



Exclusion from investment portfolios

3 June 2013

(Translation based on the original document in Norwegian)

1. Introduction

KLP and the KLP Mutual Funds have decided to exclude the company Total S.A. from its investments as of 1 June 2013.

Total S.A.'s subsidiary, Total E&P Maroc, is carrying out exploration and surveillance activities for possible oil and gas deposits on the continental shelf offshore Western Sahara. KLP and the KLP Mutual Funds consider the investments in Total S.A. to be in conflict with KLP and the KLP Mutual Funds responsible investments guidelines, and that the activity of Total E&P Maroc on the continental shelf offshore Western Sahara can be associated with a breach of basic ethical norms.

KLP and the KLP Mutual Funds together held investments in Total S.A. of approximately NOK 400 million as of 31 December 2012.

2. Occurrence

On 2 December 2011, Total E&P Maroc, together with ONHYM (Office National des Hydrocarbures et des Mines), received a permission – “authorization of reconnaissance” – from OHNYM. The permission concerns exploration and surveying of oil and gas deposits on the continental shelf offshore Western Sahara (Anzarane Offshore Area). The permission was originally valid until December 2012. It was later extended one year until December 2013, with an option for further six months. Total (then TotalFinaElf) also carried out exploration and surveying in the same area in the period 2001–2004. At the time too there was strong criticism against the company, and Total withdrew because it believed that the area did not have sufficient potential.

Total E&P Maroc is a subsidiary of the French oil company Total S.A. The company has more than 111 000 employees in 130 countries and is one of the world's leading oil companies. Total works within the whole energy chain, from extraction of crude oil and gas to refining and production of fuel, heating oil, lubricants, bitumen, specialty fluids, aviation fuel and chemically based products.

3. About Western Sahara

Western Sahara is a disputed territory over which both Morocco and the Sahrawi Arab Democratic Republic (SADR), led by the liberation movement Polisario, claim the sovereignty. The territory lies

between Morocco to the north, Algeria to the northeast, Mauritania to the south and east, and the Atlantic Ocean to the west.¹

Western Sahara is to a great extent populated by people with a Moroccan background who have moved into the territory after Morocco's de facto annexation of it. Western Sahara has a population of approximately 500 000 people.² About 165 000 of the territory's original population, the Sahrawis, have fled to refugee camps in Algeria, where they live under extremely difficult conditions.³ Moroccan authorities have constructed a 2500-km-long separation barrier through Western Sahara.⁴ This barrier consists of a wall guarded by the military and a mine field with large amounts of anti-personnel landmines.⁵ The purpose of the separation barrier is to prevent infiltration by Polisario forces into Moroccan-controlled territory. The barrier also makes it difficult for the expelled Sahrawis to move to those parts of Western Sahara that Morocco controls.

Figure 1. The Sahrawi Arab Democratic Republic

Population: In the refugee camps, 165 000, and in Polisario-controlled areas, about 30 000. In the occupied areas it is uncertain, perhaps 250 000 Moroccan settlers and 100 000 Sahrawis. In addition, there are also about 100 000 Moroccan soldiers and police.

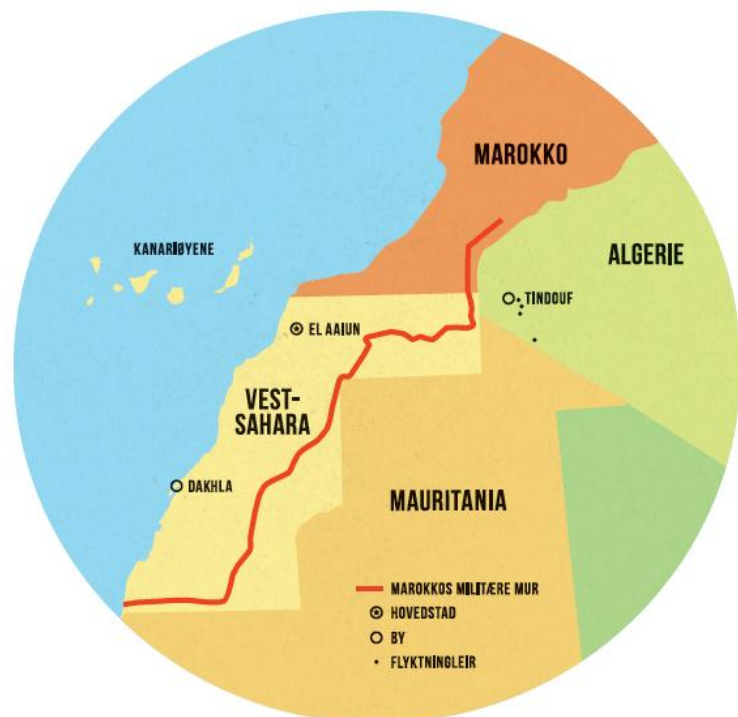
Area: 266 000 km². Borders on Morocco to the north, Mauritania to the east and south and Algeria to the northeast.

Capital: El Aaiun.

Language: Hassanya Arabic.

Natural Resources: Phosphate, fish and possibly oil.

Translation to the map: Morocco, Canary Islands, Algeria, Mauritania, Western Sahara, Morocco's military wall, capital, city, refugee camp



Source: "United Nothing" – publication issued by 18 Norwegian youth organizations in February 2013.

Timeline

1884

Western Sahara becomes a Spanish protectorate.

1963

Western Sahara was established as a "non-self-governing territory" in accordance with the UN Charter.⁶ Spain was simultaneously appointed administrator of the territory then called Spanish Sahara. Today

Western Sahara still has UN status as a non-self-governing territory.⁷ Unlike the world's other non-self-governing territories, Western Sahara does not have a recognized administrative power.⁸

1973

The liberation movement Polisario (Frente Popular de Liberación de Saguía el Hamra y Río de Oro) is established with the aim of making Western Sahara an independent state. Polisario starts an armed insurrection against the Spanish administration.

1975

In October the International Court of Justice (ICJ) in The Hague refused Morocco's and Mauretania's claims for sovereignty over distinct parts of Western Sahara.⁹ Immediately afterwards, Morocco invaded parts of Western Sahara, which provoked strong condemnation by the UN Security Council. Spain entered into an agreement (The Madrid Accords) with Mauretania and Morocco on the transfer of the administrative authority in Western Sahara. The Madrid Accords confirmed Spain's intention to contribute to the decolonization of Western Sahara and transfer its duties as administrator to Morocco and Mauretania. This agreement therefore did not transfer sovereignty over Western Sahara to Morocco and Mauretania, since Spain did not have such sovereignty and consequently could not give or transfer sovereignty over the territory. Nor did the agreement change Western Sahara's status as a non-self-governing territory under the UN Charter. Spanish authorities presupposed that a referendum would be held in Western Sahara about the territory's future status.

1976

Morocco and Mauretania agree to divide Western Sahara.

1979

Mauretania withdraws. Since then Morocco has had armed forces in Western Sahara¹⁰, without being administrator of the territory according to the UN declarations. As legal administrator of the territory Morocco would, in accordance with Article 73 of the UN Charter, be obliged to, among other things, "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".

1991

After armed conflicts between Polisario and Morocco, a truce was entered into in 1991. The UN's peacekeeping forces, MINURSO,¹¹ supervised the truce and were originally also intended to supervise the planned referendum on the territory's future. Since the 1990s there have been several initiatives under the auspices of the UN to hold a referendum on the future of the territory.

2007

Negotiations between Moroccan authorities and Polisario were attempted in 2007, and it has regularly been attempted to resume the negotiations since. Morocco has presented a proposition for the territory for limited autonomy under Moroccan sovereignty. Polisario maintains the demand for referendum for the territory, with the possibility of independence.¹²

2012

The Swedish parliament votes for a recognition of Western Sahara as a separate state¹³, but the Swedish government's view is that the legal prerequisites for a recognition are not fulfilled.¹⁴

2013

The European court of Justice is assessing whether Polisario, Western Sahara's liberation movement, will get the case of Western Sahara's natural resources tried in the court. Morocco has agreements with the EU to sell off the natural resources of occupied Western Sahara.¹⁵ Polisario believes these agreements are in conflict with international law.

4. International law on the situation in Western Sahara

UN Convention on the Law of the Sea

As a point of departure, coastal states have sovereign rights over the natural resources on the continental shelf offshore their own land territory. This principle is established by the UN Convention on the Law of the Sea¹⁶ and by international legal usage. Morocco does not have sovereignty over Western Sahara and thus as a point of departure does not have the right to exploit its resources on the continental shelf. Both Article 73 of the UN Charter and the General Assembly's resolutions establish that economic exploitation of resources in non-self-governing territories may only occur with the consent of the people and must be in agreement with their economic interests.¹⁷ This is also evident from the regulations of the UN Convention on the Law of the Sea. Resolution IIIa, which is an addendum to the Convention, states that:

*In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.*¹⁸

This resolution covers Western Sahara as a non-self-governing territory and states that the rights under the UN Convention on the Law of the Sea are to be implemented for the benefit of the people of non-self-governing territories. The Convention's Article 77 (1) states that:

The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploring its natural resources.

The rights to the continental shelf, which in this case is due the population of Western Sahara in accordance with the above-mentioned provision in Resolution IIIa, thus comprise in accordance with Article 77 (1) both exploring and exploiting.

Morocco ratified the UN's Convention on the Law of the Sea on 31 May 2007.¹⁹ Even though the Convention was in force with regard to international law prior to this, the country's obligation to live up to it was strengthened in 2007.

Legal Opinion from the UN's Legal Counsel

When Total signed the first license in 2001, the UN Security Council asked its legal office to provide an evaluation of the company's (and Kerr-McGee's) agreement with Morocco. The UN's legal counsel, Ambassador Hans Corell (Under-Secretary-General for Legal Affairs), then provided a legal opinion.²⁰

The opinion of 2002 treated, among other things, mineral resource exploitation in non-self-governing territories generally and gives an evaluation of this in the situation in Western Sahara specifically.

The evaluation takes its point of departure in Article 73 of the UN Charter, which instructs states that have taken on responsibility for non-self-governing territories to administer the resources in these in accordance with the interests of the people. It is stated, however, that because there so far is no exploitation, this exploring activity is in itself hardly illegal:

...while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.²¹

Here there is a possible difference between what the Convention on the Law of the Seas' regulations use as a starting point and what the UN's legal office uses. In 2005 the Ethical Council of the Norwegian Government Pension Fund – Global stated as follows about this difference:

"The Council on Ethics does not intend to make an attempt on deciding what the legally correct answer should be in this case. It should be pointed out, however, that in a situation of contradictory interpretations of international law, treaty law would prevail over a legal opinion. One might therefore suggest that there are sound legal arguments for arguing that not only exploitation of natural resources, but also exploration, could be deemed unlawful in the present case".²²

5. The company's involvement

Withdrawal of natural resources from occupied land is declared illegal by the UN. Even if Total's contracts at present do not include drilling and exploitation, it is obvious that the goal of the activity is withdrawal of natural resources. The company is directly involved in these activities.

6. Dialogue with Total

KLP has had a good dialogue with Total for several years and especially in connection with its activity in Myanmar. KLP has also had talks with Total about its activity in Western Sahara.

In addition, the company has on demand from investors and civil society prepared a public statement on its activity in Western Sahara and its reasoning for its legitimacy.²³ In this statement, Total confirms the activity in the territory and the fact that the license was extended with one year in December of 2012, with an option for a further six months.

Total has not involved the people in connection with its present activity in Western Sahara, nor do the people have the right to information about the results of the exploration (the contracting party is the Moroccan authorities). The contract contains standard clauses with options for further development after the exploration, and the company specifies that all such activity will promote the interest of the local people. The company claims that the contract is not illegal (according to the UN's legal office's evaluations and statements in 2002) and refers to the UN's statement which supports its arguments about

legality. Important in Total's evaluation is the fact that the contract explicitly excludes exploitation, so that no natural resources will be exploited in the territory. Total emphasizes the difference between what it calls reconnaissance and exploration.

Reconnaissance versus exploration

Total is deliberate in its choice of words. The company believes, on the basis of the UN's statement in 2002, that exploration and reconnaissance activities are not in conflict with international law, whereas any further exploration or exploitation would be in conflict with international law – if not carried out in such a manner that it promotes the interests of the local people.

On ONHYM's web site there is a clear distinction among licenses for reconnaissance, permission for exploration and concessions for exploitation. Reconnaissance is a definition that is not often used in the oil and gas industry.²⁴ The activities that Total is carrying out – geological and geophysical studies, marine investigation and purchase of seismic data – are considered exploration activities by the industry. Drilling of test wells would, however, also normally be considered a part of exploration contracts but is not a part of Total's license today.

7. Evaluation

The Ethical Council of the Government Pension Fund – Global

Total's activity in the territory is very similar to that in which the American company Kerr-McGee was involved in 2005. It was at that time decided to exclude the company from the [Norwegian government] Pension Fund Global's investments on the grounds of "unacceptable risk of complicity in serious violations of fundamental ethical norms".²⁵

In the recommendation to exclude the company Kerr-McGee Corp. in 2005 the Ethical Council stated, among other things:

"The framework of international law, including the UN Charter and the Convention on the Law of the Sea, lay down that economic activity which involves exploitation of natural resources in occupied or Non-Self-Governed Territories must be exercised in cooperation with the people inhabiting those territories. The local population also has a right to the potential profits of such activities. These rules have been developed through treaty law and state practice, based on the understanding that especially natural resources often constitute the very reason for occupation and violent conflicts. The framework of international law thus seeks to make it unlawful to benefit economically from exploitation of natural resources, if such exploration has been based on occupation. As mentioned before, it is not entirely clear whether Morocco's exploration activities constitute a violation of international law, but based on the rationale behind the general rules of the international law in this area, the Council on Ethics finds that the economic activities offshore Western Sahara can be considered unethical."

The exclusion of Kerr-McGee was cancelled by the Ministry of Finance on 24 May 2006, after the company had terminated its exploration activity in the territory. The company was therefore also included in KLP's and the KLP Mutual Funds' investments in 2006.

Preparatory work to the Pension Fund's Ethical Guidelines

The question of investments in companies with activity in non-self-governing territories has been discussed in the legislative history of the Pension Fund's Ethical Guidelines (the Graver Report). In its report, pointed especially to problems connected with investments in companies with activity in non-self-governing, disputed or occupied territories and mentioned activity on the continental shelf offshore Western Sahara as a concrete example in which there could be grounds for showing constraint.²⁶

*“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.”*²⁷

International Law and Policy Institute

KLP Kapitalforvaltning has asked the International Law and Policy Institute (ILPI), through Gro Nystuen, former head of the Ethical Council of the [Norwegian Government] Pension Fund, for an assessment of Total's activity in the light of the present situation. ILPI concluded that Total's ongoing activities cannot be said to differ greatly from those of Kerr-McGee in 2005. If anything, ILPI believes that the grounds for exclusion are stronger now than in 2005. The reason is that Morocco ratified the UN Convention on the Law of the Sea in 2007 and is thus required to implement the Convention's regulations in the non-self-governing territories under its control. Resolution III states, among other things, that when a conflict arises with regard to the rights to natural resource exploitation in a non-self-governing territory, the parties must enter into consultation in which “the interests of the people of the territory shall be a fundamental consideration”. The state parties are further obliged not to “jeopardize or hamper the reaching of a final settlement of the dispute.”²⁸

Norwegian authorities have also several times warned Norwegian companies against investing in business activity in this territory – among other things because such activity may be perceived as a legitimization of the Moroccan sovereignty claim, which in turn might undermine the UN process.²⁹

8. Summary

Total claims, on the basis of the statement by the UN's legal office in 2002, that the company's activity is not in conflict with international law. The Ethical Council [of the Norwegian Government's Pension Fund], in its recommendation on Kerr-McGee in 2005, chose not to emphasize this argument, since its conclusion was that Morocco's goal without doubt was to exploit petroleum deposits and that Kerr-McGee in its activity contributed to this goal. Even though it was unclear whether Morocco's exploration activity constituted a violation of international law, in the light of general regulations of international law in this territory it had to be considered unethical.

ILPI concluded that no material difference exists between Total's activities in Western Sahara today and Kerr-McGee's activities in 2005. Total claims that its activities are not illegal according to the statement by the UN's legal office. ILPI believes the statement's validity is highly dubious inasmuch as there has been a considerable change in Morocco's obligations according to international law. In 2007 the country ratified the UN Convention on the Law of the Sea, and its obligations vis-à-vis the people of Western Sahara were strengthened. In 2005 the Ethical Council [of the Norwegian Government Pension Fund]

nonetheless chose to ignore whether the company contributed a breach of international law. The Ethical Council at that time looked at the ethical guidelines and considered the activity a breach of basic ethical norms – among other things because "such activities can be seen as support for the Moroccan sovereignty claims and thus weaken the UN sponsored peace process". Since the statement by the UN's legal office in addition is based on outdated legal information, ILPI concludes that Total's activity offshore Western Sahara is in breach of KLP's and the KLP Mutual Funds' ethical guidelines for responsible investments.

On the basis of the above-mentioned arguments and discussion, Norwegian authorities' requests, and precedents from earlier cases, KLP and the KLP Mutual Funds consider investments in Total S.A. to constitute a risk of contributing to breaches of fundamental ethical norms, and that the company is therefore excluded from investments.

9. Resolution

KLP and the KLP Mutual Funds resolve to exclude the company Total S.A. from investments as of 1 June 2013.

References

¹ URL: http://en.wikipedia.org/wiki/Western_Sahara

² Landinfo (The Norwegian Country of Origin Information Centre) URL: <http://www.landinfo.no/id/579.0>

³ UN High Commissioner for Refugees, UNHCR, Annual Report on Algeria, 2013.
URL: <http://www.unhcr.org/pages/49e485e16.html>

⁴ See UN map over Western Sahara with the separation barrier (the 'Berm') included.
URL: <http://www.un.org/Depts/Cartographic/map/dpko/minurso.pdf>

⁵ ICBL, Landmine and Cluster Munitions Monitor 2012

⁶ The system of Non-Self-Governing Territories was established through the UN Charter in relation to the decolonization process, and to regulate the situation for territories that had not achieved independence, meaning colonies, protectorates and mandates of different kinds. See UN Charter, Article 73, Declaration regarding Non-Self Governing Territories. URL: <http://www.un.org/en/documents/charter/chapter11.shtml>

⁷ The UN General Assembly has adopted a series of resolutions establishing the status of Western Sahara, including A/RES/59/131, 25 January.

⁸ UN's list over Non-Self-Governing Territories
URL: <http://www.un.org/Depts/dpi/decolonization/trust3.htm>

⁹ ICJ, Advisory Opinion, dated 16 October 1975
URL: <http://www.icj-cij.org/docket/index.php?sum=323&code=sa&p1=3&p2=4&case=61&k=69&p3=5>

¹⁰ The Petroleum Fund's Council on Ethics: Recommendation on Exclusion of the company Kerr-McGee Corp, 12 April 2005, clarifies further the background of the conflict and of the status of Western Sahara.
URL: http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/tilradninger-og-brev-fra-etikkradet/Recommendation-on-Exclusion-from-the-Government-Petroleum-Funds-Investment-Universe-of-the-Company-Kerr-McGee-Corporation.html?id=419582

¹¹ MINURSO's webpage, URL: <http://www.un.org/en/peacekeeping/missions/minurso/>

¹² See e.g. US Government, Central Intelligence Agency, World Fact Book 2012:
URL: <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html>

¹³ URL: <http://www.riksdagen.se/sv/Dokument-Lagar/Utskottens-dokument/Betankanden/Arenden/201213/UU8/>

¹⁴ URL: <http://www.regeringen.se/sb/d/2688/a/19643>

¹⁵ URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:055:0014:0015:EN:PDF>

¹⁶ United Nations Convention on the Law of the Sea, 1982 (UNCLOS), among other articles 76 and 77.

¹⁷ E.g. GA RES 3458 (XXV) of 10 December 1975 establishing "the right of the people of the Spanish Sahara to self-determination, in accordance with General Assembly Resolution 1514 (XV)"

¹⁸ Resolution III, Third United Nations Conference on the Law of the Sea.

¹⁹ URL: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Morocco

²⁰ Letter from UN Legal Office to the President of the Security Council, dated 12 February 2002, S/2002/161

²¹ S/2002/161, para 25

²² URL: http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/tilradninger-og-brev-fra-etikkradet/Recommendation-on-Exclusion-from-the-Government-Petroleum-Funds-Investment-Universe-of-the-Company-Kerr-McGee-Corporation.html?id=419582

²³ URL: <http://no0ilcanarias.files.wordpress.com/2012/12/total-re-western-sahara-14-dec-2012.pdf>

²⁴ GES has carried out an extensive internet search on the terminology in the industry.

²⁵ URL: http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/tilradninger-og-brev-fra-etikkradet/Recommendation-on-Exclusion-from-the-Government-Petroleum-Funds-Investment-Universe-of-the-Company-Kerr-McGee-Corporation.html?id=419582

²⁶ Norwegian Government, White Paper, 2003: 22, Forvaltning for fremtiden page 92

²⁷ Norwegian Government, White Paper, 2003: Annex 7, para 3.1, page 92

²⁸ United Nations Convention on the Law of the Sea, Resolution III(1)a, Dec. 10, 1982, 1833 U.N.T.S. 3, 397; 21 I.L.M. 1261 (1982) [hereinafter, UNCLOS].

²⁹ URL: <http://www.regjeringen.no/nb/dep/ud/tema/naeringslivssamarbeid/vest-sahara.html?id=480822>