

New U.S. Policy, Same Human Rights Expectations: Companies Sourcing from the Western Sahara Are Still Obligated to Respect International Law

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On December 10, 2020, President Trump formally announced that the Government of Israel and the Kingdom of Morocco will normalize their bilateral relationship, marking the fourth Arab country that recognizes Israel as a result of the Abraham Accords. Over the coming months, the new agreement will allow the two countries to resume full diplomatic relations, increase cooperation on security and economic matters, and open up regular flights between Morocco and Israel.

Concerns remain over how the normalization of ties between Arab nations and Israel will affect Palestinian self-determination rights and the final political status of the Palestinian territory, which remains under Israeli occupation. This is important because the Morocco-Israel agreement also includes U.S. recognition of Morocco's claim to the Western Sahara, despite broad international recognition of the indigenous Sahrawi's right to self-determination.

Prior to the Trump Administration, both Democratic and Republican Administrations had consistently refrained from adopting a position on the Western Sahara's political status. Instead, all previous Administrations supported international diplomatic efforts under MINURSO – the U.N. peacekeeping mission mandated with providing a referendum for the Sahrawi on self-determination.

Against this backdrop, a handful of companies have sought to source natural resources from the Moroccan-occupied portion of the Western Sahara. The activities of these companies have included exploring for hydrocarbons in offshore Western Sahara, fishing operations off the Western Sahara coast, and purchasing phosphates mined in the territory.

It is important for companies that source or are considering sourcing from the Western Sahara to bear in mind a key fact: Morocco's occupation of the Western Sahara is illegal under international law and Morocco's political consolidation of the territory, by way of such occupation, has led to gross human rights violations aimed at suppressing Sahrawi resistance to Moroccan rule. Under a landmark Advisory Opinion issued in 1975 – the year Morocco annexed much of the Western Sahara – the International Court of Justice unequivocally ruled that Morocco had no historical or legal claim to the territory.

The Legal Advisor to the United Nations has subsequently clarified that Morocco's sale of the Western Sahara's resources is illegal and violates the fundamental rights of the Sahrawi. Moreover, the European Union's Court of Justice ruled in 2016 that trade agreements between the European Union and Morocco do not apply to products sourced from the Western Sahara because Morocco does not have a legal right to the territory.

Additionally, myriad U.N. General Assembly resolutions stipulate that no territorial acquisition resulting from the threat or use of force shall be recognized as legal, and therefore constitutes a violation of international humanitarian law.

Accordingly, although recognition of Morocco's claim of sovereignty over the Western Sahara may now be the Trump Administration's policy, that policy contravenes international law, violates internationally recognized human rights principles, and does not change the obligation of companies to ensure that their operations and supply chain activities do not infringe upon the human rights of the Saharawi people.

If a company were to enter into a contract with the Government of Morocco to buy the natural resources of the Western Sahara, that contract would be per se illegal under international law. Notably, it would be just as illegal for the company to source those natural resources from Morocco, without establishing a physical presence in Africa, as it would be for the company to directly harvest the

resources in the territory without the consent of the Saharawi.

In assessing any business activity related to the Western Sahara, companies should give careful consideration to the U.N. Guiding Principles on Business and Human Rights (UNGPs) — the primary international framework setting corporate responsibilities for respecting human rights. The UNGPs make clear that the activities of companies should not be materially associated with human rights violations, and call upon businesses to conduct robust due diligence to prevent potential harms to rights-holders.

The UNGPs framework sets criteria for determining the relationship between corporate activities and human rights harms as well as the human rights risks associated with such activities. Based on these criteria, any company that sources from Moroccan-occupied Western Sahara would face significant reputational risks and could also face legal challenges if their operations cause, contribute, or can be linked to human rights violations in the territory.

The incoming Biden Administration will encounter significant pressure from Members of Congress, human rights organizations, and legal scholars to reverse U.S. recognition of Morocco's claims to the Western Sahara and to reaffirm MINURSO's mandate. The Sahrawi's right to self-determination enjoys bipartisan support from liberal and conservative Members of Congress, ranging from Senator Patrick Leahy (D-VT) to Senator James Inhofe (R-OK). Moreover, foreign policy experts of various political persuasions, including former National Security Advisor John Bolton, House Foreign Affairs Committee Chairman Eliot Engel (D-NY), and former Secretary of State James Baker have decried Trump's new policy and called for its reversal. This will make it easier for the new Administration to restore U.S. adherence to internationally recognized principles.

Accordingly, companies considering business in the region are strongly advised to ensure that their operations are consistent with international standards and that their supply chains do not include products from the Western Sahara purchased through Morocco.

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