Western Sahara remains unresolved. Dispute resolution has been at the center of my professional life. As Legal Adviser for the U.S. State Department, I acted as principal negotiator in completing, among other things, the Peace Agreement between Egypt and Israel by settling the border at Taba; the compensation to be paid to relatives of the victims of the Pinochet Government's assassination of Chile's former Ambassador to the United States; the compensation to be paid the families of U.S. Navy personnel killed when Saddam Hussein's forces attacked the *USS Stark*; and many thousands of legal disputes (and some political ones) between Iran and the U.S. government or U.S. companies at the Iran/U.S. Tribunal in The Hague. I have also argued before the International Court of Justice ("ICJ") on behalf of my country, including in a case upholding the right of United Nations Human Rights reporters to perform their work without interference by the states of which they are nationals. After leaving the government I have continued to assist public and private entities in resolving disputes, including as counsel for WWF International in settling its dispute with WWF U.S. over internal governance. Several years ago I had the pleasure of meeting with high-level members of Norway's Foreign Ministry to discuss informally the possibilities of achieving peace between Israel and the Palestinians.

My experiences have taught me that, in advancing positions based on public international law or ethical principles, one must rely on commitments of States in treaties or other published understandings. Consistent with this principle, Section 3 of the "Guidelines for observation and exclusion of Companies from the Government Pension Fund Global" (hereinafter "Guidelines") relies on universally accepted norms. A company may be put under observation or excluded from investment "if there is an unacceptable risk that the company contributes to or is responsible for" such clear human rights violations as murder, torture, and deprivation of liberty, violations of the laws of war, "severe" environmental damage, "gross" corruption, and "other particularly serious" violations of "fundamental ethical norms".

The reference to "ethical norms" may suggest to the untutored eye a less exacting standard of conduct than described in subsections (a) through (d). But the language of subsection (e), referring to "other" violations, and including only violations that are "particularly serious" and of "fundamental" norms, necessarily implies that the "ethical" violations referred to are of those "norms" so "fundamental" as to be analogous to the universally accepted standards of conduct listed in the earlier provisions. This reading is consistent with the manner in which the ICJ and leading scholars determine what international law requires, and how philosophers and ethicists determine what standards of ethical behavior are "fundamental."

In determining the content of international law, for example, the strongest evidence includes universally adopted treaties, such as the Genocide

Convention, the Geneva Conventions, and UN Security Council resolutions. Highly persuasive evidence includes universally adopted prohibitions, such as exist regarding murder, severe environmental damage, and "gross" corruption. To justify a ruling that an entity is in violation of an "ethical" standard based on international law requires a determination, as Section 3 requires, that the standard be "fundamental" and that the violation be "particularly serious." "Fundamental" means that the standard be so widely adopted among nation states as to indicate it is mandatory despite its lack of explicit implementation in treaties or other written evidence. "Particularly serious" means that the breach of the fundamental standard must be uncommonly grave, rather than one that is formal, or that has limited consequences. Unwritten international commitments will be found to exist only where they amount to a *jus cogens,* a standard of conduct universally accepted by states as obligatory, not merely desirable. And in determining whether any such standard has been established under international law it is essential to respect the views of the UN Security Council and other authoritative entities, as well as the conduct of states, rather than to rely on the opinions of particular states or scholars.

In determining whether a form of conduct is unethical, for purposes of applying remedies, philosophers and ethicists have been similarly circumspect. Ethical conduct may demand more than what States formally agree should be mandated. Yet, given the inherent vagueness of norms based on such concepts, and the tendency of humans to be subjective in making judgments about the conduct of others, leading thinkers in the Western philosophical tradition have cautioned that such concepts must be used fairly, objectively, and with a view of doing more good than harm. As St. Paul warned: Evil must not be done so that good may come of it. (Romans: 7-8) Similarly, to be just, an action should have a high probability of success; ineffectual actions are inherently unjust. See http://sheila-t-harty-speaker-editor.com/Just-War%20Principles%20of%20Augustine.pdf: .

In my opinion, the Committee's proposed decision regarding Kosmos cannot be justified under international law or fundamental ethical norms on any or all of the grounds relied upon by the Committee.

Article 73 of the UN Charter. The Committee relies on Article 73 as stating the governing principles for the administration of non-sovereign areas. It properly notes that this provision calls for respecting the culture of "the peoples concerned", including their "political, economic, social and educational advancement," in addition to developing "self-government" taking "due account of the political aspirations of the peoples . . . ." Departing from this carefully crafted language, however, the Committee asserts: "the economic and political developments in such areas are to take place *in*

accordance with the local population's wishes and interests." (Draft, p.5. Emphasis added.)

This analysis gives no weight to the explicit interest in development in non-self-governing territories – their "well being" – which has been reinforced by several UN resolutions. On the other hand, it concludes that the governed "peoples" of such territories have an absolute right of self-determination, including the right to prevent any economic or political steps advanced by the governing authority. As applied to a colonial regime the notion of an absolute right to self-determination and to prevent the exploitation typical of such regimes is understandable. But economic development that is in the "interests" of the local population is clearly permissible, indeed it is highly desirable, and Article 73 does not require any particular form of approval by any particular local group for such activities.

Morocco is not a colonial regime. It is a State, like many others, that claims sovereignty over a territory that includes local peoples who themselves have no history of sovereign control as that concept is understood in the modern nation-state system. Indigenous peoples all over the globe have been made part of sovereign systems based on political realities unrelated to colonial rule, including of course within the United States. The US has struggled to enhance the authority and rights of such groups within its borders, enforcing treaties, confirming land grants, and recognizing varying degrees of local control over land use and resources, but retaining sovereignty and control over some aspects of development and over national issues such as foreign affairs. Norway has had an analogous experience with its Sami population.[1] Norway has not ceded sovereignty, but it has done a great deal, in stages over time, to give its indigenous population legislative and other authority to impact decisions that affect their interests. Self-determination in non-colonial contexts is a complex and nuanced process. It does not justify preventing exploration for resources that could lead to development and economic advancement that is in the interests of the indigenous population where it is understood that further discussions and arrangements will be required in the event significant resources are found.

A further complication in applying colonial-era principles to the present context is determining who constitute the "peoples concerned" as to any consultation requirement to be satisfied. The population of Western Sahara, as the Committee notes, now includes a majority of non-Sahrawi people, and that majority is increasing over time. These non-Sahrawis, some of whom have lived in the area for decades, are virtually all Muslim Arabs racially similar if not identical to Sahrawis. It is questionable whether, under

[1] Koivurova, Timo, Vladimir Masloboev, Kamrul Hossain, Vigdis Nygaard, Anna Petrétei, & Svetlana Vinogradova, "Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States," *Arctic Review* [Online], 6.1 (2015): http://arcticreview.no/index.php/arctic/article/view/76 (12 Apr. 2016).

international human rights principles, they can be excluded from "peoples concerned" under Article 73. The Polisario represents some of the local population, but it cannot be regarded as the entire population's exclusive representative for all purposes. Morocco and Kosmos have consulted other representatives, including Sahrawi leaders, and a broader process of consultation would be required if resources were found that warranted development.

The UN Legal Opinion of 2002. The Committee's description of this authoritative Opinion is inaccurate and adds requirements to those stated in the Opinion that have no support in either its language or its real-world application. The Opinion unquestionably ruled that foreign companies may lawfully accept licenses from the government of Morocco to *explore* for oil and gas in the territorial waters off Western Sahara, so long as such "resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf *or* in consultation with their representatives . . . ." (Para. 24. Emphasis added.) This conclusion is inconsistent with several of the Committee's assertions:

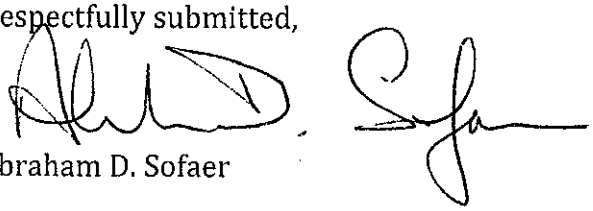
- The Opinion concluded that Morocco should be treated as the *de facto* administering power over Western Sahara despite its lack of sovereignty or recognition as an administering power.
- The Opinion makes clear that, so long as the license is limited to exploration, it is enough to show that it is in "the interests" of the local population, and not also as the Committee insists "in accordance with the local population's *wishes* . . . ." (Emphasis added.)
- The Polisario opposed the licenses upheld by the Opinion, but the Opinion nonetheless did not require consultation with that group or any other specific group, because no improper "exploitation" could occur based on licenses limited to exploration.

Security Council Actions and State Practice. The Committee should give weight in reaching its conclusions to the fact that the UN Security Council has not seen fit to find that Morocco has violated the Charter. The Council has recognized that a dispute exists that has delayed a vote of "the peoples concerned," and has recommended that the parties proceed in the meantime with the autonomy process proposed by Morocco. The Secretary General has repeatedly stressed the need for economic development in the area as a matter of humanitarian concern. And other entities, including the European Union, have arranged with Morocco, not only for exploration but also for the purchase of resources, specifically fish, from Western Saharan waters on the premise that the funds paid to Morocco be used in the interests of the peoples of the administered area.

Effect of the Committee's Proposed Action. The Committee should take into account the likely effects of its proposed action. It concludes without any empirical basis that allowing exploration will lead Morocco to be less likely to reach an agreement on self-determination. The only concrete effect of the Committee's action, however, will be to cause the Bank to sell its Kosmos shares. Morocco will remain free to contract with Kosmos or with other companies less determined than Kosmos to ensure compliance with international law. To the extent the Committee's proposed action does prevent exploration for resources, moreover, it will certainly lead to Morocco's having less wealth to allocate to the development of Western Sahara, causing real human suffering. To cause real harm in the speculative hope of advancing a politically difficult settlement violates long established ethical norms. Patience and moral clarity, rather than the infliction of pain on human beings living in the area, is the preferred course in dealing with such complex political problems.

In conclusion, I appreciate the Committee's concern that the government of Morocco has failed to confer with Polisario. Assuming, however, that Morocco should consult with Polisario, or should authorize Kosmos to do so, this failure cannot be said to create the danger of a violation of fundamental ethical norms, because it is unlikely to be consequential, and is therefore more a formal rather than substantive failure, and certainly not a "serious" violation of any norm. The Committee will achieve more by continuing to monitor developments and working constructively for both economic development and increased engagement, than by issuing a condemnation that is legally and ethically unjustified.

Respectfully submitted,



Abraham D. Sofaer