

Phosphate from Western Sahara – the back story

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PART I – THE PROBLEM

You may have heard there is a problem with phosphate imported from Western Sahara. Very briefly we would like to give you the back story, so you can understand why there is a problem and what can be done about it.



*The Bou Craa phosphate mine site in occupied Western Sahara. Moroccan flags do not stop Bou Craa phosphate from belonging to the Saharawi people.
(photo Norwegian Support Committee for Western Sahara)*

1 Illegal because contrary to Australian and International Law

Phosphate imports from Western Sahara sold by Morocco are illegal.

a) The International Court of Justice said in 1975¹ that Morocco had no claim to the territory of Western Sahara and reaffirmed the people of Western Sahara's right to self-determination. The Saharawi people's right to determine their sovereignty over that territory means that first: their consent is needed before exploitation of their natural resources can be legal and second they must benefit from the trade, see Hans Corell.²

¹ ICJ Advisory Opinion 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>

² Hans Corell, UN Legal Counsel, Letter dated 29 January 2002 to the President of the Security Council www.arso.org/UNLegaladv.htm

See also: General Assembly resolution 1803 (XVII) of 14 December 1962 establishing the principle of "permanent sovereignty over natural resources". And also: UNGA Resolutions 1514 and 1541 of 1960 which enshrine the right of self-determination.

However, over half the population live in refugee camps over the border in Algeria, where they fled to in 1975-1976 when Morocco invaded their country and bombed them with napalm, white phosphorus and cluster bombs. Life in the refugee camps is tough in a particularly harsh desert with no trees or shelter, but strong winds, sand storms and searing heat in the summer. The Moroccans claim that they have invested in Western Sahara (roads, desalination plant, wharf etc), but these refugees clearly gain no benefit. Moreover, the purported investment in infrastructure serves to further entrench the illegal occupation and the settlement of Moroccan nationals in Western Sahara.

b) An important principle of Contract law is *Nemo dat quod non habet*, which means that 'you cannot give what you haven't got'. Morocco does not own title to the resources of Western Sahara because it is not the recognised sovereign but merely an administrative illegal occupant. It cannot pass good title to importing companies in other countries.³

Furthermore, Section 26 (1) of Sale of Goods Act states that a buyer from a non-owner obtains no better title than the seller⁴

c) Australian Customs declarations require importers to name the country of origin of the goods they are bringing into Australia. Here the importers face a problem – do they write Western Sahara (country code EHS) or do they write Morocco (country code MAR)? Either way they do something wrong. If Western Sahara, they need to prove consent and benefit of the people. If Morocco, it is false and they have written something misleading on their declaration to Customs which is an offence.⁵

d) Other legal issues can be raised, according to a Canadian international law professor, Jeffrey Smith, about the question of criminality of those involved in taking Western Sahara's resources. These include potentially the crime of receiving stolen goods, of being guilty of pillage in a war zone, of aiding and abetting a war crime, of being part, with Morocco, of a joint criminal enterprise.⁶

2 Unethical trade gives support to an illegal and brutal regime

The Saharawi population is divided by a military wall with over half living in refugee camps in the harsh desert of south west Algeria, the rest live under an oppressive Moroccan regime in occupied Western Sahara. These

³ Tim Robertson SC spoke on this point at the Australian Institute of International Affairs (AIIA) on 5 October 2011, recorded here : <http://www.aiia.asn.au/vic-papers>

⁴ SALE OF GOODS ACT 1923, s26(1)

⁵ See Tim Robertson *ibid*

⁶ See Jeffrey Smith: *The Plundering of the Sahara*, See here the discussion of the two streams or sources of international law applicable to the taking of Western Sahara's natural resources in part 3 and especially at paragraphs 3.13 – 3.20, in "The plundering of the Sahara: Corporate criminal and civil liability for the taking of natural resources from Western Sahara".

people suffer daily human rights abuses in the streets, even in schools.⁷ The Saharawi are also economically marginalized in their own land.

The OECD has guidelines for multinational enterprises⁸ which show that that the responsibilities of companies extend right down the supply chain. We believe that Australian companies must consider themselves responsible for perpetuating the systematic persecution of Saharawis living under Moroccan control. Whereas taking a stand would definitely help the people whose resources they desire. The OECD due diligence guidance for responsible supply chains⁹ assists companies to make sure that they protect human rights and do not contribute to conflict.

All importers of phosphate from Western Sahara are accepting a product mined and sold by a Moroccan company. They are not mining themselves, but their responsibilities still extend down the supply chain to the rock face in the open cut mine at Bou Craa.



The bulk carrier Allegra unloads its cargo from Western Sahara in Hobart November 2011 (photo Glenn Towler)

3 Unjust because exploitation of natural resources in Western Sahara lacks consent of the sovereign Saharawi people and they do not benefit

Saharawi workers at the Bou Craa phosphate mine make up less than 10% of the workforce. They are nearly all at the lowest pay rung. Saharawi technicians and engineers have been replaced by Moroccan

⁷ See: Amnesty International Annual Report 2011:

<http://www.unhcr.org/refworld/country,,,ESH,456d621e2,4dce1552c,0.html>

⁸ OECD Guidelines for Multinational Enterprises,

http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html

⁹ OECD Due Diligence guidance for responsible supply chains of Minerals from Conflict Affected and High Risk Areas.

http://www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00.html

settlers, enticed to Western Sahara with big tax advantages, fuel subsidies and housing benefits¹⁰.

A mass protest took place at Gdeim Izik in October-November 2010 in which 20,000 Saharawis walked out of the towns to complain that they have become second class citizens in their own country. Moroccan authorities reward their own countrymen with land and property in Western Sahara, while Saharawis cannot get jobs, decent housing, health or education benefits for their families. They believe that their country's resources would sustain the indigenous population very comfortably¹¹.

PART II – THE SOLUTION

4 Support for UN peace process needs strengthening

Australia, like every country in the United Nations General Assembly, supports the UN peace process for Western Sahara but turning a blind eye to the effects of the trade of Australian companies in Saharawi resources is undermining that very process.

The international network, Western Sahara Resource Watch maintains that Morocco will have little incentive to reach a settlement of the conflict so long as such trade continues. Stopping importing strengthens the peace process. A Canadian lawyer, Jeffrey Smith has documented how much Morocco gains by its sale of phosphate mined in Bou Craa¹²

The Norwegian state pension fund was found to be investing in several companies dealing in the natural resources of Western Sahara. They have not sought to justify this, on the contrary, they have taken steps to engage with the companies and in the case of those unwilling to cease their activities, they have divested their holdings in those companies from their portfolios.¹³ Needless to say, this amounts to many millions of dollars. Such a move is helpful in convincing Morocco that the days are numbered when it can take what it wants from the country it illegally annexed in 1975.

¹⁰ Verbal communication in 2009 from Sid'Ahmed Lemsiyed, president of CSPRON, a Saharawi association in the occupied territory protecting the natural resources of Western Sahara. Lemsiyed is at present in Salé Prison near Rabat, the capital of Morocco, where he has been incarcerated without trial since being arrested on 25 December 2010. 22 other Saharawis share the same fate.

¹¹ ASVDH - Saharawi Association of Victims of Serious Human Rights Abuses by the Moroccan State - Report on the camp of Gdeim Izik and the events which followed its dismantling. 4 January 2011: <http://asvdh.net/index.php?s=rappport+gdeim+izik>
JJP Smith confirms this having assessed the value of the shipped exports from El Aaiun to be US\$ 450m per annum.

¹² J.J.P. Smith, "The taking of the Sahara: The role of natural resources in the continuing occupation of Western Sahara" (manuscript pending publication mid-2012).

¹³ vest-sahara.no : <http://vest-sahara.no/a49x1737>

Another case where we saw a change of heart in this conflict was when Mauritania gave up its claim. It had invaded Western Sahara from the south in 1975, while Morocco came from the north, but in 1979 Mauritania renounced its claims, acknowledging its occupation to have been illegal.

In Namibia, trade by South Africa was halted when the UN declared that the resources of a country awaiting self-determination could not be exploited.

It is in the long term interests of every company which wishes to trade in Saharawi resources, whether phosphate, fish, oil or sand, to act in such a way that the UN can accomplish its mission and set the situation to rights so that everyone knows with whom to deal. The UN mission sent to organise a referendum of self-determination went to Western Sahara in 1991. It's 21 this year. It is high time it fulfilled its mandate. With full cooperation by UN member states, it can do so.

We ask Australian importers to become part of the solution to this conflict instead of remaining part of the problem. Eventually Australia negotiated a fair deal with East Timor over the exploitation of its oil reserves. Let's do the right thing here too.

5 Using alternatives for Bou Craa phosphate will enable Saharawi self-determination and self-management of their natural resources

The Australian importers tell us that the phosphate from Western Sahara is of a very high quality and that it is difficult to source such material elsewhere. Yet some companies are taking an ethical position and refusing to deal in phosphate from Western Sahara.

The Norwegian fertiliser giant, Yara, for example, has just made a new contract with OCP (The Moroccan phosphate company, Office Chérifien des Phosphates) which specifically excludes any material mined in Western Sahara, see: <http://vest-sahara.no/a49x1734> The Spanish fertiliser company FMC Foret closed its plant in Huelva at the end of 2010 as it had stopped importing phosphate from Bou Craa. Mosaic in the USA has also ceased its imports from Bou Craa.

Other sources for the phosphate can be sought, but other fertilisers can be used as well. We see a diversification of methods of fertilising the land as a good form of future-proofing Australian agriculture.

6 Conclusion – An independent Western Sahara would allow the region to prosper

Settlement of the conflict in Western Sahara is highly desirable for the Maghreb region of North Africa as a whole. It put plans for an economic union on ice about 10 years ago, chiefly because of this unresolved issue. Development could proceed to the advantage of all the countries (Libya, Tunisia, Algeria, Western Sahara, Morocco and Mauritania) as soon as the last colony in Africa is allowed to exercise its right to self-determination.

Furthermore, there would be no reason in such circumstances for Morocco to remain the only country not in the African Union.¹⁴

José Ramos Horta has said that Western Sahara would be a beacon for democracy in Africa and a link to the rest of the world. The government in exile of the Saharawi Republic is “the most vibrant democracy in the Arab Islamic world”, says Middle East expert, Stephen Zunes. This is why we, too, want to see the long running case resolved. Not only for justice to be done finally to the long-suffering Saharawi people, but for the region and for the world.



Will this Saharawi baby born in the refugee camps have a chance to grow up in his own country and benefit from its natural resources?

¹⁴ Morocco walked out of the AU's predecessor, the Organisation for African Unity in 1984 following admission in 1982 of Western Sahara as a full member state.

Further information

- ICJ Advisory Opinion 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>
 - Hans Corell, UN Legal Counsel, Letter dated 29 January 2002 to the President of the Security Council www.arso.org/UNlegaladv.htm
 - European Parliamentary legal opinion on fishing agreement: <http://www.wsrw.org/a159x1346>
 - AIIA speech by Tim Robertson on Australia's phosphate imports
 - JJP Smith, "The plundering of the Sahara" link to pdf on http://saharaoccidental.blogspot.com.au/2011_10_01_archive.html
 - JJP Smith, "The taking of the Sahara", to be published as a chapter of a forthcoming book in 2012.
- wsrw.org
awsa.org





Map from Wikipedia

Bou craa phosphate mine is linked to the port of El Aaiun by a 100km conveyor belt

Tindouf in Algeria (top right) is where the Saharawi refugee camps are situated, subsisting on international “emergency” aid for 36 years.

A military wall or berm, marked in red, separates the coastal area held by Morocco from the territory held by the Polisario Front on the inland side of the berm. Every Saharawi family is divided by this wall. Only in the past eight years have there been family exchange visits organised under the United Nations program of “confidence-building measures”. The berm, illegal under international law, has an estimated five million landmines along its course. The berm was built in part to protect continued production at the Bou Craa mine site.