



Decision to exclude from investments

1 June 2015

Introduction

KLP and the KLP Funds have decided to exclude the companies HeidelbergCement AG and Cemex SAB de SV from their investment portfolios with effect from 1 June 2015.

HeidelbergCement is one of the world's largest suppliers of building materials, including aggregates.¹ The company is based in Germany, and has operations in 40 countries.² In 2007, HeidelbergCement acquired the British company Hanson plc,³ which has a wholly owned subsidiary, Hanson Quarry Products Israel Limited, with operations on the West Bank.

Cemex is a global supplier of building materials.⁴ The company was established in Mexico, and now operates in more than 50 countries.⁵ In 2005, Cemex acquired RMC Group plc, which at that time was already established on the West Bank via a subsidiary.⁶

Through its subsidiaries, the companies HeidelbergCement AG (HeidelbergCement) and Cemex SAB de SV (Cemex) operate quarries in Area C of the West Bank, an area under complete Israeli civilian and military control. The companies pay licence fees and royalties to the state of Israel. It is not clear how Israel uses these funds. The products deriving from the quarries are sold primarily for use in Israel's domestic construction market.

This assessment builds on a review of applicable international law, and concludes that in all probability the opening of any new quarries on the West Bank after the start of the occupation – as is the case here – is incompatible with the law of belligerent occupation. This is primarily because the quarries were established after occupation had already begun, but also because the income deriving therefrom is used for purposes other than the occupation itself or the needs of the local population. The Oslo Accords of 1995 do not seem to affect this conclusion, since the wording of the agreement stipulates that it does not alter the parties' rights. In any case, no such agreement can override the rules relating to occupation set out in the Hague Regulations and the Fourth Geneva Convention.

¹ HeidelbergCement Group, <http://www.heidelbergcement.com/en> (last visited 27 February 2015). Aggregate is used in the production of concrete.

² Ibid.

³ HeidelbergCement Group, <http://www.buildingforgenerations.heidelbergcement.com/> (last visited 27 February 2015).

⁴ CEMEX, *About Us*, <http://www.cemex.com/AboutUs/WorldwideLocations.aspx> (last visited 27 February 2015).

⁵ CEMEX, *Worldwide Locations*, <http://www.cemex.com/AboutUs/WorldwideLocations.aspx> (last visited 27 February 2015).

⁶ Cemex response re alleged violations of international law and contravention of codes of conduct and conventions regulating the activities of multinational corporations (28 June 2011). URL: <http://business-humanrights.org/media/documents/company-response-cemex-27-jun-2011.doc> (last visited 27 February 2015).



The fact that exploitation of natural resources from an occupied or non-self-governing territory may help to prolong conflict is also an important factor when assessing this matter, as in earlier decisions by KLP with respect to Western Sahara.⁷ Any rule that allows the occupant to begin exploiting resources in occupied territory creates an incentive to prolong the occupation. This violates the underlying principle of the law on occupation – that occupation should be temporary.

Given all of the above, KLP considers that the companies' operations are associated with violations of fundamental ethical norms.

As of 31 December 2014, KLP and the KLP Funds had shareholdings in HeidelbergCement were worth approx. NOK 17,520,000, while their shareholdings in Cemex were worth approx. NOK 22,400,000.

The incident and the companies' involvement

HeidelbergCement's involvement with quarrying on the West Bank began in 2007 when it acquired Hanson plc. A wholly owned subsidiary of Hanson plc, Hanson Quarry Products Israel Limited⁸ operates a quarry near Nahal Raba in occupied territory on the West Bank. The quarry was established after 1967, when Israel's armed forces first took control of the West Bank.

Since 2005, Cemex has had a 50 per cent shareholding in the Yatir quarry, which is also located in occupied territory on the West Bank. The quarry is operated through a joint venture between Lime & Stone and Kfar Giladi Quarries, with the latter acting as operator.⁹ Lime & Stone is a wholly owned subsidiary of ReadyMix Industries,¹⁰ which in turn is wholly owned by Cemex.

Both quarries pay regular fees and royalties to the state of Israel, via the Civil Administration, in order to keep operating. The products deriving from the quarries are used primarily in the domestic Israeli market.¹¹

⁷ See, for example, Decision to exclude from investment (3 June 2013). URL:

https://www.klp.no/polopoly_fs/1.24654.1391185123!/menu/standard/file/Total_beslutning%20om%20utelukke_lse_03062013_NORSK_korrigert.pdf

⁸ HeidelbergCement, Annual Report 2012, p. 229,

http://www.heidelbergcement.com/NR/rdonlyres/ABE4A8AA-5288-472F-B00C-16F9E47DD0AA/0/AnnualReport_2012_Web.pdf.

⁹ Cemex response re alleged violations of international law and contravention of codes of conduct and conventions regulating the activities of multinational corporations (28 June 2011). URL: <http://business-humanrights.org/media/documents/company-response-cemex-27-jun-2011.doc> (last visited 27 February 2015).

¹⁰ ReadyMix Industries (Israel) Ltd., *History*. URL:

http://www.readymix.co.il/BuildeGate5/general2/data_card.php?U=no&SiteName=readymix&ItemID=634992571&ValuePage=Card5 (last visited 8 May 2014).

¹¹ *Yesh Din v. The Commander of the IDF Forces in the West Bank et al.*, s. 3. URL: <http://www.yesh-din.org/userfiles/file/%D7%94%D7%9B%D7%A8%D7%A2%D7%95%D7%AA%20%D7%93%D7%99%D7%9F/psak.pdf>

The Oslo Accords of 1995 (Oslo II) presume the ultimate transfer of Area C from Israeli to Palestinian control through so-called final status negotiations. However, since these negotiations collapsed in 2000, the status of the agreement has been unclear.¹² Nevertheless, the parties continue to cooperate in line with the agreement, though on relatively uncontroversial practical issues.

International law on the exploitation of natural resources in the West Bank

KLP asked the International Law and Policy Institute (ILPI), hereunder, Gro Nystuen, former chair of the Council on Ethics of the Norwegian Government Pension Fund Global (GPF), to assess the case in light of the current situation. ILPI's assessment constitutes the legal analysis in this document. ILPI concludes that international law does not provide unambiguous answers to this issue. Nevertheless, their review of the relevant parts of the law on occupation and the Oslo Accords of 1995 finds that it is highly probable that the operation under Israeli licence of quarries in Area C of the West Bank, which opened after the occupation began, is inconsistent with the requirements of the law of belligerent occupation. The Oslo Accords do not seem to affect this conclusion. As can be seen from the discussion below, this agreement has no impact on the parties' rights. In any case, no such agreement can override the rules on occupation set out in the Hague Regulations and the Fourth Geneva Convention.

The Hague Regulations permit the extraction of natural resources from occupied land only when 1) extraction takes place on the same scale as before the occupation commenced, and 2) when the income deriving from such extraction is used for the benefit of the local population or to defray costs associated with the occupation. Extraction is problematic in this case since the quarries were established after the occupation had begun, and probably also because the income deriving therefrom is used for purposes other than the actual occupation or the benefit of the local population.

The law of belligerent occupation

The human rights organisation *Yesh Din* initiated a lawsuit against the Israeli government over quarrying operations in Area C of the West Bank, where Israel has full control over both the civilian and military administration. Israel considers this area to be "Israeli state land", e.g. that it belongs to the state of Israel.¹³ The case went all the way to the Israeli Supreme Court, but was rejected because the court concluded that it raised issues that could only be resolved through political channels and not through the courts.¹⁴ The Supreme Court commented on the application of the law of belligerent occupation in the case concerned, but these comments are not legally binding, since the court refused to hear the case on the merits.

Area C of the West Bank is an occupied territory subject to both the Hague Regulations, attached to the Hague Convention of 1907, and the Fourth Geneva Convention of 1949. Israel is a signatory to the Fourth Geneva Convention, but not the Hague Convention. Nevertheless, the Hague Regulations are deemed to constitute customary international law, and are therefore

¹² Article 31 of Annex II to the Oslo Accords of 1995.

¹³ See, for example, *Yesh Din v. The Commander of the IDF Forces in the West Bank et al.* (2011), p. 3.

¹⁴ *Yesh Din v. The Commander of the IDF Forces in the West Bank et al.* (2011), p. 8.

also binding on states which are not signatories to the Hague Convention. The rules stipulated in the Fourth Geneva Convention supplement the Hague Regulations.

The law of occupation law presumes that occupation is a temporary situation, which must be terminated once the armed conflict is over. Article 43 of the Hague Regulations states that an occupying power must maintain law and order, while respecting the occupied territory's legal system as far as possible:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 43 makes it clear that the occupant has temporary authority over the occupied territory, but not *sovereignty*. In line with the presumption that occupation is temporary, it is also a general principle of international law that the occupying power must take into consideration both its own military needs and the interests of the local population.¹⁵

International humanitarian law on the use of natural resources in occupied territory

Occupation law does *not* prohibit the occupant from making use of real property, but the occupant's role is restricted to that of a caretaker. The property must be restored to the occupied power once the conflict has ended. This principle is reflected in Article 55 of the Hague Regulations, which restricts the occupant to the administration and use of resources in the area occupied. Article 55 states:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

The requirement to "safeguard the capital" and comply with the "rules of usufruct" underline that Article 55 permits the occupant to exploit natural resources, but only in a sustainable manner. Even though Article 55 does not specifically mention quarries, and despite the fact that rock, in contrast to forests and crops, is not a renewable resource, the provision has been deemed to encompass mining operations.

Norway's military manual states the following with respect to occupation law:

With respect to other property belonging to the state... the occupying power shall be regarded only as an administrator with the right to use the objects concerned. This applies to public buildings, real property, forests and agricultural areas that belong to the occupied state and are located therein. In other words, the occupying power does not become the owner of what is confiscated, but may make use of it for the duration of

¹⁵ A. Cassese, "Powers and duties of an occupant in relation to land and natural resources," in E. Playfair (Ed.), *International Law and the Administration of Occupied Territories* (Oxford: Clarendon Press, 1992), p. 420.

*the occupation. Nevertheless, it is required that movable and immovable property not be used in such a way that they are damaged or their value impaired. For example, the occupying power will be entitled to let or use public buildings, sell crops, cut down and sell timber, and operate mines, as long as such exploitation is within that which is considered customary.*¹⁶

In short, therefore, an occupant may operate an *existing* quarry if the level of exploitation remains the same as before the occupation began. The issue of whether an occupant is entitled to open *new* quarries, which did not exist before the occupation, is more controversial. The wording of Article 55 is silent on this point, perhaps due to the presumption that occupation is a temporary situation.

Some sources argue that the law of belligerent occupation permits new exploitation if it would be beneficial for the local population.¹⁷ The Israeli Supreme Court has also made this case, although it is unclear whether “local population” also refers to Israeli settlers.¹⁸ Israeli citizens are not protected persons under the Fourth Geneva Convention, which, on the contrary, prohibits an occupant from inserting its own population into an occupied area.¹⁹

In a legal opinion from the 1970s, the United States argued against allowing an occupant to begin exploiting natural resources in occupied territory. Israel was, at that time, assessing the possibility of extracting oil from the Sinai Peninsula. In his opinion, the US State Department Legal Advisor writes:²⁰

*The occupant’s right to state-owned oil in the ground is that of a usufructuary under Article 55 and does not include the right to open new oil fields.*²¹

The United States was referring to the general rule, as expressed in the cited Norwegian military manual, that the occupant may not exploit more than is customary or necessary. This prevents new exploitation of resources, because there had been no previous or customary exploitation.²² The alternative would give states an incentive to occupy other countries in order to gain access to natural resources, which could also prolong the occupation.²³

To summarise: even though there is no unambiguous, legally binding answer to this question, the most restrictive interpretation is the most convincing, given the underlying principle of the Hague Regulations in restricting an occupant’s ability to introduce permanent changes in an occupied area.

In this case, the quarries were opened after 1967, when Israel’s occupation began. Thus, Israel has granted licences to companies to open quarries in occupied territory, where no quarries

¹⁶ Norwegian Armed Forces, *Manual of the Law of War* (2013), p. 265, para. 13.54.

¹⁷ See Dinstein, *Belligerent Occupation*, s. 215.

¹⁸ *Yesh Din v. The Commander of the IDF Forces in the West Bank et al.* (2011), p. 16.

¹⁹ Fourth Geneva Convention, Art. 49.

²⁰ Legal Adviser to the Department of State

²¹ US Department of State, Memorandum of Law, 16 ILM 733 (1977), p. 735 (hereinafter *1977 US legal opinion*).

²² *Ibid*, p. 741.

²³ *Ibid*, p. 745–6.

previously existed. For the reasons given above, the opening of a quarry in occupied territory is in all probability incompatible with Article 55 of the Hague Regulations

Significance of Oslo (II) for the operation of quarries in Area C

Oslo II was intended to serve as an interim agreement that would be finalised through negotiations on the territory's permanent status between Israel and the PLO. The collapse of negotiations prompted doubt about the status of Oslo II, and it is unclear if the agreement still applies. Nevertheless, it is worth considering the possible implications of Oslo II for the lawfulness of quarrying operations in the West Bank's Area C.

On the matter of "mines and quarries", Oslo II states specifically that these should be gradually transferred to Palestinian jurisdiction.²⁴ Although Israeli sources have claimed this as an example of Palestinian acceptance of the current status quo,²⁵ this interpretation is incompatible with the text of the agreement, which says:

*Nothing in this Agreement shall prejudice or pre-empt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP [Declaration of Principles on Interim Self-Government Arrangements]. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.*²⁶

Furthermore, there is a general principle that protects civilians from renouncing the rights they have under the law of belligerent occupation, expressed in Article 8 of the Fourth Geneva Convention. The principle reflects the underlying balance of power between the occupant and the occupied, as well as the negative humanitarian consequences that would result if citizens of occupied territories were obliged to renounce the protection offered by international humanitarian law.

In brief, Oslo II does not seem to affect the rights that the local population on the West Bank enjoy under international humanitarian law.

Dialogue with the companies

Dialogue with HeidelbergCement

KLP has engaged in a good dialogue with HeidelbergCement, and understands that the company is aware of the criticism levelled at its activities. HeidelbergCement confirms that its subsidiary Hanson Israel operates a quarry in Rahal Naba under licences from the Civil Administration in Judea and Samaria. The quarry pays royalties for the rock extracted. The company emphasises that a majority of Hansen's employees on the West Bank are Palestinian.

²⁴ Article 31 of Annex II to the Oslo Accords of 1995.

²⁵ See, for example, *Yesh Din v. The Commander of the IDF Forces in the West Bank et al.* (2011), p. 8.

²⁶ Oslo II, Art. XXXI(6).

HeidelbergCement acknowledges that the local population is an important stakeholder with respect to its operations on the West Bank, and is examining opportunities for establishing a dialogue. However, the company has no plans to alter its operating model at present.

Dialogue with Cemex

KLP has contacted Cemex several times over the past year to arrange a meeting with the company on this matter, but no such meeting has materialised. As a result, KLP has had to rely on publicly available information about the company's views on its quarrying operation.

In a letter published through the Business and Human Rights Resource Centre, Cemex confirms that its subsidiary Lime & Stone is engaged in a joint venture with Kfar Giladi Quarries, and that the latter operates the Yatir quarry.²⁷ Cemex emphasises the fact that its subsidiary is not the operator, merely the local partner.²⁸ In the same way as HeidelbergCement, Cemex also mentions that the quarry's workforce includes Palestinians, who are employed at the same terms and conditions as their Israeli co-workers.²⁹ Finally, Cemex argues that operation of the quarry is lawful, since – according to the Oslo Accords – Area C is placed under Israeli control until the conclusion of final negotiations between Israel and the PLO.³⁰

Assessment

Both HeidelbergCement and Cemex point to the Israeli Supreme Court's comments as evidence that they are operating lawfully. As mentioned in the introduction, these comments are not legally binding, since the Court refused to hear the case on its merits. ILPI's review of applicable international law in this case concludes that even though international law does not provide unambiguous answers, operation of a quarry under an Israeli licence in Area C of the West Bank, which opened after the occupation began, is in all probability not in compliance with the requirements of the law of belligerent occupation. Nor do the Oslo Accords from 1995 seem to affect this conclusion, since the agreement does not alter the parties' rights and, in any case, does not override international humanitarian law.

The fact that HeidelbergCement and Cemex employ Palestinian workers is not sufficient to declare that the companies exploit the resources in a way that benefits the local population. The income deriving from the resources extracted is paid to the Israeli Civil Administration, and the bulk of the rock is used in Israel's domestic market.

The Norwegian GPF's Council on Ethics has previously addressed this issue in connection with the exploitation of natural resources in Western Sahara:

²⁷ Cemex response re alleged violations of international law and contravention of codes of conduct and conventions regulating the activities of multinational corporations (28 juni 2011). URL: <http://business-humanrights.org/media/documents/company-response-cemex-27-jun-2011.doc> (siste besøk 27 februar 2015).

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.



This is about the exploitation of a limited deposit of non-renewable mineral resources. That individual Sahrawis have worked at OCP does not compensate for the fact that the area is being emptied of natural resources and that this is not benefiting a large part of the Sahrawi population.³¹

The fact that a company's workforce comprises members of the local population cannot be regarded as evidence that the company is exploiting natural resources for the benefit of the local population as a whole. If employment of locals were deemed sufficient to meet the requirement for upholding the local population's interests, it would lead to a practice in which those resources benefited only a minority of the local population.

KLP considers that the ethical arguments carry the heaviest weight in this case. The extraction of non-renewable resources in occupied territory may weaken the future income potential of the local population, including the Palestinian residents. Moreover, when this is undertaken in a way that is difficult to justify within the requirements of the law of belligerent occupation, KLP considers that this activity represents an unacceptable risk of violating fundamental ethical norms.

Decision

HeidelbergCement AG and Cemex SAB de CV are excluded from KLP and the KLP Funds' investment portfolios with effect from 1 June 2015.

³¹ See, for example, the Council on Ethics, *Recommendation to exclude Innophos Holdings Inc. from the investment universe of the Government Pension Fund Global* (26 September 2014), p. 9.