



Decision to exclude Glencore plc from investment

8 December 2015

Introduction

Glencore plc (Glencore) is one of the world's largest mining and trading companies. The enterprise is registered in Jersey, headquartered in Switzerland¹ and operates in more than 50 countries.² Glencore is listed on stock exchanges in London, Hong Kong and Johannesburg.³ KLP and the KLP Funds had combined investments in Glencore worth approx. NOK 85,5 million in stocks and 126 million in bonds as of 31 December 2014.

KLP has excluded Glencore on the grounds that the company's oil exploration off the coast of Western Sahara runs an unacceptable risk of violating fundamental ethical norms. Glencore is, moreover, the world's third-largest coal producer, measured in volume. However, since this business area accounts for no more than around 22 per cent of the company's overall revenues it will not be discussed further in this recommendation.⁴

The incident and the company's involvement

In a presentation to investors on 10 September 2013, Glencore announced that it was the operator for Boujdour Offshore Shallow, with a "participating interest" of 38.25 per cent.⁵ Glencore further announced at a presentation in May 2014 that the company had a "participating interest" of 18.75 per cent in Fom Ognit Offshore.⁶ The presentations describe the blocks as part of Morocco.⁷ However, on closer inspection of the map used in the May presentation, the NGO Western Sahara Resource Watch (WSRW) discovered that both Boujdour and Fom Ognit are

¹ Glencore, "Investors: Shareholder FAQs". URL: <http://www.glencore.com/investors/shareholder-centre/shareholder-faqs/>.

² Glencore, "Who We Are: What We Do". URL: <http://www.glencore.com/who-we-are/what-we-do/>.

³ Glencore, "Who We Are: Our Story". URL: <http://www.glencore.com/who-we-are/our-business-at-a-glance/our-story/>.

⁴ Trucost data, on file with KLP.

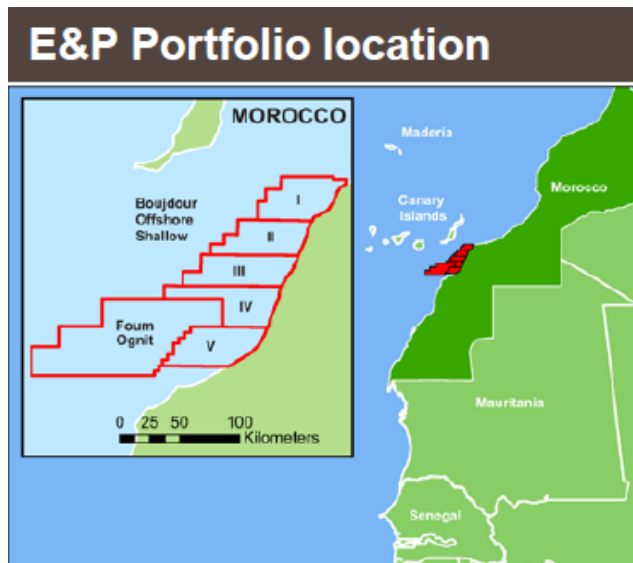
⁵ Glencore, *Investor Day Presentation*, 10 September 2013, p. 5. URL:

http://www.wsrw.org/files/dated/2014-09-29/glencore_presentation_10.09.2013.pdf.

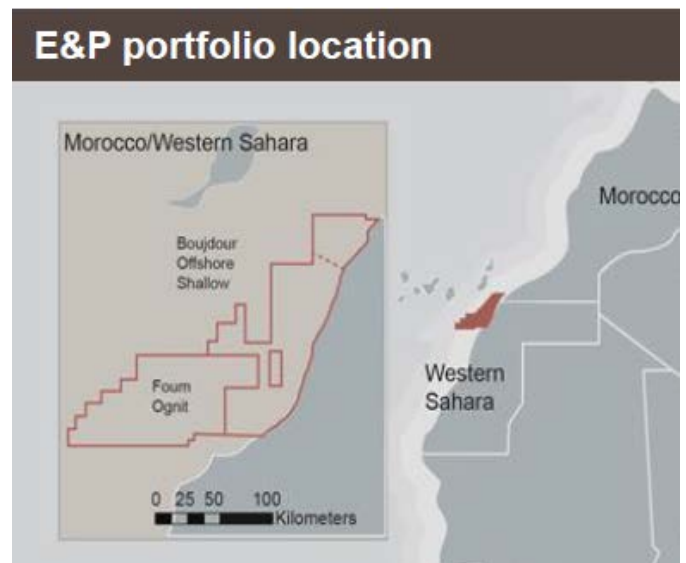
⁶ Glencore, *2014 Global Metals, Mining & Steel Conference*, Bank of America Merrill Lynch, Miami, May 2014, p. 21. URL: http://www.wsrw.org/files/dated/2014-09-29/glencore_presentation_13.05.2014.pdf.

⁷ Ibid; and Glencore, *Investor Day Presentation*, 10 September 2013, p. 5.

located off the coast of Western Sahara.⁸ Glencore confirmed this in an investor presentation in December 2014, where the Boujdour Offshore and Foug Ognit licences are referred to as "Morocco/Western Sahara".⁹ The pictures from the presentations in May and December 2014, respectively, are reproduced below:



Glencore presentation, May 2014



Glencore presentation, December 2014

As shown above, Glencore has now corrected the error in the map, which identified the whole of Western Sahara as part of Morocco. Glencore's stake in Boujdour Offshore and Foug Ognit is owned by Glencore Exploration and Production (Morocco) Ltd.,¹⁰ a subsidiary of Glencore.¹¹ In conversations with KLP, the company has confirmed that it is engaged in exploration activities, though not the drilling of wells.¹²

⁸ Western Sahara Resource Watch, *Glencore with 2 Licences Off Occupied Western Sahara*, 15 October 2014. URL: <http://www.wsrw.org/a105x2964>.

⁹ Glencore, *Investor Day Presentation*, 10 December 2014, p. 3. URL: http://www.glencore.com/assets/media/doc/speeches_and_presentations/glencore/2014/GLEN-Investor-Day-2014-Oil-final.pdf.

¹⁰ Office national des hydrocarbures et des mines (ONHYM), *List of Partners*, <http://www.onhym.com/en/partnership-and-cooperation/list-of-partners.html> (last visited 30 October 2015).

¹¹ Neither Glencore's 2014 annual report nor the company's website mention whether Glencore Exploration and Production (Morocco) Ltd. is a wholly owned subsidiary of Glencore. Since, on the other hand, Glencore's investor presentations describe the licences as "Glencore's" investments, KLP presumes that Glencore Exploration and Production (Morocco) Ltd. is a wholly owned subsidiary of Glencore.

¹² Telephone conversation between Glencore and KLP (5 June 2015).



About Western Sahara

According to the UN Charter, Western Sahara is a non-self-governing territory.¹³ Morocco claims sovereignty over the territory, and has entered into agreements with private organisations for the exploitation of Western Sahara’s resources, including phosphates, fish and oil (offshore). The International Court of Justice (ICJ) in The Hague rejected Morocco’s claim to sovereignty in 1975,¹⁴ and Morocco is not recognized as the territory’s administrator under the terms of the UN Charter. As the lawful administrator of the area, Morocco would, pursuant to Article 73 of the UN Charter, have a duty to: *ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement...* and to *“develop self-government, to take due account of the political aspirations of the peoples...”*

KLP and the KLP Funds have excluded several companies associated with the exploitation of resources in Western Sahara: Total S.A. (excluded in 2013), Agrium Inc. (excluded in 2014), Potash Corporation of Saskatchewan (excluded in 2010) and FMC Corporation (excluded in 2010, exclusion rescinded in 2013).

The exclusion of Total S.A. is the most relevant for this recommendation.¹⁵ Like Glencore, Total engages in exploration and mapping (“reconnaissance”) activities off the coast of Western Sahara. Like Total, Glencore believes that its activities do not violate international law, and refers to the 2002 legal opinion written by the UN’s then legal advisor.¹⁶ This opinion concluded that Morocco’s contracts with companies with respect to exploration activities off the coast of Western Sahara are not in themselves unlawful, but that further exploration and production would have to be undertaken in accordance with the best interests and wishes of the local population in order not to violate the provisions applying under international law to non-self-governing territories.¹⁷

¹³ The system of Non-Self Governing Territories was established through the UN Charter in connection with decolonization and to regulate matters for territories which had not achieved independence, e.g. colonies, protectorates, and mandate areas of various types. Article 73 of the UN Charter: Declaration regarding Non-Self Governing Territories: <http://www.un.org/en/documents/charter/chapter11.shtml>.

¹⁴ ICJ, Advisory Opinion, dated 16 October 1975:

<http://www.icj-cij.org/docket/index.php?sum=323&code=sa&p1=3&p2=4&case=61&k=69&p3=5>.

¹⁵ KLP, *Exclusion from investment portfolios*, 3 June 2013. URL:

http://english.klp.no/polopoly_fs/1.28396.1409665032!/menu/standard/file/Total_Decision_to_exclude_03062013_ENGLISH.pdf.

¹⁶ Telephone conversation between Glencore and KLP (5 June 2015).

¹⁷ Letter from the UN’s Office of Legal Affairs to the President of the Security Council, dated 12 February 2002. S/2002/161, para. 25.



Map No. 3175 Rev. 4 UNITED NATIONS
 October 2012

Department of Field Support
 Cartographic Section

Source: UN

International standards

Rules under international law

KLP has previously discussed the issues pertaining to international law in its recommendation to exclude Total S.A.¹⁸ There is therefore no point in repeating them here in their entirety. Instead, KLP refers to the decision to exclude Total S.A. This decision underlines that the companies' interpretation of the UN's 2002 legal opinion is not uncontroversial. The author of the text, former UN legal advisor Hans Corell, has also subsequently written that his opinion has been misunderstood.¹⁹ He believes that the opinion makes it clear that companies have a duty to ensure that both "*exploration*" and "*exploitation*" are undertaken in accordance with the local population's interests and wishes.²⁰

Furthermore, since the legal opinion was written, Morocco has acceded to the UN Convention on the Law of the Sea.²¹ This means that the Convention's provisions in Resolution IIIa on the rights of local populations in non-self-governing territories applies with even greater force. As the Council on Ethics of the Norwegian Government Pension Fund Global (GPF) has previously pointed out in relation to this legal opinion, "in a situation of contradictory interpretations of international law, treaty law would prevail over a legal opinion".²² Asking whether the legal opinion from 2002 is outdated is also a legitimate question.²³

The UN Guiding Principles for Business and Human Rights

The UN Guiding Principles for Business and Human Rights (UNGPs) are also relevant for activities in non-self-governing territories. Principle 18(b) states that companies have a

¹⁸ KLP, *Exclusion from investment portfolios*, 3 June 2013. URL: http://english.klp.no/polopoly_fs/1.28396.1409665032!/menu/standard/file/Total_Decision_to_exclude_03_062013_ENGLISH.pdf.

¹⁹ Address by Hans Corell, 5 December 2008, Pretoria, South Africa, "The legality of exploring and exploiting natural resources in Western Sahara", p. 239-41. URL: <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>.

²⁰ Ibid.

²¹ United Nations Division for Ocean Affairs and the Law of the Sea, "Chronological list of ratifications of, accessions and successions to the Convention and the related Agreements as at 3 October 2014 (last updated 7. January 2015). URL: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.

²² Council on Ethics of the Norwegian GPF, *Recommendation on exclusion from the Government Petroleum Fund's investment universe of the company Kerr-McGee Corporation*, 11 April 2005, p. 4. URL: <http://etikkradet.no/files/2014/12/KMG-eng-april-2005.pdf>.

²³ KLP, *Exclusion from investment portfolios*, 3 June 2013. URL: http://english.klp.no/polopoly_fs/1.28396.1409665032!/menu/standard/file/Total_Decision_to_exclude_03_062013_ENGLISH.pdf.



responsibility to enter into meaningful consultation with parties who may potentially be affected before embarking on activities that could have adverse human rights impacts:

18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

(a) Draw on internal and/or independent external human rights expertise;

(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.²⁴

Exercizing this kind of duty of care with respect to human rights is described as "*human rights due diligence*". Oil exploration off the coast of Western Sahara is not unproblematic with respect to human rights. Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights lays down the right of peoples to control their own natural resources:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.²⁵

Even though the principle's content is general, it is rooted in universally endorsed conventions.

²⁴ UN Guiding Principles for Business and Human Rights, p. 19. URL: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

²⁵ International Covenant on Civil and Political Rights, Art. 1; International Covenant on Economic, Social and Cultural Rights, Art. 1.



Dialogue with the company

KLP has engaged Glencore in a dialogue relating to Western Sahara on two occasions. Glencore has referred to the 2002 UN legal opinion and explained that this underpins the company's understanding of the applicable international legal framework. KLP asked Glencore to explain the company's assessment of its activities in relation to the UN Guiding Principles for Business and Human Rights, specifically the fact that companies have a responsibility to respect human rights. Glencore considers its assessment of the 2002 UN legal opinion to be sufficient to meet its obligations under the UN Guiding Principles, but acknowledges that the company has not engaged in consultation with potentially affected parties in Western Sahara ahead of its investment.

Glencore believes that consultation with the local population will be relevant only if the company should decide to start oil production. The company is of the opinion that oil exploration has no significant impact on the human rights situation in Western Sahara. Glencore believes that only production can potentially lead to adverse human rights impacts.

Assessment

In KLP's opinion there is no material difference between Glencore's activities in Western Sahara and those of Total, which formed the basis for that company's exclusion. It is, moreover, worrying that Glencore seems to have provided erroneous information about its activities, such that it took more than a year before its involvement in Western Sahara was discovered. The fact that Glencore considered the UN's legal opinion before investing shows that the company was aware of the situation in Western Sahara.

Glencore has so far not consulted the local population about the company's activities. Glencore believes that this is unnecessary at this stage. Glencore claims that oil exploration will not have any adverse human rights impacts. KLP disagrees. For non-self-governing territories, even oil exploration under contract with an occupying power is a potential violation of the rights of the occupied population. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights lay down the right of peoples to exercise control over their natural resources. Oil exploration without the Sahrawis' permission could potentially violate this right. The UN Guiding Principles do not require companies to consult interested parties only when there is no shadow of a doubt that the company's activities will have an adverse impact on their human rights. The purpose of a human rights due diligence is to identify this risk in advance. In KLP's opinion, it is obvious that even mapping and exploration could potentially have a negative impact on the right of the people to exercise control over their



natural resources. Thus, it is difficult to conclude that Glencore fulfils its obligation to respect human rights under the UN Guiding Principles.

Oil exploration does not take place absent the objective of eventually engaging in oil production. As mentioned in KLP's decision to exclude Total S.A.,²⁶ there is a substantial risk that discoveries of natural resources could help to extend the conflict in Western Sahara, and KLP has been consistent in excluding companies that exploit natural resources in occupied territory. In keeping with its assessment of Total S.A., KLP concludes that there are also grounds to exclude companies that engage in oil exploration. It is extremely doubtful that these activities can be undertaken in line with the requirements of applicable international law.

Based on the above-mentioned arguments and assessments, the Norwegian authorities' recommendations and precedence from previous cases, KLP considers that KLP and the KLP Funds' investments in Glencore plc represent a risk of complicity in violations of fundamental ethical norms.

Conclusion and recommendation

The company Glencore plc will be excluded from investment by KLP and the KLP Funds at the latest on 8 December 2015.

²⁶ KLP, *Exclusion from investment portfolios*, 3 June 2013. URL: http://english.klp.no/polopoly_fs/1.28396.1409665032!/menu/standard/file/Total_Decision_to_exclude_03_062013_ENGLISH.pdf.