

SENIOR ADVISORS:*

Lord Paul Boateng, PC

Fmr. UK Chief Secretary to the Treasury & High Commissioner to South Africa
(Mentor to DaMina Advisors)

H.E. Kabine Komara

Fmr. Prime Minister, Guinea

H.E. Luísa Dias Diogo

Fmr. Prime Minister, Mozambique

Hon. Victor Kasongo Shomary

Fmr. DR Congo Deputy Minister of Mines

H.E. Isaiiah Chabala

Fmr. Zambia Ambassador to EU & UN

H.E. Chris Katsigazi

Fmr. Ugandan Ambassador to the US & Permanent Sec. Min. of Foreign Affairs

Dr. Ousmane Sylla

Fmr. Guinean Minister of Mines

H.E. Mamadouba Max Bangoura

Fmr. Guinean Minister of Planning and Private Investment Promotion

Mr. Bismark Rewane

Chair, Delta State Econ Council, Nigeria

Ms. Rita Gail-Johnson

Fmr. Senior Executive, Eurasia Group

Mr. David Ensor

Fmr. Chief Credit Officer, AIG-Chartis

Mr. Scott Korman

CEO, Nashone Inc

Hon. Conrad Enill

Fmr. Finance Minister, Trinidad & Tobago

H.E. Dr Ablasse Ouedraogo

Fmr. Deputy Director General, WTO;
Fmr Foreign Minister, Burkina Faso

H.E. Anthony De Bono

Fmr Malta Ambassador to Jordan

**AFRICA-ASIA POLITICAL RISK RESEARCH,
DUE DILIGENCE, GEOPOLITICAL,
REGULATORY RISK ADVISORY SERVICES**

Sebastian Spio-Garbrah

Managing Director & Chief Analyst,
sebastian@daminaadvisors.com

Philippe de Pontet

Senior Fellow, Sub-Saharan Africa
Philippe@daminaadvisors.com

ABOUT DAMINA

DaMina Advisors is a preeminent Africa-Asia focused independent frontier markets political risk research, due diligence, M&A transactions consulting and strategic geopolitical risks advisory firm.

DaMina Advisors is legally registered and has offices in the US, Canada, The UK and Ghana. DaMina is headquartered in Toronto.

US Treasury vs. US DOJ on Glencore DRC Payments

Secretary Mnuchin may designate company as ‘systemically important’ to avert collapse

Sebastian Spio-Garbrah, Chief Frontier Markets Analyst

Harrison Declan, LLB, BL, LLM, MCI Arb - DaMina Research Fellow, Regulatory Risks

The US Treasury and US Justice Department are at seeming loggerheads over Glencore’s DR Congo payments to sanctioned Israeli billionaire Dan Gertler. While the US Treasury is believed to have signaled its ‘okay’ to the Swiss based company to proceed with a new payment arrangement in June – outside the US banking system - to its Israeli partner, without triggering a negative action from OFAC, the US Justice Department has taken the opposite position. The unresolved tensions between the two US government agencies is not likely to be easily resolved. If Glencore share price slides much further, The US Treasury may invoke Section 113 of the Dodd-Frank Act, with the Financial Stability Oversight Council which is chaired by the Treasury Secretary Steven Mnuchin to temporarily designate Glencore as ‘systemically important’ since it’s material financial distress—(or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities) — poses a threat to U.S. financial stability. A US Treasury designation of Glencore as a “Nonbank Financial Company Designation” will effectively torpedo the US Justice Department action and see Glencore’s financing activities regulated by the US Federal Reserve Bank/Swiss National Bank.

How we got here

The Global Magnitsky Human Rights Accountability Act (2016) empowers the U.S. president to impose sanctions on non-U.S. individuals and entities who engage in or materially assist or sponsor gross violations of human rights committed in any foreign country. In exercise of powers under the Act, the U.S. government, in December 2018 announced the imposition of sanctions against Dan Getler and other business entities associated with him. Additional entities were added to the sanction list in June 2018. The effect of the sanctions was to block properties or interest in properties belonging to Getler and the entities, and to prohibit U.S. persons from engaging in transactions with them.



Timeline of Recent Events before July 3, 2018 DOJ FCPA Subpoena

EUROPE
3 Abercorn Mansions
17 Abercorn Place
London NW8 9DY

AFRICA
10 Abokobi Road
East Cantonments, Accra
Ghana, West Africa

AMERICAS
55 Fifth Ave.
Suite 1702, NY 10003
New York

CANADA (HQ)
90 Burnhamthorpe Road West, Suite 1208
Mississauga, Ontario, Canada

The Parties

Glencore is a Swiss based major mining and metals trading company. Some of its most prized assets include cobalt/copper mines in the Democratic Republic of Congo. Getler is an Israeli entrepreneur who owned 31 per cent stake in the Mutanda Mining Joint Venture held through his Fleurette Group, and 14 per cent stake in Katanga Mining in the Democratic Republic of Congo. Glencore also owned stakes in these Mines. Glencore purchased Getler's 31 per cent and 14 percent in the Mutanda and Katanga Mining respectively, thus owning 100 per cent in Mutanda and around 86.3 per cent in Katanga. Glencore's cobalt and copper assets in the DRC – if suddenly removed from the global cobalt and copper supply chain could cause a catastrophic rise in copper prices, and doom struggling cobalt dependent battery companies such as TESLA among others.

The Issue

In April 2018, Getler sued Glencore seeking over \$2 billion in damages for alleged unpaid royalties. It also served freezing orders on Glencore's assets in the DRC. Glencore reached an agreement with Getler for the alleged payments to avoid freezing of their assets in the DRC in June.

However since Getler is under U.S. sanctions, and with no US bank willing to process a payment to Gertler Glencore decided that the best option would be to pay Getler in Euros. By not paying him in US dollars, it hoped it would be getting around the sanctions. A spokesman of Glencore said the company had discussed the matter with U.S. and Swiss authorities but has kept sealed lips as to the outcome of the discussion. Glencore would not have proceeded unless it got an okay from the US Treasury.

Glencore Options before DOJ action

Glencore did not avoid U.S. sanctions by paying Getler in Euros. A payment to Getler is a violation of the sanctions irrespective of the currency in which the payment is made unless it got a waiver or assurance from the US. And although Glencore is not a U.S. entity, violating U.S. sanctions would practically shut it out of the U.S. financial system because U.S. entities would be reluctant to do business with Glencore for fear of primary sanctions from the U.S. government, which can be imposed on them under § 3 of the Magnitsky Act. Today's DOJ action may see US dollar denominated credit lines to Glencore frozen in the coming weeks if the company's share prices collapse much further – unless the US Treasury invokes Section 113 and intervenes in the dispute.

There were possibly three options by which Glencore could escape U.S. secondary sanctions. First, if it qualifies under the exception created in the Magnitsky Act relating to "goods"; second, if it can show that exempting it from sanctions is vital to the U.S. national interest; and third, if its home country is a party to any bilateral or multi-lateral treaty or measure that provides protection from U.S. sanctions.

Under the first option, the Magnitsky Act exempts from sanctions, the importation of “goods” as defined under the Export Administration Act of 1979: (§ 3(2)(C)(i)). “Goods” under the Export Act means “any article, material, supply or manufactured product, including inspection and test equipment, and excluding technical data”: (§ 17). Thus, if Glencore’s business relationship with the U.S. is the importation of goods into the U.S., it would not be subject to sanctions.

Under the second option, Glencore may be exempted from sanctions if the president determines that it is in the national security interest of the U.S. or the Treasury Secretary determines that it is in the national interest of the U.S. (§ 3(g) of the Magnitsky Act). The U.S. Department of State has a list of the National Interest of the U.S., and this includes open markets and global economic growth. Thus, Glencore could be exempted from sanctions if it can show that such exemption would be in the national interest of the U.S.

It is worthy of note that this option applies to a sanctionable entity, i.e. the entity must have committed an act that warrants an imposition of sanction but then may seek a waiver or exception from sanctions.

Under the third option, Glencore may escape the sanctions if its home country is a party to any bilateral or multi-lateral treaty or measure that provides protection from U.S. sanctions. Glencore has its headquarters in Switzerland. Switzerland is located in Europe but is not a member of the European Union (EU), and still maintains its close ties to the United States. If there were any protections from U.S. sanctions the EU was contemplating for member states’ companies, Glencore would not be able to benefit from it.

Iran angle

The above analysis also applies to the EU – Iran debacle. Recall that following the re-imposition of sanctions on Iran by the U.S., the EU sought measures to protect companies in member states that do business with Iran from U.S. sanctions. Knowing how ineffective these measures would be, the EU has pled with the U.S. to waive sanctions for EU companies. Already, most EU companies have reiterated their commitments to comply with U.S. sanctions and stop doing business with Iran. For companies that rely on assurances from the EU and continue doing business with Iran, they have to either avoid the U.S. financial system or seek refuge in any of the three options discussed above.

LTCM-type black swan collapse?

It is very likely that ultimately the pro-business wing of the Trump administration led by Secretary Mnuchin may yet prevail over the DOJ prosecutors, but in the interim, Glencore’s sudden loss of US dollar credit lines and evaporating air of capital market inevitability may yet see it endure a sudden LTCM-type black-swan event which may cause the US Treasury/ Swiss National Bank and US Fed to intervene fearing a domino effect on the global banking system if Glencore were to tether on collapse.

Contact: Stephanie@DaMinaAdvisors.Com

To schedule in-depth Q&A with DaMina Advisors

DaMina Advisors is a preeminent Africa-Asia focused independent frontier markets political risk research, due diligence, M&A transactions consulting and strategic geopolitical risks advisory firm. DaMina Advisors is legally registered and has offices in the US, Canada, The UK and Ghana. DaMina is headquartered in Toronto.

www.DaminaAdvisors.com

On Twitter  [@DaMina_Advisors](https://twitter.com/DaMina_Advisors)