Australia Western Sahara Association (AWSA)

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3 April 2008

Submission to the Senate Inquiry into the pricing and supply arrangements in the Australian and global chemical and fertiliser markets, the implications for Australian farmers of world chemical and fertiliser supply and pricing arrangements, monopolistic and cartel behaviour and related matters.

Purpose of AWSA's Submission

The Australia-Western Sahara Association works for justice for the Saharawi people. One of the many injustices they currently suffer is losing their natural resources to Morocco's gain. Australia also profits from this trade, which motivates us to raise this problem here in the hope that an honourable solution might be found.

The companies involved are Incitec-Pivot Limited (IPL) with their head office in Melbourne, Wesfarmers CSBP supplying WA from Kwinana, and Impact Fertilisers, based in Hobart.

We have written to the companies and spoken with them over the past two years, pointing out the status of Western Sahara in international law and the unethical implications of trading with the occupying power, Morocco in another country's resources. They say they look to the Australian government to give a lead.

We see this inquiry as an opportunity to draw the Australian government's attention to this situation relating to the supply of one particular material, phosphate rock, used in the manufacture of the 1.3 million tons of SSP (superphosphate) produced in Australia annually.

Background

Further information on the background to Western Sahara and the resource question can be found on our website: http://www.awsa.org.au/
on the website of the international network, Western Sahara Resource Watch, of which AWSA is a member: http://www.wsrw.org/
and the multilingual site of the international solidarity for Western Sahara:
http://www.arso.org/ressnat.html

Calling for a halt to imports from Morocco of phosphate sourced in Western Sahara until the referendum of self-determination

1 We assume it is likely that from now on the price of phosphate will only increase

- partly because of peak phosphate – the time at which this limited resource peaks before starting to diminish as global supplies become exhausted. See http://www.energybulletin.net/33164.html

- Although the deposit at Bou Craa (south of Laayoune in Western Sahara) is extensive, it is nonetheless finite. At present rate of exploitation it is calculated to last only until 2046.

- As the population of the world increases it will create increased worldwide demand for food, which will encourage farmers to try to make the land bear more fruitfully by the use of fertiliser.

- Peak oil will also contribute to the price of all goods, especially those dependent on transport across the globe.

2 We understand that it is tempting for fertiliser firms to take advantage of the demand for their product.

However it is contrary to international law to exploit the resources of a non-self-governing territory so there is a special problem with Western Sahara.

- Exploitation of the phosphate in Bou Craa mine in Western Sahara, is taking place against the wishes of the Saharawi people and is not to their benefit.

- Use of natural resources of Western Sahara cannot happen without the consent of the indigenous people of the territory and must be to their benefit. See Hans Corell's 2002 legal opinion for the UN on this question: http://www.arso.org/UNlegaladv.htm

- Colonel Kurt Mosgaard, until recently the head of MINURSO, the UN's peace-keeping force in Western Sahara was quoted as saying "Western Sahara is occupied by Morocco, and as long as there is no solution to the problem, it will be in conflict with the UN's recommendations to bring raw materials out of the country", quoted by Danwatch 22.2.08, see: http://www.wsrw.org/index.php?parse_news=single&cat=105&art=676

- No country recognises Morocco's claim to Western Sahara, which it has occupied since 1975 and refuses a referendum to determine the question of sovereignty.

- Morocco's invasion as the Spanish withdrew from their colony resulted in the population being divided between those who took refuge in south west Algeria where they have been living in exile in refugee camps for over 30 years, and those who remained in their own homeland living under a brutal military occupation and suffering daily human rights abuses at the hands of the Moroccan regime. Even if it could be shown that benefits have accrued to Saharawis living in the occupied territory it is certainly not true that any living outside the territory have consented to the trade or benefited from it. This is certainly the case of 165.000 Saharawis who fled the Moroccan invasion and have living in southwest of Algeria since 1975.

3 Using phosphate bought from Morocco sourced in Western Sahara Australia is harming the Saharawis.

- This trade is using up resources the Saharawi people should have at their disposal
- It is supporting an illegal regime both morally and financially
- The Saharawi miners have been badly treated by Morocco's OCP phosphate company which took over running the mine from the Spanish Fosbucraa company which operated before Spain withdrew from its colony.
- Saharawi phosphate miners at Bu Craa have many grievances about contractual provisions which have not been honoured by OCP, many are owed redundancy money as well as compensation following injury, see http://www.arso.org/PHOSBOUCRAAe.doc
- On 19 February a delegation of trades unionists from France, Italy and Spain met with 100 workers and retired miners to inform them about efforts taken to regularise their situation with their former Spanish employer, when the Moroccan police arrested them and the host family in whose house the meeting took place.

4 AWSA asks the Australian government to put a hold on imports of phosphate from Morocco sourced in Western Sahara until the referendum. Then the Saharawi people can vote to determine the sovereignty of this country.

- We believe it would really help Morocco to understand that the international community is serious about wanting to see the sovereignty of Western Sahara determined by a referendum as laid down by UN resolution 1514 (XV) 1960, as Australia is an important customer for this phosphate rock.

5 Would Australian farmers suffer if phosphate imports from Western Sahara were put on hold?

- Australian Fertiliser firms can import phosphate from other countries such as Togo, Jordan, Vietnam, Christmas Island, Nauru.

- We understand that phosphate rock from BouCraa is used, by Australian fertiliser companies, to manufacture superphosphate for pasture to raise meat-producing animals.
- Meat however is now understood to be expensive food in terms of the resources it uses.
- Vegetable food sources will help feed the world better than meat can. Reducing meat production to diversify into producing other foods might well be a shrewd move by Australian farmers, which the government could encourage.

6 Will Australian fertiliser companies suffer if they stop importing Saharawi phosphate?

We believe that the Australian fertiliser companies can afford to take a stand on this issue, to honour their own ethical policies.

In recent months Wesfarmers has been blacklisted by a Norwegian bank KPL (04.12.07) and Swedish Öhman Funds (31.01.08) has also divested on account of their trade in Saharawi phosphate through their subsidiary CSBP (see: http://www.wsrw.org/index.php?cat=106&art=604&searchString=wesfarmers&shw=3&sy=&sm=&stm=&page=1&mto=0
&
http://www.wsrw.org/index.php?cat=105&art=658&searchString=wesfarmers&shw=3&sy=&sm=&stm=&page=1&mto=0). Others may follow. In this way Australian fertiliser companies could actually stand to lose more by continuing the trade in illegal phosphate from Western Sahara than by renouncing to deal in it now.

The Australia Western Sahara Association (AWSA) would welcome the opportunity to appear at a public hearing to expand on the points above and to answer questions from the Select Committee inquiring into fertiliser pricing and supply.

Cate Lewis (Secretary) and Rolf Sorensen (Committee member)

3 April 2008

Australia Western Sahara Association (Victoria)
inc no: A0047692T
post: P O Box 164, Clifton Hill 3068
tel: +613 9489 4007
mobile: 0407 288 358
email: awsamel@alphalink.com.au
web: http://www.awsa.org.au/

Appended,
1 UN legal opinion of 29 January 2002 on the natural resources of Western Sahara
2 Opinion piece from AFR 25 March 2008 by Kamal Fadel, *Fertiliser firms selling out refugees*

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Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council

1. In a letter addressed to me on 13 November 2001, the President of the Security Council requested, on behalf of the members of the Security Council, my opinion on "the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and agreements concerning Western Sahara of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara".

2. At my request, the Government of Morocco provided information with respect to two contracts, concluded in October 2001, for oil-reconnaissance and evaluation activities in areas off-shore Western Sahara, one between the Moroccan "Office National de Recherches et d'Exploitations Pétrolières" (ONAREP) and the United States oil-company Kerr Mc-Gee du Maroc Ltd., and the other between ONAREP and the French oil company TotalFinaElf E&P Maroc. Concluded for an initial period of 12 months, both contracts contain standard options for the relinquishment of the rights under the contract or its continuation, including an option for future oil contracts in the respective areas or parts thereof.

3. The question of the legality of the contracts concluded by Morocco off-shore Western Sahara requires an analysis of the status of the territory of Western Sahara , and the status of Morocco in relation to the Territory. As will be seen, it also requires an analysis of the principles of international law

governing mineral resource activities in Non-Self-Governing Territories.

4. The law applicable to the determination of these questions is contained in the United Nations Charter, in General Assembly resolutions, pertaining to decolonization, in general, and economic activities in Non-Self-Governing Territories, in particular, and in agreements concerning the status of Western Sahara. The analysis of the applicable law must also reflect the changes and developments which have occurred as international law has been progressively codified and developed, as well as the jurisprudence of the International Court of Justice and the practice of States in matters of natural resource activities in Non-Self-Governing Territories.

A. The status of Western Sahara under Moroccan administration

5. A Spanish protectorate since 1884, Spanish Sahara was included in 1963 in the list of Non-Self-Governing Territories under Chapter XI of the Charter (A/5514, Annex III). Beginning in 1962, Spain as administering Power transmitted technical and statistical information on the territory under Article 73 (e) of the Charter of the United Nations. This information was examined by the Special Committee with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples ("Special Committee"). In a series of General Assembly resolutions on the Question of Spanish/Western Sahara, the applicability to the territory of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV), was reaffirmed.

6. On 14 November 1975, a Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania (the Madrid Agreement), whereby the powers and responsibilities of Spain, as the administering Power of the territory, were transferred to a temporary tripartite administration. The Madrid Agreement did not transfer sovereignty over the territory, nor did it confer upon any of the signatories the status of an administering Power - a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the territory to Morocco and Mauritania in 1975, did not affect the international status of Western Sahara as Non-Self-Governing Territory.

7. On 26 February 1976, Spain informed the Secretary-General that as of that it had terminated its presence in Western Sahara and relinquished its responsibilities over the Territory, thus leaving it in fact under the administration of both Morocco and Mauritania in their respective controlled areas. following the withdrawal of Mauritania from the Territory in 1979, upon the conclusion of the Mauritano-Sahraoui agreement of 19 August

1979 (S/13504, Annex I), Morocco has administrated the territory of Western Sahara alone. Morocco however, is not listed as the administering Power of the territory in the United Nations list of Non-Self-Governing Territories, and has, therefore, not transmitted information on the territory in accordance with Articles 73 (e) of the United Nations Charter.

8. Notwithstanding the foregoing, and given the status of Western Sahara as a Non-Self-Governing Territory, it would be appropriate for purposes of the present analysis to have regard to the principles applicable to the powers and responsibilities of an administering Power in matters of mineral resource activities in such a Territory.

B. The law applicable to mineral resource activities in Non-Self-Governing Territories.

9. Article 73 of the United Nations Charter lays down the fundamental principles applicable to Non-Self-Governing Territories. Members of the United Nations who assumed responsibilities for the administration of these territories have whereby recognized the principle that the interest of the inhabitants of these territories are paramount, and have accepted as a sacred trust the obligation to promote to the utmost the well-being of the inhabitants of these territories. Under Article 73 (e) of the Charter, they are required to transmit regularly to the Secretary-General for information purposes statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories under their administration.

10. The legal regime applicable to Non-Self-Governing Territories was further developed in the practice of the United Nations and, more specifically, in the Special Committee and the General Assembly. Resolutions of the General Assembly adopted under the agenda item "implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples", called upon the administering Powers to ensure that all economic activities in the Non-Self-Governing Territories under their administration do not adversely affect the interests of the peoples of such territories, but are instead directed to assist them in the exercise of their right to self-determination. The Assembly also consistently urged the administering Powers to safeguard and guarantee the inalienable rights of the peoples of these territories to their natural resources, and to establish and maintain control over the future development of those resources (GA res 35/118 of 11 December 1980; 52/78 of 10 December 1997; 54/91 of 6 December 1999; 55/147 of 8 December 2000; and 56/74 of 10 December 2001).

11. In the resolutions adopted under the item "Activities of foreign economic and other interests which impede the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in territories under Colonial Domination", the General Assembly reiterated that "the exploitation and plundering of the marine and other natural resources of colonial and Non-Self-Governing Territories by foreign economic interests, in violation of the relevant resolutions of the United Nations, is a threat to the integrity and prosperity of these Territories" and that "any administering Power that deprives the colonial people of Non-Self-Governing Territories of the exercise of their legitimate rights over their natural resources... violates the solemn obligations it has assumed under the Charter of the United Nations" (GA res. 48/46 of 10 December 1992 and 49/40 of 9 December 1994).

12. In an important evolution of this doctrine, the General Assembly in resolution 50/33 of 6 December 1995, drew a distinction between economic activities that are detrimental to the peoples of these territories and those directed to benefit them. In paragraph 2 of that resolution, the General Assembly affirmed "the value of foreign economic investment undertaken in collaboration with the peoples of Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories". This position has been affirmed by the General Assembly in later resolutions (GA res. 52/72 of 10 December 1997; 53/61 of 3 December 1998; 54/84 of 5 December 1999; 55/38 of 8 December 2000; and 56/66 of 10 December 2001).

13. The question of Western Sahara has been dealt with by both the General Assembly, as a question of decolonization, and by the Security Council as a question of peace and security. The Council was first seized of the matter in 1975, and in resolutions 377 (1975) of 22 October 1975 and 379 (1975) of 2 November 1975 it requested the Secretary-General to enter into consultations with the parties. Since 1988, in particular, when Morocco and the Frente Polisaro agreed, in principle, to the settlement proposals of the Secretary-General and the Chairman of the OAU, the political process aiming at a peaceful settlement of the question of Western Sahara has been under the purview of the Council. For the purposes of the present analysis, however, the body of Security Council resolutions pertaining to the political process is not relevant to the legal regime applicable to mineral resource activities in Non-Self-Governing Territories and for this reason is not dealt with in detail in the present letter.

14. The principle of "permanent sovereignty over natural resources" as the right of peoples and nations to use and dispose of the natural resources in

their territories in the interest of their national development and well-being, was established in General Assembly resolution 1803 (XVII) of 14 December 1962. It has since been reaffirmed in the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, as well as in subsequent General Assembly resolutions, most notably, resolution 3201 (S-VI) of 1 May 1974, "Declaration on the Establishment of a New International Economic Order", and Resolution 3281 (XXIX) containing the Charter of Economic Rights and Duties of States. While the legal nature of the core principle of "permanent sovereignty over natural resources", as a corollary to the principle of territorial sovereignty or the right of self-determination, is indisputably part of customary international law, its exact legal scope and implications are still debatable. In the present context, the question is whether the principle of "permanent sovereignty" prohibits any activities related to natural resources undertaken by an administering Power (cf. para. 8 above) in a Non-Self-Governing Territory, or only those which are undertaken in disregard of the needs, interests and benefits of the people of that territory.

C. The case law of the International Court of Justice

15. The question of natural resource exploitation by administering Powers in Non-Self-Governing Territories was brought before the International Court of Justice in the Case of East Timor (Portugal v. Australia) and the Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia). In neither case, however, was the question of the legality of resource exploitation activities in Non-Self-Governing Territories conclusively determined.

16. In the Case of East Timor, Portugal argued that in negotiating with Indonesia an agreement on the exploration and exploitation of the continental shelf area of the Timor Gap, Australia had failed to respect the right of the people of East Timor to permanent sovereignty over its natural wealth and resources, and the powers and rights of Portugal as administering Power of East Timor. In the absence of Indonesia's participation in the proceedings, the International Court of Justice concluded that it lacked jurisdiction.

17. In the Nauru Phosphate Case, Nauru claimed the rehabilitation of certain phosphate lands worked out before independence in the period of the Trusteeship administration by Australia, New Zealand and the United Kingdom. Nauru argued that the principle of permanent sovereignty over natural resources was breached in circumstances in which a major resource was depleted on grossly inequitable terms and its extraction involved the

physical reduction of the land. Following the Judgment on the Preliminary Objections, the parties reached a settlement and a Judgment on the merits was no longer required.

D. The practice of States

18. In the recent practice of States, cases of resource exploitation in Non-Self-Governing Territories have, for obvious reasons, been few and far apart. In 1975, the United Nations Visiting Mission to Spanish Sahara reported that at the time of the visit, four companies held prospecting concessions in off-shore Spanish Sahara. In discussing the exploitation of phosphate deposits in the region of Bu Craa with Spanish officials, the Mission was told that the revenues expected to accrue would be used for the benefit of the Territory, that Spain recognized the sovereignty of the Saharan population over the Territory's natural resources and that, apart from the return of its investment, Spain laid no claim to benefit from the proceeds (A/10023/Rev.1, p. 52)

19. The exploitation of uranium and other natural resources in Namibia by South Africa and a number of Western multinational corporations was considered illegal under Decree No. 1 for the Protection of the Natural Resources of Namibia, enacted in 1974 by the United Nations Council for Namibia, and was condemned by the General Assembly (GA res. 36/51 of 24 November 1981, and 39/42 of 5 December 1984). The case of Namibia, however, must be seen in the light of Security Council resolution 276 (1979) of 30 January 1970, which declared that the continued presence of South Africa in Namibia was illegal and that consequently all acts taken by the Government of South Africa were illegal and invalid.

20. The case of East Timor under the United Nations Transitional Administration in East Timor (UNTAET) is unique in that, while UNTAET is not an administering Power within the meaning of Article 73 of the United Nations Charter, East Timor is still technically listed as a Non-Self-Governing Territory. By the time UNTAET was established in October 1999, the Timor Gap Treaty was fully operational and concessions had been granted in the Zone of Cooperation by Indonesia and Australia, respectively. In order to ensure the continuity of the practical arrangements under the Timor Gap Treaty, UNTAET, acting on behalf of East Timor, concluded on 10 February 2000, an Exchange of Letters with Australia for the continued operation of the terms of the Treaty. Two years later, in anticipation of independence, UNTAET, acting on behalf of East Timor, negotiated with Australia a draft "Timor Sea Arrangement" which will replace the Timor Gap Treaty upon the independence of East Timor. In concluding the agreement for the exploration

and exploitation of oil and natural gas deposits in the continental shelf of East Timor, UNTAET, on both occasions, consulted fully with representatives of the East Timorese people, who participated actively in the negotiations.

E. Conclusions

21. The question addressed to me by the Security Council namely, "the legality... of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara", has been analysed by analogy as part of the more general question of whether mineral resource activities in a Non-Self-Governing Territory by an administering Power is illegal, as such, or only if conducted in disregard of the needs and interests of the people of that territory. An analysis of the relevant provisions of the United Nations Charter, General Assembly resolutions, the case law of the International Court of Justice and the practice of States, supports the latter conclusion.

22. The principle that the interests of the peoples of Non-Self-Governing Territories are paramount, and their well-being and development is the "sacred trust" of their respective administering Powers, was established in the Charter of the United Nations and further developed in General Assembly by resolutions on the question of decolonization and economic activities in Non-Self-Governing Territories. In recognizing the inalienable rights of the peoples of Non-Self-Governing Territories to the natural resources in their territories, the General Assembly has consistently condemned the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of these territories and deprive them of their legitimate rights over their natural resource. It recognized, however, the value of economic activities which are undertaken in accordance with the wishes of the peoples of those territories, and their contribution to the development of such territories.

23. In the Cases of East Timor and Nauru, the International Court of Justice did not pronounce itself on the question of the legality of economic activities in Non-Self-Governing Territories. It should be noted, however, that in neither case was it alleged that mineral resource exploitation in such territories was illegal per se. In the Case of East Timor, the conclusion of an oil exploitation agreement was allegedly illegal because it was not concluded with the administering Power (Portugal); in the Nauru Case, the illegality allegedly arose because the mineral resource exploitation depleted unnecessarily or inequitably the overlaying lands.

24. The recent State practice, though limited, is illustrative of an opinio juris on the part of both administering Powers and third States: where resource exploitation activities are concluded in Non-Self-Governing Territories for the benefit of the peoples of these territories, on their behalf, or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering Power, and in conformity with the General Assembly resolutions and the principle of "permanent sovereignty over natural resources" enshrined therein.

25. The foregoing legal principles established in the practice of States and the United Nations pertain to economic activities in Non-Self-Governing Territories, in general, and mineral resource exploitation, in particular. It must be recognized, however, that in the present case, the contracts for oil reconnaissance and evaluation do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued. The conclusion is, therefore, that, 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 international law principles applicable to mineral resource activities in Non-Self-Governing Territories.

Hans Corell
Under-Secretary for legal Affairs

The Legal Counsel

Fertiliser firms selling out refugees

"The next mouthful of food you take after you read this may have an awful aftertaste. T necessarily because there's anything wrong with your food, but because of how it gets t Opinion in The Australian Financial Review, by Polisario's Australia representative, M 25 March 2008

Australia Financial Review
25 March 2008

In Australia, three companies control the superphosphate market. The largest is Incitec Pivot 65 per cent of the market. CSBP, owned by Wesfarmers, and Impact control the remainder.

According to a statement in 2007 from Incitec Pivot, "Without rock from Western Sahara, it i Australian manufacturers could produce the 1 million tonnes of single superphosphate farme year."

The trouble is. Western Sahara gets none of the benefit of this trade. Since 1975 the region, h indigenous population known as Sahrawis, has become an illegal annex of Morocco. The king the Sahrawis remain under its control, deprived of their basic liberties and freedoms. Some 1 refugees are stranded in the desert. Many haven't been able to go home for more than three d

UN resolutions come and go, confirming the right of Sahrawis to self-determination, and cou admonitions emerge and fade away like mirages. Over 80 countries recognise Western Sahar independent entity and it is a member of the African Union No country recognises Morocco's

The spotlight was cast on Western Sahara again last week, but another round of talks betwee Morocco ended in stalemate.

Despite widespread condemnation of Morocco's occupation and brief news-cycle flurries, the how to ignore Western Sahara

But not the superphosphate industry. It has been pumping funds into the pockets of the Mor and depriving impoverished Sahrawis of their rightful return on resources.

Various international legal pillars refer directly to Western Sahara's status as a non-self-gove Legal opinion is mounting that Morocco's exploitation of Sahrawi resources, and the subsequ those resources, would fail the test of international jurisprudence.

The Australian government has offered only a limp response to the immoral phosphate impo

But businesses and investors overseas have been less forgiving. Swedish and Norwegian com already left the sector, dumping shares in Wesfarmers late last year.

Also, in 2006, various oil and gas companies signed contracts with the secessionist Western S
in relation to various exploration and extraction rights. The crux of these agreements is that,
given a vote on their independence, these companies will gain exclusive commercial rights.

It's a case of betting not on the winning horse, but on the right horse. The Australian superph
might take a leaf from this book and the federal government should be looking into ensuring
sustainable approach

All Australians — shareholders, voters and consumers — have a duty in ensuring that the una
Western Sahara's illegal exploitation is ended.

Kamal Fadel is the Australian representative for Polisario, the independence movement for
See the opinion here.