Your Letter to ENGIE re Proposed Desalination Facility Near Dakhla - Stakeholder Engagement

Sara Eyckmans <coordinator@wsrw.org> 3 February 2021 at 10:55
To: Andrew IANUZZI <andrewianuzzi@globaldiligence.com>
Cc: Apso Lument <apsolument@yahoo.fr>

Dear Mr Ianuzzi,

Thank you for your email of 21 January 2021 and your follow-up email with further information of 23 January 2021, inviting Western Sahara Resource Watch for a conversation regarding "a stakeholder engagement process" on ENGIE SA's desalination facility in Dakhla, occupied Western Sahara.

Your mail to us explains that your assessment is based on UN legal opinion S/2002/161, often referred to as the Corell Opinion.

We are deeply concerned over your reference to that opinion. First, your reference seriously misrepresents the content of the document. Second, your organisation has seemingly failed to take into account the legal clarifications and developments which have taken place since then and to thoroughly consider the applicable principles of international law, as summarized by the EU Court of Justice in four consecutive rulings so far. Your interpretation of the Corell Opinion bears the exact same flaws as the one held by the EU Commission and Council for several years - an interpretation that has been thoroughly and explicitly dismissed by the EU Court of Justice.

1. As stated with great clarity by the EU Court of Justice, Western Sahara is a territory that is "separate and distinct" from Morocco, and the latter has no mandate to administer the territory. This is also explained in the Corell Opinion, which uses the competence of an administering power as a point of departure, yet explicitly states that this was done by analogy - "as any limitation of the powers of such entity acting in good faith would certainly apply *a fortiori* to an entity that did not qualify as an administering Power but *de facto* administered the Territory." (Corell, Pretoria, 2008) It is worth recalling that the UN treats Western Sahara as the only Non-Self-Governing Territory without an administering power in place. We submit that there is a term in international law that applies to a State that *manu militari* controls another territory to which it has no tenable claim, all the while denying the people of that territory to express their views on the situation. ENGIE's approach to the territory suggests that it regards Morocco as having a mandate or title over the territory. Any engagement process by Global Diligence would have to address this presumption.
2. The focus of your stakeholder engagement process is, based on your description, on the intended and potential benefits of ENGIE's desalination project – and purports to rely on the Corell Opinion as a basis for such an approach. Yet the key-element of the Corell Opinion is not part of your mail to us. The conclusion of the Corell Opinion is to be found in the 25th - concluding - paragraph, where it states that activities "*in disregard of the interests and wishes of the people of Western Sahara… would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories*". The crucial element that is not part of ENGIE's approach to the desalination project in Western Sahara, nor of Global Diligence's stakeholder process, is that of "wishes" - whether the people want the activity to take place or not. This is particularly dangerous. For years, the EU Commission and Council have argued along the same lines as your email to us, claiming that including Western Sahara in bilateral agreements with Morocco was to the benefit of the Saharawis (and therefore legal), referring to the Corell Opinion in the very same way as Global Diligence. This practice has led Hans Corell himself to state that "*As a European I feel embarrassed*" (https://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf). The EU Court of Justice responded to the EU Council and Commission's claims on the beneficial aspect of including Western Sahara in agreements with Morocco that it is not necessary "*to determine whether such implementation is likely to harm it [the third party, i.e. the people of Western Sahara] or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party.*" (Art. 106, Case C-104/16 P, 21 December 2016, Council of the European Union v Front, Polisario) As evident from the Court's ruling, consent is a natural corollary of the internationally recognised right to self-determination of the people of

Western Sahara – the right to determine the status of the territory, and the resources harboured therein. Yet this cornerstone principle governing the entire UN approach to the conflict in Western Sahara is seemingly absent from the approach of both ENGIE and Global Diligence.

3. Your reference to paragraph 24 of the Corell Opinion, stating that "*certain business activities should be 'conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf, or in consultation with their representatives';"* merits attention. Again, due to the lack of precedents, the Corell Opinion was developed by taking the competences of an administering power as a point of departure. Morocco is not the administering power of Western Sahara. On the other hand, there is no dispute that the territory is Non-Self-Governing and that its people have a right to self-determination. As stipulated by the EU Court of Justice, this entails that their consent is required to lawfully undertake activities in their homeland. That is a manifestly different notion than consultation. Per their right to consent, the people of Western Sahara have the decisive voice whether or not ENGIE's desalination project on their land will go ahead. In a consultation process, their voice is one of many stakeholders and easily dismissed. To not ask for the consent of the people having the right to determine the status of the land, and assuming that your endeavour will be to their benefit, is eerily reminiscent of a colonial stance.

As a matter of principle, WSRW is ready to assist in advising businesses that consider undertaking operations in the territory, as part of companies' due diligence process. We are more sceptical, however, to give input to such a stakeholder engagement process as you mention, as we in general are concerned that our good name and input will be used by companies in an effort to legitimize operations that the Saharawis object to and hence are established in violation of international law.

We note that you do not qualify WSRW as a potential stakeholder, but rather invite us to give input to the process that you are to undertake. In general, WSRW, as an international Europe-based organization, is hesitant to be defined as a stakeholder relating to corporate activity on the territory of Western Sahara, where the Saharawi people have the right to self-determination. Giving advice on how Global Diligence is going to undertake this process could be equally problematic for us, as it implies accepting the existence of the process itself before we understood the purpose, method and scope of the study.

As long as the consultation is based on a misreading of international law, we have to regret that we do not wish to take part in the process.

Based on ENGIE's engagement, and Global Diligence's approach to the matters of applicable international law, Western Sahara Resource Watch has a series of questions for your company. This will be part of an article we are planning to write on our website.

1. What is the purpose of the "stakeholder engagement"?
2. What are the Terms of Reference for the "stakeholder engagement"? In particular, what is the definition of a "stakeholder" in the Terms of Reference?
3. Will the Terms of Reference of the "stakeholder engagement process" be shared with the people of Western Sahara? If yes, how will these terms be shared? If not, why?
4. What is the timeframe for the "stakeholder engagement process"?
5. Will the results of the "stakeholder engagement process" be shared by Global Diligence with the people of Western Sahara? If yes, how? If not, why?
6. Will Global Diligence travel to the territory of Western Sahara as part of the engagement with ENGIE?
7. Will Moroccan government/regional/municipal institutions or Moroccan politicians elected at Moroccan parliamentary elections or Moroccan research institutions or Moroccan organisations or Moroccan trade unions or Moroccan business interests be invited as 'stakeholders' for this process? If yes, why does Global Diligence consider these as relevant 'stakeholders', considering Dakhla is not located in
Morocco, and that the Court of Justice of the EU states that Western Sahara is a "separate and distinct" territory from Morocco?
8. Does Global Diligence agree with the CJEU ruling of 21 December 2016, Article 106, which clarifies that the aspect of consent of the people of Western Sahara is a prerequisite for an activity affecting the territory to be considered lawful, and that the question of "benefits" is irrelevant?
9. How does Global Diligence define the right to self-determination in the context of Western Sahara? Does it encompass the right to permanent sovereignty over natural resources, to national unity and territorial integrity?
10. How does Global Diligence define the status of the people of Western Sahara? Are they an indigenous population or a colonial people? Do they enjoy the right to self-determination and

independence?

11. Will this particular "stakeholder engagement" assess the Saharawi people's right to self-determination in relation to the establishment of infrastructure projects on their land - and how ENGIE's has related to this right?
12. What is your assessment of the legal status of Western Sahara under international law?
13. What is your assessment of the legal status of Morocco's presence in parts of Western Sahara under international law?
    a) Does Morocco have sovereignty over Western Sahara?
    b) Is Morocco the administering power of Western Sahara as defined by the UN Charter? If yes, please explain how Global Diligence has come to this conclusion.
    c) Is Morocco occupying parts of parts of Western Sahara under international humanitarian law? If so, can Morocco act directly through its national administration in Western Sahara or does it have to establish a separate and distinct military authority as the Israeli government did in relation to the West Bank in 1967?
14. Has Global Diligence seen the permissions or contracts that ENGIE has obtained with the Moroccan authorities relevant to this operation? In which legal capacity do the Moroccan authorities issue those permissions or sign those contracts? Is Moroccan domestic law the applicable law to those permissions or contracts?
15. How does Global Diligence assess the legal validity of ENGIE's agreements for a facility in Dakhla, considering that ENGIE's engagement in the territory is made through permissions from the neighbouring country of Morocco?
16. Will your "stakeholder engagement process" include an analysis of whether ENGIE carried out a human rights due diligence prior to engaging with the government of Morocco in Western Sahara, and whether such due diligence included a study of the legal nature of the territory, of Morocco's presence in the territory, and of the right to self-determination as a human right?
17. If Global Diligence is of the view that Morocco has no right to issue infrastructure permits like the one given to ENGIE, how does Global Diligence explain that it has, itself, undertaken such assignment for ENGIE?
18. Considering that Global Diligence's reference to the 2002 legal opinion fails to quote the conclusion of the opinion, but instead uses arguments that have been explicitly found irrelevant by the highest European Court, please clarify which company - ENGIE or Global Diligence - was the first to apply this misleading Corell quote as a starting point for the assessment that was to be made.
19. The right to self-determination is a human right. This is well described by the Advocate General of the CJEU in 2018. http://curia.europa.eu/juris/document/document.jsf?text=&docid=198362&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=518656 This is also why the CCPR in 2016 (wsrw.org/files/dated/2016-11-04/ccpr_c_mar_co_6_25813_f.docx) and the CESCR in 2015 (https://wsrw.org/files/dated/2015-12-09/cescr_morocco_2015_eng.pdf) so strongly urged Morocco to respect the Saharawi people's right to consent in relation to business operations in the territory. Does Global Diligence agree that the right to self-determination for the people of a Non-Self-Governing Territory in the process of decolonisation is a human right?
20. Your email to WSRW explains that Global Diligence intends to "encourage all stakeholders to engage with us in a spirit of realism and compromise".
    a) While it is still unclear to us what Global Diligence means by a 'stakeholder', may Global Diligence explain what it means by the two terms 'realism' and 'compromise'?
    b) Does Global Diligence ask for a compromise on the right to self-determination?
    c) If the Saharawi people oppose ENGIE's project on their territory, what, according to Global Diligence, would a compromise to that opposition look like?
21. Is Global Diligence of the view that human rights, in general, can be compromised? To what extent does Global Diligence believe that UNGP opens for compromising on certain human rights? To what extent does Global Diligence believe that it might now risk undermining the Saharawi people's right to self-determination through its assessment? To what extent does Global Diligence believe that it, *itself*, is acting in violation of the UNGP through taking on such assignment for a business interest on occupied land without having first obtained the permission of the people of the territory?

Thank you in advance for your consideration of our questions, and we look forward to hearing from you, both with answers to the questions, as well as with a copy of the Global Diligence's complete Terms of Reference with ENGIE, as described in question 2.

We want to be very clear that an assignment of the kind that Global Diligence is now undertaking, risks undermining the Saharawi people's right to self-determination and legitimising ENGIE's partnership with Morocco.

As ENGIE's project facilitates further infrastructure on the ground and influx of Moroccan settlers, it contributes to prolong the illegal occupation. We do not think Global Diligence wishes to be associated with such a business activity. A 'consultation' study by your company which includes Moroccan interests and groups supportive to the Moroccan position on the conflict also risks increasing social conflict on the ground in the short term.

We strongly recommend your company to study the relevant international law applicable to the decolonisation of the territory of Western Sahara, and not to proceed with an alleged 'stakeholder engagement' which the Saharawi people have probably never asked you to carry out.

A copy of this mail has been sent to Mrs. Estelle GABILLET, Ethics, Compliance & Privacy Deputy Director, ENGIE. A mail has today been sent to ENGIE with questions that are partially overlapping.

Note that we look forward to Global Diligence's answers to these questions above, independently of what ENGIE might or might not respond to some of the same questions.

With best regards,

Sara Eyckmans

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www.wsrw.org

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