



## Saharawi Arab Democratic Republic Petroleum and Mining Authority



12 June 2014

### Statement of the Saharawi Republic concerning Incitec Pivot Limited and the trade in phosphate rock from occupied Western Sahara

In 2013 IPL imported two shipments of phosphate mineral rock from occupied Western Sahara, valued at approximately \$ AUS 12 million. Such shipments have been routinely protested by the SADR, and despite them, continue to arrive in Australia. Western Sahara remains illegally occupied by Morocco, contrary to declarations of the United Nations General Assembly and a 1975 determination of the International Court of Justice. No state recognizes Morocco's claim to Western Sahara and all countries are under a positive duty to support the self-determination of the Saharawi people. As the original inhabitants of the territory until its invasion, the Saharawi people have exclusive sovereign rights to phosphate, a non-renewable resource, and have continuously called for an end to its taking.

Purchasers of Saharawi phosphate rock face criminal and civil legal risk. The criminal risk is essentially personal, falling on directors and officers of corporations which knowingly trade in the resource. In contrast, the civil risk is that of corporations in claims for compensation by the people and the state of the Saharawi Republic.

Criminal risk in the purchase of Saharawi phosphate rock is founded on the war crime of pillage. The crime is provided for both in the 1998 *Rome Statute* of the International Criminal Court and in complementary national legislation of member states of the Court, including Australia. It is the Kingdom of Morocco, which is responsible for the crime of pillage in occupied Western Sahara, that is, the primary criminal liability is that of individual persons who direct the export of the resource. The crime of pillage (or plunder) – developed in the cases resulting from the Second World War in Europe – is not overcome by assertions or even demonstrations that the taking of natural resources in some way benefits a population under occupation or is otherwise consented to by them, any such purported acceptance or acquiescence being vitiated by the *Fourth Geneva Convention*, 1949.

The criminal legal liability of corporate directors and officers in national legal systems and before the International Criminal Court is indirect, that is, secondary. Such liability is based on the principles of contributory responsibility, namely, the aiding and abetting of the war crime of pillage in the export of phosphate rock from occupied Western Sahara. This form of liability is established in international criminal law following decisions of the past two decades by the International Criminal Tribunal for the Former Yugoslavia and the 2012 decision of the Special Court for Sierra Leone in the *Charles Taylor* case.

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The SADR government will seek to invoke aiding and abetting liability against individuals by complaint to the International Criminal Court, and to the prosecuting authorities of states which are members of the Court and in which corporations responsible for the trade in Saharawi phosphate rock are located, or (in the case of such states and third states) where responsible individuals are to be found.

The civil legal risk for corporations is primarily that of reparations – compensation – claims. The government of the SADR records the volumes and value of phosphate rock imported into Australia and other states, and maintains figures and supporting evidence for eventual civil claims in the courts of such receiving states and where corporate assets are located. The basis of claims for civil compensation is founded on corporations purchasing the phosphate rock on a knowing basis (the understanding) that the Moroccan exporting companies Office Chérifien des Phosphates SA and Phos BouCraa do not have title or legal ownership of the resource, and have been routinely given notice of that fact by the SADR government. The precedent of uranium exported from *apartheid* South Africa occupied Namibia in the 1980s is instructive in this regard, as is the now-completing work of the United Nations mandated Kuwait-Iraq Compensation Commission. The Saharawi Republic has prepared claims for future action in some national jurisdictions and will proceed in states where present restrictions do not exist. Our government is mindful of pursuing secondary legal remedies including permanent injunctions against the import of Saharawi phosphate rock into selected states, equitable orders to restrain the disposition of corporate assets connected with or obtained from the trade in the resource, and declaratory judgments.

The government of the SADR has warned IPL since 2005 in meetings and through correspondence of the grave human rights abuses, which have continued in the territory and to the well-documented corruption rampant in the Moroccan state that extends to government held corporations such as the Office Chérifien des Phosphates SA.

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