

To the attention of Ms Nicole Notat
President, Vigeo Eiris

London, 3 March 2017

Re: Vigeo Eiris Maroc certification of bonds for energy production in occupied Western Sahara

Dear Ms. Notat:

Western Sahara Resource Watch (WSRW) notices a letter that your company sent to Business and Human Rights Resource Centre (BHRRC) on 27 February 2017. The purpose of your letter is to comment on the concerns from our association regarding Vigeo Eiris' certification of green bonds issued for the Moroccan company MASEN in occupied Western Sahara.

Ms. Notat, WSRW still expects to receive an answer to the questions that we have sent to you. We believe that facilitating the financing of Moroccan energy projects in Western Sahara through the issuing of certificates for green bonds is manifestly contrary to the wishes and interests of the people of Western Sahara.

Allow us to make some observations and concerns regarding your letter to BHRRC.

1. Due diligence

Your letter to BHRRC on 27 February 2017 opens with the following: "Mr Hagen has repeatedly stigmatised the circumstances and the legitimacy of **the due diligences conducted by our agency** in November 2016 as Verifier in the process that enabled the Moroccan company Masen to obtain the CBI (Climate Bond Initiative) certification for its green bond" (our bold).

As is clear from our previous letters, and based on the serious consequences for the people of Western Sahara of your company granting a certification to Moroccan energy projects in the territory, it has been vital for Western Sahara Resource Watch to find out why and with what right Vigeo Eiris undertook such a certification. In this regard, we find your statement regarding due diligence somewhat misleading. At first sight, one would believe that the due diligence you mentioned is referring to our question, namely why Vigeo Eiris decided to undertake the certification for Moroccan projects in Western Sahara. However, upon reviewing the overall correspondence (both the letter of 27 February 2017 as well as the one dated 19 December 2016), it appears clear that the due diligence referred to by Vigeo Eiris in this remark is referring to the narrow analysis of whether or not the projects evaluated are in line with the CBI standards. As we have stated elsewhere, this is not our concern.

Elsewhere in the letter of 27 February, Vigeo Eiris writes (our bold):

"We have noted that Mr Hagen sets to one side the scope of this green bond verification - i.e. the sustainable production of clean electricity from wind and solar energy – and concentrates on issues **unrelated to the framework of the due diligences that we have undertaken**, so as to question the legitimacy of these projects due to the location of some of them in the western side of Sahara."

In other words, Vigeo Eiris' purported due diligence has *not* extended to matters of sovereignty, international law and human rights as we have addressed in our correspondence. In the same way, we

understand from your letters that your due diligence did *not* address the question of which laws apply to Western Sahara, it did *not* address the legal nature of the territory itself, it did *not* address the rights of the people as the original inhabitants of that territory at the time of the Moroccan invasion, nor did it address the question of what gives Vigeo Eiris the right to certify a project in Western Sahara for a Moroccan institution.

Elsewhere in your letter, you write “We are aware (...) that Mr Hagen’s campaign against the due diligences undertaken by Vigeo Eiris is linked to the dispute...”. It should be noted that WSRW is not “against” any due diligence. We fail to see why Vigeo Eiris would believe this. We have specifically stated that the compliance of the project vis-à-vis the CBI standard is irrelevant to us. What we have sought is a clarification of *what kind* of actions were taken by your company upon and after deciding to undertake the assignment for the two projects located in Western Sahara, such as which laws would apply. We find it confusing that Vigeo Eiris criticizes WSRW for realizing a “campaign” against a due diligence that you rather clearly state has *not* been carried out.

We note that Vigeo Eiris in its letter to us on 19 December 2016 claims to adhere to international standards such as UN Guiding Principles. At the same time, you state that you have not undertaken due diligence of aspects relating to the issues which we have raised. We believe this is an unfortunate omission, considering that the people of Western Sahara are in a particularly vulnerable situation. The Guiding Principles were set up particularly in order to protect such vulnerable groups and individuals:

The Saharawi people are the only people in the whole world from a non-self-governing territory, not represented by an administering power. Half live in exile in refugee camps, the other half under an occupying power with no legal right to be present on their land. No UN member state is today speaking on their behalf.

It should be added that Vigeo Eiris in the second consecutive letter to BHRRC states that WSRW is against the renewable energy projects *per se*, since some of them are located in Western Sahara. As we have already commented in our letter 14 February 2017, this is not correct. We are of course not against *all* such projects. WSRW’s concern is limited to the certification of the two projects that are located in Western Sahara. WSRW has no objections regarding the projects in Morocco proper.

2. Vigeo Eiris’s approach to the territory

We note that Vigeo Eiris criticizes our “views” regarding the status of Western Sahara, while at the same time fails to answer our questions on international law and its own policies. Despite the fact that a due diligence has not been carried out on the issues we have raised, we observe that Vigeo Eiris maintains its very clear position from previous letters, addressing the territory and the conflict from what seems to be a perspective with no basis in international law.

In your letter to BHRRC, Vigeo Eiris specifically addresses topics such as a) the conditions under which Vigeo Eiris believe operations in “the western side of Sahara” must take place; b) the representativeness of Polisario; c) the legal status of the Moroccan claims. We would like to address a few concerns regarding the new elaborations from Vigeo Eiris regarding the territory:

a) Naming of the territory

Vigeo Eiris still insists on reformulating the name of the territory in manners which are not in accordance with the terminology of the UN. This is the second consecutive letter in which we are baffled to see Vigeo Eiris use a terminology wholly different to that used by the international

community. In its letter to BHRC of 27 February, Vigeo Eiris uses the formulation “the western side of Sahara” - *twice*. We must admit this is the first time we have heard such a formulation. Trust us, this is not meant to be sarcastic, but the formulation is so peculiar that it provides only *one* hit on www.google.com. Even though it is an improvement from the Moroccan expression “region of Sahara” used in your previous correspondence, we ask for your understanding that we seriously need to question your company’s knowledge regarding the territory and the conflict when it fails to name the territory in line with UN terminology. We also observe that the map on your website is still not corrected, and remains different to UN maps of the territory. Not a single UN member state, except Morocco, would apply such a map.

b) Mixing the “people” with the “population”

Vigeo Eiris in its last letter replaces the term “people” with “population”. For instance, “these investments can drive the improvement of populations’ living conditions”, or the claim that Polisario is not in a position to “act as the representative of the whole population”. A study of the rights of the Saharawi people might have helped to clarify this position. The Court of Justice of the EU judgement of 21 December 2016, and Article 1 of the ICESCR and ICCPR Covenants are clear on these points. It is a “people” – not a “population” – which has the right to self-determination. It can also be added that WSRW has never claimed that Polisario is the representative of the whole population, as you suggest. Polisario is considered a representative of the “people” of the territory.

c) Nature of Polisario

Vigeo Eiris claims that Polisario is a “stakeholder in the political negotiation”. That is wrong. Polisario is one of two “parties” to the conflict. We refer you to *any* UN Security Council resolution with Western Sahara as its subject. As noted before, the UN has also used the terms “representative of the people of Western Sahara” with reference to Polisario. The Court of Justice of the EU is very clear on this point, and this constitutes the entire basis of the mentioned judgement. Find the last few decades worth of UNSC resolutions on the website of MINURSO:

<http://www.un.org/en/peacekeeping/missions/minurso/resolutions.shtml>

d) The legal status of Morocco in Western Sahara

Vigeo Eiris questions our terminology of “occupation” in regards to Morocco’s presence in Western Sahara, stating that such terms are “not endorsed by the whole international community”. It should be noted that not a single territory or country in the entire world would be qualified as “occupied” if applying this criterion.

When operationalizing the legal concept of ‘occupation’, it would be useful to refer to other criteria, for instance as seen in the methodology applied by the Eiris Foundation’s project on business in occupied lands, <http://www.businessinoccupiedlands.org/methodology>

“This project focuses on corporate operations and activity in occupied territories by researching the presence of companies in two occupied territories—Crimea and Palestine. In determining that these two territories are occupied, we defer to the United Nations (UN) General Assembly and relevant UN agencies. In the case of Crimea, the UN General Assembly voted on March 14, 2014, not to recognize changes in the status of the Crimea region. In the case of Palestine, the UN’s International Court of Justice (ICJ) affirmed in its advisory opinion of July 9, 2004, that Palestine is occupied. “

It is worth noting that the UN General Assembly has labelled Western Sahara as under “occupation”, which is not the case of the UN General Assembly resolution on Crimea from 2014 mentioned above.

The responses from the Security Council and the General Assembly were stronger in the case of Western Sahara than in the situation of Crimea. The relevant UNGA resolution 34/37 on the occupation of Western Sahara was referred to in the CJEU judgement which we mentioned in our previous letter.

The ICJ has stated that Morocco has no legal right to be in Western Sahara.

A useful, independent analysis of the occupations of Western Sahara, Palestine and Crimea can be found in the publication "Occupation/annexation of a territory: Respect for international law and human rights and consistent EU policy" by the Policy Department of the European Parliament, 2015, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534995/EXPO_STU\(2015\)534995_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534995/EXPO_STU(2015)534995_EN.pdf)

3. Methodology in measuring consent or opposition

In our previous letters, we have stressed the obligation of companies to seek meaningful consent prior to undertaking business in Western Sahara.

We are surprised to read "We have not collected or observed any material element suggesting the opposition of citizens, associations, political parties or labor unions, against Masen's solar and wind energy infrastructure projects".

- a) The argument is *ethically problematic* and shows that Vigeo Eiris might have limited understanding of the situation on the ground in Western Sahara. Would Vigeo Eiris expect Saharawis to jeopardise their personal security and safety in order to protest against renewable energy projects or their financing? There is a fundamental risk involved for Saharawis in the Moroccan controlled parts of the territory to undertake protests, and there is a near impossibility for them to establish associations, parties or unions. The secretary-general for the unregistered Saharawi association CSPRON, which monitors Morocco's economic activities in Western Sahara, is currently serving a life sentence in a Moroccan jail.
- b) The statement is *factually wrong*. Hundreds of Saharawi refugees have indeed protested Masen's activities, in several demonstrations. Find photos and images on our website www.wsrw.org. Search for instance "Siemens". If Vigeo Eiris has mistaken the 'people' for 'population' (as we have commented on above), we would understand that it has forgotten that this half of the Saharawi people exist.
- c) *The argument shows that Vigeo Eiris is relating to human rights abuses in a reactive, rather than proactive manner*. It would have been more in line with modern understanding of a company's human rights obligations if Vigeo Eiris first tried to seek the consent from the people of Western Sahara, rather than expecting this oppressed people to protest afterwards. We find such a way of reflecting on a company's own human rights responsibilities surprising. The approach is contrary to the principles and guidelines of, for instance, UNGP or OECD which Vigeo Eiris in a letter on 19 December 2016 stated that it respects.
- d) Your argument *proves our point*. The fact that Vigeo Eiris has "not collected (...) material element suggesting the opposition" against energy projects raises the immediate question: Why did Vigeo Eiris not seek to collect such information? We fail to understand why Vigeo Eiris seemingly did not seek the consent of the people of the territory prior to undertaking the certification. Such process would have documented the opposition. Vigeo Eiris seems to have missed the P in FPIC.
- e) In terms of *methodology and logic*, we note that Vigeo Eiris considers the absence of an observation as a proof that something does not exist. That is not a valid argument. In our opinion, the lack of visibility of a protest under a repressive regime is not a suitable indicator

for measuring whether or not local consent or rights are respected. This is particularly the case if one has not tried to look for such observations. We note in your letter of 19 December that the work on this certification was done “in full compliance with the agency’s methodological standards” and “under our shared quality control processes”. We recommend those be reviewed.

4. Maintaining dialogue

Finally, WSRW would like to express our wish to maintain a dialogue with Vigeo Eiris over this matter. We would like to point three aspects that could be improved in this dialogue.

Unclear addressees. We notice in your latest letter to BHRRC, on 27 February 2017, at the bottom of the first chapter, the following statement “we are pleased to provide you and Mr. Hagen with the following comments”. The same letter also states that the letter which your company sent to BHRRC on 27 January 2016 as an answer to the letter we sent you on 23 December 2016. This was new to us. If letters are meant for us, we urge you to address them to us.

Unclear sending. When responding to WSRW’s letters, you are welcome to send the letters to the email addresses WSRW has provided you with. The previous two letters which Vigeo Eiris seems to have been wanting to send to us are both sent to BHRRC only. The first of these two letters to BHRRC was never sent to us at all, while the second was sent to us in blind copy. We would prefer not to guess which letters online you intend to have been sending to us. It complicates the correspondence.

Referencing the sender. This dialogue is between Western Sahara Resource Watch and Vigeo Eiris. Numerous references in your letters give the impression that they are sent by one of our board members in his personal capacity, as if the concerns were of a personal nature. WSRW works from over 40 countries internationally, and our letters have been sent from WSRW.

WSRW regrets that Vigeo Eiris does not reply to our questions. They are related to Vigeo Eiris’ understanding of international law, to the very specific certification of Moroccan projects in Western Sahara and to Vigeo Eiris’ general business practice. We read that you prefer not to answer our questions as you view them “sometimes very detailed”. We disagree on that point.

A copy of this mail is provided to UN Global Compact. We observe that Vigeo Eiris is adhering to UNGC. As a participant of UNGC, Vigeo Eiris is expected to respond to concerns from civil society. We would like to underline that one phosphate importer from Western Sahara has been filed as non-communicative, and thus delisted from UNGC for not responding to questions from civil society.

Your letter to BHRRC on 27 February, and our response of today, will today be posted on our website www.wsrw.org/a105x3765.

Looking forward to hear from you with answers to our questions

Sincerely,



Joanna Allan

Chair, Western Sahara Resource Watch

joanna@wsrw.org, www.wsrw.org