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 **NORTON ROSE FULBRIGHT**

# Human Rights Assessment Report

## *Agrium Phosphate Rock Supply from Western Sahara*

Norton Rose Fulbright Canada LLP - 2016



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**NOTE:**

This Assessment is solely for the use of the board of directors and management of Agrium and shall not be published, reproduced, quoted in whole or in part or relied upon by anyone other than Agrium without the prior written consent of the Reviewers.

This report contains general information only and is not exhaustive but represents the best evaluation by the Reviewers based on the information obtained and reviewed, as well as impressions and information obtained by third parties and stakeholders. While every reasonable effort was made to confirm the accuracy of the information obtained, proportionality of the due diligence placed reasonable limits on the Assessment process. Readers should conduct their own investigations and obtain advice from their own advisors prior to making any decisions in relation to the matters discussed in this report.

The information contained herein includes impressions, unverified information and opinions of persons that could not be confirmed with certainty, but which provide useful context for readers. The purpose of including such information in this report is to assist in understanding potential views and perceptions of stakeholders. No information has been included or excluded for any improper purpose. For purposes of this Assessment, we have assumed that the information provided or prepared by third parties (and any information provided to such third parties) is true and correct and we have not sought to establish the reliability of the sources of information used or provided to such third parties by reference to other information. While the Assessment was reasonably calculated to elicit relevant facts, as with any due diligence exercise, there is a risk that key information may have been withheld or misrepresented or otherwise may not have been brought to the attention of the Reviewers. Except as otherwise specifically noted, information contained herein is based solely on information obtained from interviews conducted by the Reviewers and documentation or research obtained in the course of the Assessment.

The report does not include information that relates to legitimate requirements of commercial confidentiality, that is subject to legal privilege or that should be omitted to protect the confidentiality concerns of stakeholders who participated in the Assessment.

## **Acronyms and Abbreviations**

**Amarpenws** – Association for the Monitoring of the Natural Resources and for the Environmental Protection in Western Sahara

**ARSO** – Association de soutien à un référendum libre et régulier au Sahara Occidental

**Assessment** – Independent human rights assessment in relation to the supply of phosphate rock from Office Chérifien des Phosphates.

**BPL** – Bone Phosphate of Lime

**CFPOA** – *Corruption of Foreign Public Officials Act*

**Corell Opinion** – A legal opinion to the United Nations Security Council often cited by both sides of the dispute, written by Hans Corell (then United Nations Under-Secretary-General for Legal Affairs) addressing the inter-relation between resource rights and self-determination in the context of Western Sahara

**CSR** – Corporate Social Responsibility

**Dupont** – Dupont Sustainability Solutions, external consultants

**ICMM** – International Council on Mining and Metals

**IFC** – International Finance Corporation

**IFC Performance Standards** – International Finance Corporation Performance Standards for Environmental & Social Sustainability

**ILO** – International Labour Organization

**INI** - Instituto Nacional de Industria

**IPIECA** – International Petroleum Industry Environmental Conservation Association

**Jacobs** – Jacobs Engineering SA, international engineering consultants

**KPMG Report** – Findings of KPMG set out in a report dated July 30, 2015

**New Model** – New Development Model for the Southern Provinces, released in October of 2013

**NRFC** – Norton Rose Fulbright Canada LLP

**OCP** - Office Chérifien des Phosphates

**OCP/Phosboucraa** – Office Chérifien des Phosphates and Boucraa S.A.

**Phosboucraa** – Boucraa S.A.

**Reviewers** – NRFC Lawyers Michael Torrance (Toronto) and Sally Gomery (Ottawa).

**SADR** – Saharawi Arab Democratic Republic

**Supplier Code** – Agrium’s Supplier Code of Conduct

**Supplier Relationship** – supplier relationship between a subsidiary of Agrium and Boucraa S.A.

**UN** – United Nations

**WSRW** – Western Sahara Resource Watch

## 1. Introduction

### (a) Purpose

Norton Rose Fulbright Canada LLP (“**NRFC**”) has been engaged to conduct an independent human rights assessment (the “**Assessment**”) in relation to the supply of phosphate rock from a subsidiary of Office Chérifien des Phosphates (“**OCP**”) in the Western Sahara, Boucraa S.A. (“**Phosboucraa**”) (collectively, “**OCP/Phosboucraa**”) to a subsidiary of Agrium (hereinafter referred to as “**Agrium**”).

The objective of the Assessment is to apply the United Nations (“**UN**”) Guiding Principles on Business and Human Rights (the “**UN Guiding Principles**”), associated international human rights standards and Agrium’s Supplier Code of Conduct (the “**Supplier Code**”), in assessing Agrium’s supplier relationship with OCP/Phosboucraa.

### (b) About the Reviewers

Norton Rose Fulbright Canada LLP (“**NRFC**”) is a global legal practice with more than 3800 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia. Business ethics and anti-corruption and the interplay of business and human rights are important practice areas both in Canada and globally. In March 2015, Norton Rose Fulbright and the British Institute of International Comparative Law launched the Business and Human Rights Due Diligence Project – a study aimed at producing practical recommendations for businesses in relation to their approach to human rights due diligence.

The Assessment was conducted by NRFC lawyers Michael Torrance (Toronto) and Sally Gomery (Ottawa) (the “**Reviewers**”). Mr. Torrance is a member of NRFC’s Employment and Labour Group, Business Ethics and Anti-Corruption Team and Risk Advisory Practice, with expertise in human rights due diligence. He is the editor and lead author of *IFC Performance Standards on Environmental & Social Sustainability: A Guidebook*, published by Lexis Nexis in 2012. Ms. Gomery is a senior partner who heads NRFC’s Business Ethics and Anti-Corruption team. Both have experience in internal investigations and advising businesses on compliance issues.

An independent review of the Reviewers’ methodology and analysis was conducted by Lloyd Lipsett. Mr. Lipsett is an international human rights lawyer with over 15 years of experience working with leading companies, governments, national human rights institutions, civil society organizations and indigenous peoples. He has conducted human rights impact assessments in Canada, the United States, Guatemala, Colombia, Peru, Eritrea, Bolivia, Argentina, Democratic Republic of Congo, China, Philippines and Vanuatu, to advise multinational enterprises in various industry sectors. Lloyd currently works with leading companies, governments, multilateral organizations, national human rights institutions and civil society organizations to advise multinational enterprises on human rights due diligence and impact assessment initiatives. Based on his independent review, Mr. Lipsett confirms that the Assessment conforms to the expectations set by the UN Guiding Principles.

NRFC is well-positioned to advise Agrium on human rights issues as part of its legal due diligence as encouraged by the UN Guiding Principles.<sup>1</sup> NRFC, the Reviewers and Lloyd Lipsett are independent of OCP/Phosboucraa and of Agrium and any company related to either of them, the Moroccan government, the Saharawi Arab Democratic Republic or Polisario Front.

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<sup>1</sup> See Principle 23 of the UN Guiding Principles. The Reviewers are qualified to practice law only in the Canadian Provinces of Ontario and Quebec. Any views expressed as to any laws or any matters governed by any laws other than the laws of the Province of Ontario and Quebec and the federal laws of Canada applicable therein are based solely on a general understanding of the law and its application.



### (c) Agrium and its Supplier Code of Conduct

Agrium is a major producer and distributor of agricultural products and services in North America, South America and Australia through its agricultural retail-distribution and wholesale nutrient businesses. Agrium produces nitrogen, potash and phosphate fertilizers and offers growers a complementary portfolio of agricultural products, services and solutions that increase farm productivity.

Agrium has no direct involvement in the operations of OCP/Phosboucraa and Agrium has no presence and conducts no commercial operations in Western Sahara. Agrium purchases shipments of phosphate rock mined in Western Sahara on a FOB<sup>2</sup> basis from OCP/Phosboucraa.

Agrium's Supplier Code applies to suppliers providing products or services to Agrium around the world, including but not limited to OCP/Phosboucraa. The Supplier Code governs Agrium's expectations of suppliers in human rights areas, including labour standards, health and safety, international human rights standards and anti-corruption. Pursuant to the Supplier Code, Agrium conducts periodic and ongoing assessments of its supply relationships.

### (d) OCP/Phosboucraa Supplier Relationship

Morocco, together with the territory of Western Sahara, constitutes the world's largest phosphate exporter and holds three-quarters of the world's phosphate reserves.<sup>3</sup> OCP has a monopoly over the phosphates industry and holds all mining rights in the territories controlled by Morocco.<sup>4</sup> Founded in 1920, OCP is a Moroccan state-owned company headquartered in Casablanca, Morocco, engaged in extracting, marketing and selling phosphate and its derivatives, as well phosphoric acid and fertilizers. Western Sahara phosphate reserves are 1.6% of total reserves in the territories controlled by Morocco.<sup>5</sup>

Phosboucraa is a wholly-owned subsidiary of OCP operating the Boucraa mine site in Moroccan-controlled Western Sahara. Phosboucraa was created by a Spanish public company Instituto Nacional de Industria ("INI") in 1962. It began mining operations at the Boucraa mine in 1972. In 1976 OCP acquired 65% of the shares in Phosboucraa from INI, with INI retaining a 35% stake. In 2002, OCP acquired the remaining 35% of the Spanish shares, making OCP the sole owner of Phosboucraa.

### (e) Historical Context<sup>6</sup>

As of 1884, Spain was recognized as the colonial power of a defined territory of the Western Sahara that was considered a *res nullius* despite there being a population resident there.<sup>7</sup> In 1960, the UN General Assembly recognized the right of peoples to self-determination in Resolution 1514. In 1963, the Special

<sup>2</sup> F.O.B. stands for "Free on Board". According to the Incoterms Rules published by the International Chamber of Commerce, "Free On Board means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards."

<sup>3</sup> Natural Resource Governance Institute, *Morocco*, online: NRGI <<http://www.resourcegovernance.org/countries/middle-east-and-north-africa/morocco/overview>> (**NRGI**).

<sup>4</sup> NRGI.

<sup>5</sup> Economic Social and Environmental Council, "New Development Model for the Southern Provinces," Kingdom of Morocco, October 2013, online: <<http://www.ces.ma/Documents/PDF/Report-New%20development%20model%20for%20the%20southern%20provinces.pdf>> at para 179 (**New Model**).

<sup>6</sup> This is intended as a very high level summary of key events for the benefit of the reader and not an exhaustive discussion of the historical complexities and nuances underpinning the ongoing dispute in Western Sahara.

<sup>7</sup> *Front populaire pour la libération de la saugia-el-hamra et du rio de oro (Front Polisario) v Conseil de l'Union européenne*, European Court of Justice (Eighth Chamber) at paras 1-5, December 10, 2015, [EU Decision] available online: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=172870&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=227279> (**ECJ Decision, December 10, 2015**).

Committee on Decolonization declared the Western Sahara a non-self-governing territory to be decolonized. In 1965, the General Assembly adopted a resolution requesting Spain to decolonize. From 1966 to 1973, the General Assembly requested that Spain organize a referendum on independence.<sup>8</sup>

Morocco asserts that there are historical ties linking the territory to the spiritual and political leadership of Morocco that predate Spanish colonization. In an Advisory Opinion delivered in October 1975, the International Court of Justice declared that there were no ties of a nature to affect the application of the principle of decolonization and the principle of the free and genuine expression of the will of the territory's people.<sup>9</sup>

In November 1975, 350,000 Moroccan nationals moved into the territory of Western Sahara. This was known as the “Green March”. Shortly afterwards Spain signed an agreement with the states of Morocco and Mauritania ceding control of the northern two-thirds of the territory to Morocco and the southern one-third to Mauritania. Moroccan troops arrived in Western Sahara in December 1975 and have been present ever since. On February 26, 1976 Spain informed the Secretary-General of the UN that it had relinquished responsibility over Western Sahara. A cease-fire agreement reached with Mauritania in 1979 led that nation to abandon its claims to any part of the territory.<sup>10</sup>

The Polisario Front was founded in April 1973 for the purpose of gaining independence for the Western Sahara. It declared itself the legitimate representative of the people of Western Sahara.<sup>11</sup> In February 1976 the Frente Polisario proclaimed the existence of the Saharawi Arab Democratic Republic (SADR).<sup>12</sup> The Polisario Front engaged in armed conflict with the government of Morocco from December 1975 until a cease-fire agreement was reached under UN auspices in September 1991. UN peacekeepers continue to oversee and enforce the 1991 ceasefire from a base in Laayoune.<sup>13</sup>

The Kingdom of Morocco administers Moroccan law through Moroccan institutions in the estimated 85% of the territory it controls. The Polisario Front currently controls the remaining 15% of Western Sahara. A 1,690 mile sand wall separates Moroccan controlled Western Sahara from Polisario controlled territories.<sup>14</sup>

The UN regards Western Sahara as a non-self-governing territory where the process of self-determination remains to be completed.<sup>15</sup> The United Nations Security Council has, since 1991, endorsed the mandate of the UN Mission for the Referendum in Western Sahara (MINURSO). The Security Council resolution leading to the creation of MINURSO provided for a transitional period for the preparation of a referendum in which the people of Western Sahara would choose between independence and integration with Morocco. To date, however, no referendum has been held on the future of Western Sahara. Proposals for resolution of the political dispute have been tabled by both sides. The Polisario continues to

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<sup>8</sup> Front populaire pour la libération de la saugia-el-hamra et du rio de oro (Front Polisario) v Conseil de l'Union européenne, European Court of Justice (Eighth Chamber) at paras 1-5, December 10, 2015, [EU Decision] available online: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=172870&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=227279> (**ECJ Decision, December 10, 2015**).

<sup>9</sup> ECJ Decision, December 10, 2015 at para 8.

<sup>10</sup> ECJ Decision, December 10, 2015 at paras 9, 12.

<sup>11</sup> ECJ Decision, December 10, 2015 at para 5.

<sup>12</sup> Saharawi Arab Democratic Republic, “Constitution de la RASD”, adoptée par le dixième Congrès national, 26.08. - 04.09.99 (1999), available online (French), Saharawi Arab Democratic Republic <http://www.arso.org/03-0.htm>.

<sup>13</sup> United States Department of State, Western Sahara 2014 Human Rights Report at 1 online: USDS <<http://www.state.gov/documents/organization/236840.pdf>> at 15 (**USDS Western Sahara, 2014**).

<sup>14</sup> USDS Western Sahara, 2014 at 15.

<sup>15</sup> ECJ Decision, December 10, 2015 at para 3.

seek a referendum on independence. Morocco has proposed autonomy under Moroccan sovereignty. The dispute remains at a stalemate.<sup>16</sup>

On March 16, 2016, Morocco expelled MINURSO civilian personnel from Moroccan controlled Western Sahara. A report to the Security Council was released by the UN Secretary General on April 19, 2016.<sup>17</sup> Resource development was mentioned at paragraph 103 of the report as follows:

*In the light of continued interest in the exploration and exploitation of the natural resources of Western Sahara, I reiterate my call on all relevant actors to “recognize the principle that the interests of the inhabitants of these territories are paramount”, in accordance with Article 73 of the Charter of the United Nations.*

On April 29, 2016 the Security Council renewed the MINURSO mandate for another year and emphasized the urgent need for MINURSO to return to full functionality. No specific comment regarding resource development was included in the resolution.<sup>18</sup>

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<sup>16</sup> USDS Western Sahara, 2014 at 15.

<sup>17</sup> Report of the Secretary-General on the situation concerning Western Sahara, 19 April 2016, S/2016/355.

<sup>18</sup> Security Council, *Resolution 2285 (2016)*, S/RES/2285, UNSC (2016).

## **2. Summary of Findings and Recommendations**

As further developed in the body of this report, the Reviewers conclude that Agrium is not compelled by the UN Guiding Principles to end its supplier relationship with OCP/Phosboucraa and could continue sourcing phosphate from OCP/Phosboucraa consistent with the UN Guiding Principles on the basis that:

- Agrium is not causing or contributing to potential or actual negative human rights impacts in Western Sahara by its supplier relationship with OCP/Phosboucraa; and
- Agrium has leverage to mitigate potential or actual negative human rights impacts linked to the Supplier Relationship.

Should Agrium continue to source rock from OCP/Phosboucraa on this basis, the Reviewers recommend that Agrium:

- Continue to exercise its leverage to encourage compliance with internationally recognized human rights;
- Continue to engage with stakeholders to address the risks associated with Agrium's linkage to actual or perceived negative human rights impacts;
- Monitor the situation and regularly re-evaluate areas of potential or actual human rights impacts; and
- Communicate with stakeholders, as appropriate and with regard to legitimate confidentiality interests, how Agrium is addressing negative human rights impacts arising from its purchase of phosphate rock mined in Western Sahara, in accordance with the UN Guiding Principles and related international human rights standards.

The Reviewers recommend that if and when negative human rights impacts are identified that cannot be addressed adequately by Agrium's leverage over OCP, the continued relationship with OCP/Phosboucraa should be re-evaluated, with particular regard to the severity of the negative human rights impact, how crucial the Supplier Relationship is to Agrium's operations and whether terminating the relationship in itself would have any negative human rights impacts.

### 3. Methodology

#### (a) Application of UN Guiding Principles

The Assessment was conducted to accord with the UN Guiding Principles.<sup>19</sup> The UN Guiding Principles and commentary thereto describe a corporate responsibility to respect human rights. These principles can be applied by companies managing and mitigating human rights impacts associated with their suppliers and supply chains.<sup>20</sup>

The UN Guiding Principles promote the implementation of a due diligence process to identify, prevent, mitigate and account for how companies address impacts on human rights and develop a process to enable the remediation of any negative impacts.

To this end, human rights due diligence should assess actual and potential human rights impacts and identify an appropriate action plan.<sup>21</sup> Such due diligence should be conducted on an ongoing basis and consider risks to rights-holders.

Due diligence may draw on internal and/or independent external human rights expertise. It should involve meaningful consultation with affected groups and relevant stakeholders, with special attention paid to particularly vulnerable groups. Specifically, the due diligence process should include: (1) assessing actual and potential human rights impacts, (2) integrating and acting upon the findings, (3) tracking responses, and (4) communicating how impacts are addressed.<sup>22</sup>

##### *i. Assessing Impacts*

Under the UN Guiding Principles, corporations have a responsibility to avoid causing or contributing to negative human rights impacts<sup>23</sup> through their activities, to address such impacts when they occur and to seek to prevent or mitigate, through the exercise of leverage, negative human rights impacts that are directly linked to their products or services by virtue of their business relationships, even if they have not contributed to those impacts.<sup>24</sup>

##### *ii. Integration and Action*

Companies should integrate the findings of their assessments and take appropriate action. Where a business relationship is the source of an actual or potential impact, appropriate action will depend in part on the leverage the company has in the business relationship to mitigate human rights impacts. If a company lacks leverage, it should consider increasing leverage or ending the relationship. In making the decision as to whether to end a business relationship, the business enterprise should consider factors such as how crucial the relationship is to the business,<sup>25</sup> the severity of any human rights abuses,<sup>26</sup> and

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<sup>19</sup> United Nations Human Rights, Office of the High Commissioner, *New York and Geneva United Nations Guiding Principles on Business and Human Rights* (New York and Geneva: United Nations, 2011) (**UN Guiding Principles**); United Nations Human Rights, Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (New York and Geneva: United Nations, 2012) (**Guide**).

<sup>20</sup> “Business relationships” include relationships with business partners, entities in its value chain and any other non-State or State entities directly linked to its business operations, products or services. Therefore, the definition encompasses a “supplier” (Guide, Q 27).

<sup>21</sup> Guide, Q 26.

<sup>22</sup> Guide, Q 28.

<sup>23</sup> Defined as an action that removes or reduces the ability of an individual to enjoy his or her human rights (Guide, Q 10).

<sup>24</sup> Guide, Q 9.

<sup>25</sup> The commentary provides that a relationship is considered “crucial” if it provides a product or service that is essential to the enterprise’s business and for which no reasonable alternative source exists.

whether terminating the relationship would have any negative human rights consequence in itself. If it is necessary to prioritize actions to address human rights risks, companies should be guided by the severity of the potential or actual impact identified, including whether a delayed response may make the impact irremediable.

### ***iii. Tracking***

Companies should verify the effectiveness of their response, based on appropriate indicators, tracking and feedback, on an ongoing basis.

### ***iv. Communication***

Companies should be prepared to publically communicate how they address their human rights impacts, particularly when stakeholders have expressed concerns requiring more formal reporting for severe human rights impacts.<sup>27</sup> To this end, these communications should:

- Be of a form and frequency that reflect a company's human rights impacts and that are accessible to its intended audiences;<sup>28</sup>
- Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved; and
- Not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Communication should include general approaches to addressing human rights risks, possibly including specific responses to particular human rights impacts identified. There is a heightened requirement to report if there are significant human rights risks and public interest dictates a need for more formal and regular public reporting.<sup>29</sup>

## **(b) Process of the Reviewers**

### ***(i) Desktop Review***

Extensive background research was conducted using publicly available sources. This included review of documentation and analysis pertaining to OCP/Phosboucraa and the Western Sahara dispute. Publications of organizations advocating against resource development in Western Sahara were included in this review. A bibliography is set out in **Appendix C**.

The desktop review also included non-public documents obtained from OCP/Phosboucraa and Agrium. Specific documentation was requested prior to and during the site visit, including documents illustrating the governance and management practices of OCP/Phosboucraa.

In response to transparency requests, including from Agrium, OCP commissioned a legal opinion by international law firms Dechert (United Kingdom) and A. Pallacio y Asociados (Spain, led by Ana Palacio, Spain's former Minister of Foreign Affairs, former General Counsel of the World Bank and current member of Spain's State Council), who together retained KPMG International Advisory Services to conduct a detailed analysis of Phosboucraa's financial, operational, human resources, social and

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<sup>26</sup> The commentary provides that the more severe the abuse, the more quickly the business enterprise will need to see a change made to human rights impacts before making a decision to end the relationship.

<sup>27</sup> Particularly where the impact is extensive or irremediable (Guide, Q 57).

<sup>28</sup> The timing, recipients and means of that communication are then the subject of separate decisions (Guide, Q 55).

<sup>29</sup> Guide, Q 55.

environmental activities. The KPMG Report was based on four investigation processes conducted between the first quarter of 2009 to July 30, 2015. The most recent update of KPMG's findings was completed in a report dated July 30, 2015 (the "**KPMG Report**") and was reviewed by the Reviewers as part of the Assessment. The KPMG Report has not been released publicly in its entirety. With Agrium's encouragement, OCP launched a new website that highlights the key facts and analysis of the KPMG Report for transparency purposes.<sup>30</sup>

(ii) **Review of Prior Due Diligence of Agrium**

Prior to the engagement of the Reviewers, Agrium personnel actively engaged with suppliers, including OCP/Phosboucraa, on a number of occasions regarding sustainability, human rights and the application of the Supplier Code. Engagement with OCP/Phosboucraa included discussion of human rights related issues, such as transparency and addressing human rights concerns of Agrium stakeholders. This Assessment, conducted by independent external experts, builds on the previous human rights due diligence conducted by Agrium personnel in relation to their supplier relationship with OCP/Phosboucraa.

(iii) **Additional Benchmarking**

As noted, Agrium has developed its own governance practices in relation to suppliers. This includes the implementation of Agrium's Supplier Code, which sets out a policy governing relationships with suppliers in human rights areas including labour standards, health and safety, internationally accepted human rights standards and anti-corruption. Agrium has also established a Code of Business Conduct and Ethics and a Corporate Social Responsibility (CSR) Policy, both of which address human rights related issues. These codes and policies were reviewed and applied as a benchmark for the purposes of this Assessment. The specific findings of the Assessment pertaining to the elements of the Supplier Code are appended to this report as **Appendix A**.

Additional benchmarks were derived from the following leading international standards:<sup>31</sup>

- The **UN Guiding Principles** are widely regarded as the leading benchmark for human rights due diligence assessment;
- International Finance Corporation ("**IFC**") *Performance Standards for Environmental & Social Sustainability* ("**IFC Performance Standards**"). The IFC Performance Standards, particularly Performance Standard 2, reflect and operationalize the requirements of leading international human rights instruments such as the International Bill of Rights and core conventions of the International Labour Organization ("**ILO**") pertinent to the Supplier Code and UN Guiding Principles;
- Human rights due diligence and impact assessment guidance prepared by organizations such as the **World Bank/IFC** and the **International Petroleum Industry Environmental Conservation Association** ("**APIECA**"), among others;
- The 2014 **Danish Institute for Human Rights Human Rights Compliance Assessment** diagnostic tool, designed to help companies detect potential human rights abuses caused by the effect of their operations on employees, local residents and all other stakeholders;
- The **International Council on Mining and Metals Guidelines** ("**ICMM**") developed by the ICMM, which provides a list of questions and considerations which may assist mining companies in adequately addressing human rights;

<sup>30</sup> See online: <[www.phosboucraa.ma](http://www.phosboucraa.ma)>.

<sup>31</sup> Each of which are cited in the Bibliography at Appendix C.



- The **Anti-Corruption Ethics and Compliance Handbook for Business** of the OECD, which has been developed to serve as a useful, practical tool for companies seeking compliance advice; and
- The **Transparency International Anti-Bribery Checklist**, aligned to the *Corruption of Foreign Public Officials Act* (“**CFPOA**”) and the Business Principles for Countering Bribery.

(iv) **The Corell Opinion**

International legal standards, relevant judicial decisions and legal opinions in relation to the Western Sahara dispute were also reviewed and incorporated into the analysis of this Report as appropriate for the purposes of benchmarking. Of particular importance to the benchmarking analysis on the issue of self-determination human rights is a legal opinion to the United Nations Security Council (often cited by both sides of the dispute) written by Hans Corell (then United Nations Under-Secretary-General for Legal Affairs), addressing the inter-relation between resource rights and self-determination in the context of Western Sahara (the “**Corell Opinion**”).<sup>32</sup> The Corell Opinion considered 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.” The Corell Opinion considered contracts between the Moroccan government and foreign companies arising from resource exploration and new exploitation activities. This context is therefore distinct from the context of phosphate mining in Western Sahara which has taken place since 1972 and does not generally involve exploration activities or the settling of contracts for new mining rights with foreign companies. Phosphate mining activities of OCP/Phosboucraa (and its predecessors) pre-date the current political dispute in Western Sahara involving Morocco. Nevertheless, the findings of the Corell Opinion also take into account an analysis of the principles of international law (applicable to States rather than private actors) governing mineral resource activities in Non-Self-Governing Territories. In this regard, the Corell Opinion provides a useful analysis that has been considered by the Reviewers in developing benchmarks for the Assessment.

The Corell Opinion identifies two possible interpretations of the legal limits on resource exploitation activities in Western Sahara generally:

1. The more restrictive view which is that mineral resource activities in a Non-Self-Governing Territory by an administering Power are illegal, as such.<sup>33</sup>
2. The broader view which is that such development is illegal only if conducted in disregard of the needs and interests of the people of that territory.<sup>34</sup>

The Corell Opinion adopts the broader view and concludes that, “... if the territories’ resources are exploited to the benefit of the peoples of those territories, on their behalf or in consultation with their representatives, this operation is considered compatible with the obligations of the administering Powers under the Charter and in accordance with resolutions of the General Assembly and the principle of ‘permanent sovereignty over natural resources’ devoted to it.” Accordingly, pursuant to the Corell Opinion, the development of natural resources in a Non-Self-Governing Territory generally, involves an obligation on an administering power to act with regard to the self-determining peoples’ “needs, interests and benefits” in its exploitation activities.<sup>35</sup> The Corell Opinion also concludes, in the context of new contracts for new mineral exploration and development, that, “...if further exploration and exploitation activities were

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<sup>32</sup> Letter dated 29 January 2002 from the Under-Secretary-General of Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161 (29 January 2002) (**Corell Opinion**).

<sup>33</sup> Corell Opinion at paras 14, 21.

<sup>34</sup> Corell Opinion at paras 14, 21.

<sup>35</sup> Corell Opinion at para 24.



to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in the Non-Self-Governing Territories”.<sup>36</sup>

The Corell Opinion is not a determinative statement of international law or reasonable expectations applicable to resource development in Western Sahara. It has been criticized for failing to identify “who” precisely must benefit from the exploitation of Western Sahara’s natural resources. It is also contestable whether Morocco is properly considered an “administering power” for the purposes of the UN Charter, which could have bearing on the analysis of the Corell Opinion.<sup>37</sup> Definitive resolution of these issues is beyond the scope of this Assessment. The Corell Opinion is used for the limited purposes of the Assessment as a useful benchmark in the context of resource development in Western Sahara.

There are opinions from other sources that adopt the more restrictive approach noted above, including the African Union, which concludes that Western Sahara’s right to self-determination means that “[a]ny exploration of natural resources by Morocco, any other State, group of States, or foreign companies engaged by Morocco in Western Sahara is illegal since they violate international law and resolutions of the UN and the [African Union].”<sup>38</sup>

Despite that view, and acknowledging the divergent positions that exist on the applicable international law, the Corell Opinion remains widely cited as a leading statement of international expectations concerning the extraction of natural resources in Western Sahara. The Corell Opinion, and the test it proposes, is therefore a key benchmark used in this Assessment on the issue of self-determination human rights.

#### (v) **Recent Judicial Decisions**

Finally, the Reviewers took into consideration new developments in the law in various jurisdictions. For example, both the European Union Court of Justice<sup>39</sup> (the “**EU Decision**”) and the United Kingdom High Court of Justice (Queen’s Bench Division)<sup>40</sup> (the “**UK Decision**”) have released decisions in 2015 calling into question the legality of trade agreements between the European Union and Morocco, which have impacts upon the Western Sahara region. These decisions have raised difficult questions about when and how trade agreements with Morocco are consistent with international law, insofar as they affect Western Sahara. These cases do not, however, put forth a definitive statement of the law applicable to Agrium or other companies engaged in a supply relationship relating to Western Sahara. The decisions are currently under appeal.

#### (vi) **Site Visit and Interviews**

The Reviewers conducted a four-day site visit as part of the Assessment. Two Agrium personnel were present for three of the four days of the visit. The Reviewers were free of interference from Agrium to undertake the Assessment during the visit. Where Agrium representatives were present they did not interfere in the Reviewers’ interactions with OCP/Phosboucraa employees and/or third parties or attempt

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<sup>36</sup> Corell Opinion at para 25.

<sup>37</sup> Corell Opinion at paras 7-8.

<sup>38</sup> The Office of The Legal Counsel and Directorate for Legal Affairs of the African Union Commission, “Legal Opinion on the legality in the context of international law, including the relevant United Nations resolutions and OAU/AU decisions, of actions allegedly taken by the Moroccan authorities or any other state, group of states, foreign companies or any other entity in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activity in Western Sahara”, October 14, 2015, online: <<http://legal.au.int/en/content/legal-opinion-legality-context-international-law-actions-allegedly-taken-exploration-and-or-e>> at para 60.

<sup>39</sup> ECJ Decision, December 15, 2015. It should be noted that the Reviewers are not qualified to practice law in the European Union and offer no legal opinions in this regard.

<sup>40</sup> *R. (on the application of Western Sahara Campaign UK) v H.M. Revenue and Customs*, [2015] EWHC 2898 (Admin). It should be noted that the Reviewers are not qualified to practice law in the United Kingdom and offer no legal opinions in this regard.

to restrict the Reviewers' questions. Interactions during the site visit took place in French and English, one Reviewer being fully bilingual.

On the first day of the site visit, the Reviewers conducted a lengthy interview of OCP/Phosboucraa senior management at OCP headquarters in Casablanca. During this meeting, the Reviewers requested access to relevant OCP/Phosboucraa policies and procedures. Documents that were not immediately available were provided after the site visit.

Following this interview, the Reviewers spent two days in Western Sahara. On the first day, the Reviewers attended a presentation on OCP/Phosboucraa's economic and social development projects in Western Sahara. They also visited an agricultural co-operative, athletic/recreational centre under construction, the site of a proposed university/hospital centre, a local elementary school, a vocational training centre and a social club in Laayoune for Phosboucraa employees. During this phase of the visit, the Reviewers were able to speak with persons benefitting from or working with these local community institutions and projects, many of whom identified as Saharawi. These discussions were conducted without interference from Agrium or OCP/Phosboucraa representatives.

On the second day in Western Sahara, the Reviewers visited Phosboucraa's mining operations and the port facilities in Laayoune. The Reviewers visited the Boucraa mine site and processing facilities, housing for employees and their families, a medical clinic and other facilities at the mine site. They also met with OCP/Phosboucraa personnel, including the head of human resources and employee health and safety leads. While visiting the mine and port facilities, the Reviewers were able to speak with employees without interference from OCP/Phosboucraa management and to ask them questions. The Reviewers also had the opportunity to speak to a representative of Dupont Sustainability Solutions, retained by OCP to assist in the development of a comprehensive health and safety program throughout OCP's operations including Western Sahara. These interviews included discussions with persons identifying as Saharawi who work for OCP/Phosboucraa. The Reviewers did not have the impression at any point that Phosboucraa employees or third parties were apprehensive about speaking to them or that they sought direction from management representatives before answering the Reviewers' questions. No red flags were raised about workers' rights issues through the initial field and desktop research so other human rights related issues were prioritized for the purposes of the Assessment, as discussed herein.

During their time in Western Sahara, the Reviewers also met with two representatives of the local government of Moroccan administered-Western Sahara, including an elected official and an employee of the Regional Council. This interview was conducted in the presence of OCP/Phosboucraa management, but there were no overt attempts by them to limit questions, direct the Reviewers' inquiries or influence the answers to these inquiries.

The final day of the site visit involved a visit of the Khouribga mine south of Casablanca, outside of Western Sahara, which is OCP's largest operation. In the nearby town of Khouribga, the Reviewers visited a water treatment plant, a vocational training centre, a newly-built community centre and the OCP employee social club. This allowed the Reviewers to compare OCP's facilities and programs for workers and the wider community in Western Sahara with those in Khouribga.

The Reviewers took steps to maintain both the reality and appearance of independence. The Reviewers were however dependent on OCP to arrange the site visit and some of the interviews with OCP/Phosboucraa personnel and other persons that the Reviewers requested to meet with during the site visit.

(vii) ***Engagement with Saharawi Arab Democratic Republic (SADR) Representatives and Groups Opposed to the Purchase of Western Sahara Phosphate***

Before and after the site visit, the Reviewers conducted interviews and gathered and reviewed statements from groups that are opposed to the purchase of phosphate rock mined in Western Sahara. This included correspondence with an executive member of the Sahrawi Arab Democratic Republic ("SADR")

Petroleum and Mining Authority (who represented that he was speaking on behalf of the SADR government and the Saharawi national liberation movement, the Frente Polisario),<sup>41</sup> Association de soutien à un référendum libre et régulier au Sahara Occidental (“**ARSO**”),<sup>42</sup> and Association for the Monitoring of the Natural Resources and for the Environmental Protection in Western Sahara (“**Amarpenws**”),<sup>43</sup> representatives of which all responded to interview requests. Communications were also had with Western Sahara Resource Watch (“**WSRW**”) (which facilitated interviews with the above noted organizations). Publications of WSRW were also reviewed.<sup>44</sup> The responses and viewpoints expressed were considered in this Assessment and are summarized below. Wherever possible the responses of these organizations has been recreated verbatim. Any inaccuracy or mischaracterization of these statements is unintentional.

Other non-governmental organizations such as Human Rights Watch, Transparency International and Amnesty International were contacted by the Reviewers, but did not respond or declined to be interviewed. Representatives of the United Nations mission in Western Sahara were also contacted and declined to be interviewed or did not respond to interview requests.

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<sup>41</sup> Interview question responses received January 21, 2016.

<sup>42</sup> Interview question responses received December 30, 2016.

<sup>43</sup> Interview question responses received January 16, 2016.

<sup>44</sup> See Bibliography, Appendix C.

## **4. Findings of Due Diligence**

### **(a) Views Expressed by Saharawi Arab Democratic (SADR) Representatives and Groups Opposed to the Purchase of Western Sahara Phosphate**

Key points raised in the literature review and interviews with SADR, ARSO, Amarpenws and WSRW are summarized as follows:

- All groups interviewed assert that foreign companies should refuse to do business in the disputed Western Sahara region in the *status quo*, because to do so is both illegal and unethical. For example, the view was expressed by SADR and WSRW that Morocco has no legal claim to the Western Sahara territory and therefore no right to explore and exploit any natural resources, or to enter into agreements or contracts with third parties concerning those resources. These groups noted recent decisions regarding the EU-Morocco trade agreement and a legal opinion of the African Union (noted above) as supportive of this position.
- WSRW asserts that three main problems arise from resource development in Moroccan controlled Western Sahara: (i) it results in the enrichment of Morocco through the sale of the territory's natural resources and revenue gained therefrom; (ii) Morocco's development of Western Sahara's resources legitimizes and encourages further acceptance of its "illegal" presence in the territory; and (iii) development prior to a political settlement decreases availability of non-renewable resources to the Saharawi people if and when they eventually realize self-determination.
- SADR states their view that natural resource development encourages migration of non-Saharawi to Western Sahara and is used to sustain those non-Saharawi populations. SADR also stated their view that half of the Saharawi people do not live in Moroccan controlled Western Sahara, but rather in the camps at Tindouf, in Algeria.
- SADR raised the concern that the "pillage of a resource" would "degrade and erode the opportunity to exercise self-determination".
- ARSO and WSRW assert that the Saharawi derive no benefit from natural resource development in Moroccan controlled Western Sahara and that there are no advantages or positive effects associated with the fact that foreign companies currently operate in the disputed region in Western Sahara. WSRW asserts that none of the revenues from these resources is returned to the Saharawi people and no accounting of them is publicly available. Amarpenws stated that all revenue from mining activity goes straight to the Moroccan Government's coffers.
- Amarpenws states that purchases of phosphate are a source of public discontent and the expression of criticism is repressed by the Moroccan Government.
- ARSO and Amarpenws assert that the effect of ceasing all foreign commercial activity would be to: (i) "symbolically and clearly demonstrate that the country is not part of Morocco"; (ii) "diminish Morocco's interest in the continued occupation of the territory and facilitate a peaceful solution"; and (iii) "strengthen the movement of human rights in Western Sahara".
- Amarpenws asserts that legitimate resource development has not involved adequate consultation with the Saharawi people, which necessitates engagement with the Polisario Front. Elected representatives in Moroccan administered Western Sahara were said by Amarpenws to be illegitimate and corrupt. The Polisario Front was said by Amarpenws to be the unique and only representative of the Saharawi.

In addition to these views, the following was also conveyed to the Reviewers:

- SADR stated that while the exploitation and diminishment of resources is not a leading human rights concern, the whole phenomenon underscores the problem of illegal settler migration into the occupied part of Western Sahara.
- SADR stated that mining development encourages illegal settler migration into the occupied part of Western Sahara reducing prospects for self-determination.
- SADR and Amarpnws stated that mining will continue in the event of independence and a resolution of the political dispute. Mining development would be needed, according to Amarpnws, if Western Sahara were to achieve independence in order to build the state and provide for the stability, welfare, security and prosperity of the region. SADR stated that while changes to the governance of the industry would occur (including democratic legitimacy and environmental management), in many respects the commercial regime would not change.
- SADR has a policy of pursuing the open, transparent, commercial and environmentally responsible development of a mining industry in territory it controls.
- It was acknowledged by SADR that some Saharawi benefit from employment in the phosphate mining industry, although the view was expressed that such employment was no more than 25% of OCP/Phosboucraa employees. It was stated that no credible numbers were available. As well, it was asserted that those who do work for OCP/Phosboucraa are not able to express an aspiration for self-determination.
- Amarpnws stated that unemployment in Western Sahara's disputed territory is more than 16% (stating that in Morocco the rate is 9%). In addition, Amarpnws stated that there are no universities in Western Sahara where Saharawi students can attend, there is an absence of good local education and there are no decent hospitals.
- It was acknowledged by SADR that if foreign companies refused to do business in the disputed Western Sahara region, this could have economic impacts in that fewer Saharawi would be employed.

#### **(b) Views of OCP/Phosboucraa in Support of their Western Sahara Phosphate Development**

The findings of the KPMG Report, noted above, provide the underpinning to OCP/Phosboucraa's position that its operations are consistent with international legal and human rights expectations, including particularly the Corell Opinion. In OCP/Phosboucraa's view, based on the findings of the KPMG Report, its operations in Western Sahara: (i) result in non-discriminatory working conditions and the absence of wage discrimination for inhabitants of the territory; (ii) promote the economic advancement of the inhabitants of the territory; (iii) are not to the detriment of the interests of the peoples of the territory; and (iv) are exercised having regard to the development and well-being of the peoples of Western Sahara and to promote the economic and financial viability of the territory.

##### ***(i) Direct and indirect employment and community investments***

According to the KPMG Report, direct and indirect employment opportunities for people in Western Sahara have been the main contribution of Phosboucraa to the region. Direct salary and benefits totaled approximately \$1.5 billion between 1977 and 2013, 39% of which went to local persons over this time period.<sup>45</sup> The KPMG Report concludes that Phosboucraa has gradually increased the number of local

<sup>45</sup> All money amounts in this Report are in U.S. dollars. It is assumed for the purposes of this Assessment that \$1USD = 10 MAD.

employees<sup>46</sup> from 4% of the overall workforce<sup>47</sup> in 1977 to 59% by December 31, 2013. OCP has informed the Reviewers that the current proportion of local workers is 62.5%. This is an increase from 40% of employees as recently as 2007. This increase in the headcount of local employees has been achieved through a policy of prioritizing employment of local workers and significant hires of local staff from January 2011 onwards. These figures do not take into account subcontractors who have been employed by OCP/Phosboucraa since 1999 and who, according to the findings of the KPMG Report and OCP/Phosboucraa, are primarily locals. In 2016, Phosboucraa launched a program to hire and train 500 young professionals who come almost exclusively from the South (as defined in the KPMG Report). This initiative is now fully completed.

According to the KPMG Report, recruitment and training policies have focused on increasing the level of skills and qualifications of local workers, particularly through the technical training centre in Laayoune, created in 1995, which were observed during the site visit.

The KPMG Report concludes that Phosboucraa's salary scale and base salary are the same for all workers in the same professional group and at the same level of seniority, suggesting no discrimination against local workers in regards to pay for similarly situated workers.

Community investment and social responsibility projects made by OCP/Phosboucraa are noted in the KPMG Report and were also observed during the site visit. In Western Sahara, social investment programs by OCP/Phosboucraa are administered by a not-for-profit entity called the Phosboucraa Foundation. The Phosboucraa Foundation was created in May 2014 to develop and implement community investment initiatives in Western Sahara. The Foundation's three principal focus areas are education, healthcare and building capacity of local associations and co-operatives. Going forward, the Reviewers were informed that Phosboucraa has approved a 10 year plan for community investment totaling \$250 million for 2013-2022. For the year 2015, a budget of \$15 million has been approved to launch these programs. These funds are not contingent on the profitability of OCP/Phosboucraa. As found during the site visit, the leadership of the Phosboucraa Foundation includes Saharawi persons with long ties to the region.

Key programs funded by OCP/Phosboucraa are aimed at youth employment, education, health, infrastructure development, civil society capacity building, and sustainable agriculture. These projects take place across regions in which OCP/ Phosboucraa operate, including but not limited to Western Sahara.

A program called "OCP Skills" provides employability training in the Laayoune area with a budget of \$7.5 million from 2011 to 2013. The program has trained over 1300 people to supply the local job market. A variety of programs are offered in a wide range of vocational fields. During the site visit, a skills development centre in Laayoune was visited. The Reviewers were informed that the centre is available to everyone in the local community, including individuals who do not work for OCP/Phosboucraa. Training and support for small business development is made available to members of the local community. Women were observed to be particularly active in these programs in Laayoune, many of whom expressed their goal of establishing small businesses with the support of the skills centre and entrepreneurship programs. These programs, offered at the centre, are funded largely by Phosboucraa through the Phosboucraa Foundation. Some programs are delivered in partnership with international NGOs such as Amideast, International Youth Foundation, Junior Achievement or corporate partners such as Microsoft.

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<sup>46</sup> The KPMG Report defines these employees as "Employees from the South", i.e. employees whose family originated from Moroccan territory located south of Guelmin (or from Guelmin before 1976 (including Western Sahara). This is opposed to "Employees from the North" which are defined to mean "Employees whose family originated from Moroccan territory located north of Guelmin before 1976." For the sake of neutrality "Employees from the South" will be referred to as "local" workers for the purposes of this Assessment.

<sup>47</sup> Although it should be noted that an additional 59% of employees at that time were defined to be "old status", meaning they had been originally hired before 1976 by OCP's predecessor INI.



In the area of health, the Reviewers were informed that the Phosboucraa Foundation funds medical caravans which provide health care free of charge in remote areas. The Reviewers were informed that over 20,000 persons have benefited from this program.

As observed during the site visit, the Phosboucraa Foundation has invested in sustainable agriculture program activities in the Western Sahara region. As well, capacity building programs for local food producers to enter commercial supply chains are being funded by the Phosboucraa Foundation, in association with international NGO Amideast.

Plans are also in place for the building of a “Technopole” city near Laayoune, which is intended to have a university, hospital and business development facilities, as well as housing, funded by OCP/Phosboucraa. The project is anticipated to cost approximately \$200 million. The Reviewers were informed that, as a result of the investment, 1.8 million person-days’ worth of job creation is anticipated to result from the construction phase and 1200 jobs upon completion. There is no information currently available regarding the proportion of local persons who will benefit from this project, although the Reviewers were informed during the site visit that these institutions would be generally available to all local persons.

*(ii) Cash Flows and Infrastructure Investment*

According to the KPMG Report, over the period from 1977 to 2013, the total Net Present Value of cash-flows spent into Western Sahara by Phosboucraa amounted to approximately \$1.93 billion, composed of personnel costs, operating expenses and capital expenses. This, according to the KPMG Report, is more than double the net cash flows spent into Morocco by Phosboucraa over the same time period.<sup>48</sup>

From 1977 to 2013, 15.4% of the capital expenditures relates to acquisitions and services provided by local suppliers in Western Sahara. As described in the KPMG Report, the use of local resources has been constrained by the limited availability of technical and industrial services in Western Sahara. Nonetheless, there has been a substantial increase in the use of local providers since 1997, with local purchases representing 22% of all capital investments between 1997 and 2013.

The KPMG Report also states that net cash flows for OCP from Phosboucraa have been negative over the period from 1976 to 2013. This is evidence, according to the KPMG Report, that the profitability of the Phosboucraa acquisition for OCP has been lower than Morocco’s average inflation rate over that period.

Furthermore, the KPMG Report states that, as of December 31, 2013, Phosboucraa held approximately \$300 million of cash and cash equivalents. According to Phosboucraa’s management, these cash and cash equivalents will remain on Phosboucraa’s books and are reserved to finance future local investment and capital expenditures. Management has further confirmed that these cash and cash equivalents will not be distributed to OCP (as all of Phosboucraa’s profits are retained and reinvested locally) and in the interim are being invested in marketable securities. According to Phosboucraa’s management these cash and cash equivalents will remain on Phosboucraa’s books and is reserved for financing of future local investment and capital expenditures.

Over this same period of 1977 to 2013, the KPMG Report states that more than \$2 billion has been invested in capital and operating expenditures of Phosboucraa in total. The KPMG report states that these investments have been made regardless of the profit or loss of Phosboucraa’s operations. The Reviewers were informed by OCP/Phosboucraa that new infrastructure investments will extend the life of existing mine segments by making it possible to extract lower BPL content phosphate layers and investing in downstream flotation and fertilizer units. Further mining investments are planned totaling \$250 million, above the \$40 million maintenance costs invested in operations per annum. This investment includes the building of a flotation/washing unit, new drying unit and upgrading extraction equipment.

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<sup>48</sup> Accounting for the net of cash flows into Phosboucraa from Morocco and those from Phosboucraa to Morocco.

The Reviewers were informed by OCP/Phosboucraa that a new port with a seawall is also being planned and is in the feasibility study stage. This project would include \$420 million in relation to Phosboucraa port operations and an additional \$200 million to allow expansion of the port for other commercial activities independent of Phosboucraa.

A longer term plan identified by OCP/Phosboucraa is to develop a chemical fertilizer products complex, which would involve an investment of approximately \$1.2 billion.

*(iii) Sustainable Development*

OCP/Phosboucraa has expressed a commitment to “shared value” and “sustainability” in its Phosboucraa operations. The strategy, programming and implementation of community investment and social responsibility programs by OCP/Phosboucraa was observed during the site visit to be sophisticated and substantial.

The Reviewers were informed by OCP/Phosboucraa that Phosboucraa has moved from fossil fuel to wind energy avoiding an estimated 80,000 tonnes of CO<sub>2</sub> emissions each year. Wind power production exceeds the needs of OCP/Phosboucraa’s operations and supports local energy needs. OCP/Phosboucraa stated that water consumption management has been improved by the installation of high precision flow meters and sewage treatment plant investments to recycle water for the irrigation of green space in Boucraa.

According to the KPMG Report, studies are currently being conducted on emissions discharges and minimal impact has been demonstrated on local biodiversity from Phosboucraa operations.

*(iv) New Development Model for the Southern Provinces<sup>49</sup>*

Beginning in 2013, the government of Morocco engaged in a review of its approach to development in the Western Sahara regions. As part of this process, the government consulted over 1,500 people, including elected officials, women, youth, and representatives of governmental authorities, civil society, trade unions, and economic actors. This consultation formed the basis for a comprehensive assessment of “human, economic, social, cultural and environmental rights in the Southern Provinces”.<sup>50</sup> A final report on the assessment was published in March 2013. Among other things, it identified concerns about human rights issues in the region. In terms of resource development, the assessment noted criticisms that resource development did not adequately benefit local communities,<sup>51</sup> and that there was high unemployment,<sup>52</sup> poor health care facilities<sup>53</sup> and lack of higher educational institutions.<sup>54</sup> The assessment also acknowledged concerns that natural resources were being “plundered” by a local elite elected in non-transparent elections and that the political demands of the region were being ignored.<sup>55</sup>

The outcome of this process was the “New Development Model for the Southern Provinces”, released in October of 2013 (“**New Model**”),<sup>56</sup> which has an express objective of advancing sustainable development

<sup>49</sup> Note that the term “Southern Provinces” is used here only to convey the name of a Moroccan government document and for no other purpose.

<sup>50</sup> Ad-hoc Committee in charge of drafting an opinion on the new regional development model for the Kingdom’s southern provinces, “Assessing effective access to basic human, economic, social, cultural and environmental rights in the southern provinces”, Royaume du Maroc, March 2013 online: <<http://www.ces.ma/Documents/PDF/Web%20Rapport%20Effectivite%20des%20droits%20VEng%2003052013.pdf>> (**Ad-hoc Committee Report**).

<sup>51</sup> Ad-hoc Committee Report at paras 411-412.

<sup>52</sup> Ad-hoc Committee Report at para 413.

<sup>53</sup> Ad-hoc Committee Report at para 42.

<sup>54</sup> Ad-hoc Committee Report at para 43.

<sup>55</sup> Ad-hoc Committee Report at para 436.

<sup>56</sup> New Model.



in the region, with participation of stakeholders and people of Western Sahara and in compliance with basic human rights.<sup>57</sup>

Five guidelines are set out in the New Model for the development of natural resources: (i) adoption of a participatory approach, notably through public interest inquiries, so that professionals and representatives of the citizens and of civil society are involved in the development and monitoring of the policy governing the use of natural resources; (ii) the attachment of conditions to the granting of permits and licenses, requiring a commitment for the creation of local value added and jobs; (iii) ensuring sustainable exploitation of resources incorporating criteria of social and environmental responsibility; (iv) making natural resources accessible for small and medium enterprises; and (v) allocating a substantial part of revenue from the exploitation of natural resources to regional development and to improvement of the population's living conditions.<sup>58</sup> According to the New Model, "Government revenues from the exploitation of these natural resources will be mostly reallocated to the development of the southern provinces until the expected development level has been reached, as measured against other regions of Morocco."<sup>59</sup>

The New Model also proposes the creation of a fund that will facilitate the re-integration of refugees from the Tindouf camp in the event of their return. No details on the nature of this fund or its connection to revenues from mining in the region were obtained by the Reviewers.<sup>60</sup>

The management of OCP/Phosboucraa advised the Reviewers that the guidelines in the New Model were informing its practices in Western Sahara. As a result, the revenues and benefits associated with OCP/Phosboucraa's operations in Western Sahara, as a matter of policy, will substantially remain in the Western Sahara region for the benefit of the local inhabitants.

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<sup>57</sup> New Model at 13.

<sup>58</sup> New Model at para 249.

<sup>59</sup> New Model at 18.

<sup>60</sup> New Model at 19.

## 5. Application of the UN Guiding Principles

### (a) Assessing Human Rights Impacts

In light of the foregoing findings, the Reviewers applied the UN Guiding Principles as follows.

There is a live and unsettled dispute regarding Western Sahara and the appropriateness of phosphate extraction by OCP/Phosboucraa in that territory. For this reason, the positions of relevant stakeholders regarding the appropriateness of phosphate purchases from OCP/Phosboucraa are, in most respects, completely at odds and irreconcilable at the present time.

There are a number of human rights issues pertinent to the Western Sahara region. As noted by SADR, however, the exploitation of resources is not a leading human rights concern in Western Sahara.<sup>61</sup> SADR and Amarpnws also stated that mining development would continue if Western Sahara were to achieve independence, with little or no change to commercial practices. This indicates to the Reviewers that not all human rights issues pertaining to Western Sahara are relevant to the question of phosphate mining and the supplier relationship between OCP/Phosboucraa and Agrium. For example, negative human rights impacts associated solely with State actions which are not directly or indirectly caused or contributed to, or even linked to, phosphate mining in the region or the purchase of phosphate by foreign companies, are outside of the scope of the Assessment.

The UN Guiding Principles require Agrium to identify what potential or actual negative human rights impacts are caused, contributed or linked to its supplier relationship with OCP/Phosboucraa (the “**Supplier Relationship**”). With that scope in mind, the potential or actual risk areas identified are discussed below. Further findings relating to Agrium’s Supplier Code which have not been prioritized for the purposes of this Assessment but which are relevant to the overall human rights context are set out in **Appendix A**.

#### (i) *Risks related to discrimination in employment*

Risks associated with discrimination in employment have been identified, particularly as it pertains to employment of Saharawi and local persons by OCP/Phosboucraa. The best available evidence regarding this issue is found in the KPMG Report, the findings of which are based on four investigations and full access to OCP/Phosboucraa’s records between 2008 and 2015. The KPMG Report concludes that Phosboucraa has gradually increased the number of local employees from a historically low 4% of the overall workforce<sup>62</sup> in 1977 to a substantially higher rate of 59% by December 31, 2013 (currently said by OCP to be 62.5%). This has been done through a policy of prioritizing employment of local workers and development of recruitment and training programs by OCP/Phosboucraa focused on increasing the level of skills and qualifications of local workers, particularly through the technical training centre in Laayoune, created in 1995 (observed during the site visit). This finding indicates that OCP/Phosboucraa’s operations are not being used to attract non-local persons to Western Sahara through employment opportunities. It also shows that a concerted effort has been made to encourage the hiring of local employees for OCP/Phosboucraa operations in Western Sahara. It also refutes allegations that employment rates are as low as 25% for local employees.

The KPMG Report concludes that Phosboucraa’s salary scale and base salary are the same for all workers in the same professional group and at the same level of seniority, suggesting no discrimination against local workers in regards to pay for similarly situated workers.

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<sup>61</sup> See “Findings” section 4(a) above.

<sup>62</sup> Not including an additional 59% of personnel who had been hired by OCP’s predecessor INI prior to 1975.

Based on these findings, the Reviewers considered whether negative human rights impacts were caused, contributed to, or linked to the Supplier Relationship. It is evident that the Supplier Relationship is not the cause of any potential or actual discriminatory impacts related to the hiring or employment practices of OCP/Phosboucraa. There is also no indication that the Supplier Relationship contributes to any discriminatory employment practices. On the contrary, a trend towards increased employment of local employees is noteworthy and correlates with increased transparency requests of stakeholders, including Agrium. This is suggestive of leverage that has and could continue to mitigate potential negative human rights impacts linked to the Supplier Relationship.

Any actual or potential negative human rights impacts in this area which may exist could be linked to the Supplier Relationship. The effect of this possible linkage will be addressed in section 5(b) below.

*(ii) Risks related to the use of revenues from Phosboucraa*

Concerns have been raised that the proceeds of mining activity in Western Sahara are being used solely for the enrichment of the Moroccan Government and goes “straight to the coffers” of the Moroccan government. The analysis provided by the KPMG Report provides the best available analysis of this issue, and does not support such conclusions. Additionally, OCP and the Moroccan government have publicly expressed an intention to continue to invest substantially all revenues from Phosboucraa operations in Western Sahara. This investment has, to date, taken the form of significant capital investments, investment in infrastructure, the creation of employment opportunities, educational and training programs and social investment, some of which was observed during the site visit of the Reviewers. This approach and expressed intention is supported by the conclusions of the KPMG Report (noted in more detail in the “Findings” section above) and observed by the Reviewers during the site visit to Western Sahara. Transparency on these issues appears to have been improved by leverage exercised through the Supplier Relationship.

The fact remains that refugees living in camps on the Algerian side of the border do not currently benefit from Phosboucraa’s community investment programs or other investments in Western Sahara. While there may be indirect benefits to such persons in the event a political resolution is achieved, such as from investment in maintaining and upgrading Phosboucraa’s operations and infrastructure and in the establishment of the refugee fund announced in the New Model, most of these benefits will not be realized until and unless a political resolution is obtained. The Reviewers conclude that this is not caused or contributed to by the Supplier Relationship, but rather by the ongoing political and territorial dispute which transcends and predates the Supplier Relationship. The Reviewers also found no evidence that Phosboucraa’s mining activities create adverse human rights impacts in the refugee camps. Relatedly, there is no evidence that the human rights situation of persons in the refugee camps would be improved if Phosboucraa did not generate revenues through phosphate mining in Western Sahara. There is evidence that actual or potential negative human rights impacts could occur (affecting particularly persons in Moroccan-controlled Western Sahara including Saharawi) if Phosboucraa’s operations in the region were to cease, along with related employment opportunities and community investment, pending a political resolution.<sup>63</sup> Consequently, this concern, while a serious potential impact worthy of consideration, does not present an actual or potential human rights impact caused or contributed to by the Supplier Relationship.

Furthermore, while current extraction of resources reduces the amount of resources available for future extraction, there is no evidence that this reduction would, in itself, create potential or actual negative human rights impacts caused or contributed to by the Supplier Relationship. While any resource development will inherently reduce a non-renewable resource, neither the Corell Opinion nor other leading benchmarks prohibit resource development entirely pending resolution of the political dispute in Western Sahara. This suggests that such development can occur prior to political resolution, despite the inevitable reduction of non-renewable resources that will result, if development is done in a manner consistent with international law. Consequently, the reduction of future opportunities for development

<sup>63</sup> See section 5(a)(iv) below for additional consideration of this issue of negative human rights impacts associated with ceasing development of resources in Western Sahara pending political resolution .

caused by immediate development does not, in itself, result in adverse human rights impacts. Additionally, the Reviewers note that any impacts on future revenues caused by current development are inherently monetary in nature and therefore not irremediable in and of themselves.<sup>64</sup> This suggests that the severity of such impacts should be considered less than potentially irremediable actual or potential negative human rights impacts caused or contributed to by the ceasing of development pending political resolution of the dispute.<sup>65</sup>

For these reasons, the Reviewers conclude that the Supplier Relationship does not cause or contribute to negative human rights impacts associated with revenues generated by Phosboucraa.

Any actual or potential negative human rights impacts could be linked to the Supplier Relationship. The effect of this possible linkage will be addressed in section 5(b), below.

*(iii) Risks related to the right to self-determination*

Serious concerns have been raised regarding negative human rights impacts associated with the right to self-determination of the Saharawi people.

An analysis of concerns regarding actual or potential negative impacts on the right of self-determination associated with the Supplier Relationship was performed by the Reviewers, the findings of which are set out in the table at **Appendix B**. Based on these considerations, the Reviewers conclude that the existence or nature of the Supplier Relationship does not cause or contribute to any actual or potential negative human rights impacts associated with the right of self-determination identified in the Assessment.

Actual or potential negative human rights impacts associated with the right of self-determination could be linked to the Supplier Relationship. The effect of this possible linkage will be addressed in section 5(b) below.

*(iv) Potential negative human rights impacts associated with ceasing development of resources in Western Sahara pending political resolution*

Organizations such as WSRW and SADR have called for a complete end to the purchase of phosphate from Phosboucraa pending full resolution of the ongoing political dispute. The Assessment revealed potential negative human rights impacts associated with this outcome, were it to materialize, that could be relevant to any future application of the UN Guiding Principles.

It was acknowledged by SADR that some Saharawi benefit from employment in the phosphate mining industry. The position of SADR was that such employment was no more than 25% of OCP/Phosboucraa employees and credible numbers were not available. The findings of the KPMG Report suggest the figure is higher, at 59% in 2013 (and OCP states that the current proportion is 62.5%). Publicly available data confirms that unemployment in Western Sahara's disputed territory is high at more than 15%.<sup>66</sup> It was acknowledged by SADR that refusing to do business in the disputed Western Sahara region could have economic impacts that would cost the Saharawi people jobs.

Amarpenws states, as confirmed in the site visit, that there are currently no universities in Western Sahara. They also note limited educational and health care opportunities. The Assessment found significant investments by the Phosboucraa Foundation in education and healthcare, including advanced

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<sup>64</sup> The severity of human rights impacts are assessed by their scale, scope and irremediable character. "Irremediability" means any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact. See Guide at page 8.

<sup>65</sup> See section 5(a)(iv) below for additional consideration of this issue of negative human rights impacts associated with ceasing development of resources in Western Sahara pending political resolution .

<sup>66</sup> New Model at 49.

planning on investments in a university and hospital near Laayoune. It is worth considering whether such investments would be reduced were Phosboucraa operations in Western Sahara to cease and to consider the human rights impacts that would result.

SADR, ARSO and Amarpenws stated that mining activity would continue once the political dispute had been resolved and that such operations would be important to the development of the region during this period. Were Phosboucraa's operations to cease prior to a resolution of the political dispute, it is worth considering whether investment in maintenance and infrastructure would be reduced that could affect future production or profitability of Phosboucraa operations. While speculative at this time, such an outcome could impact upon the future development capacity of the region or otherwise adversely impact market access or the competitive advantage of Western Sahara phosphate. There is also a risk that customers who find alternative sources of phosphate prior to political resolution of the dispute, and who undertake significant operational and technical changes to their operations to do so, may not return to the region once political issues are resolved. Such potential adverse consequences are relevant for consideration in the application of the UN Guiding Principles in the context of a supplier relationship.<sup>67</sup>

## **(b) Integration and Action**

Based on the above analysis, the Reviewers conclude that Agrium is not causing or contributing to potential or actual negative human rights impacts in Western Sahara by its Supplier Relationship with OCP/Phosboucraa. The Supplier Relationship could, however, be linked to concerns of potential or actual negative human rights impacts.

It is relevant to consider whether Agrium can prevent, or mitigate through leverage, any negative human rights impacts directly linked to its products by its business relationships, even if it has not contributed to those impacts.<sup>68</sup>

A threshold question is whether Agrium has leverage in the Supplier Relationship to prevent or mitigate potential negative human rights impacts. Leverage is a function of the unique relationship between business partners, including the commercial or reputational importance and quality of the relationship.<sup>69</sup> In the case of the Supplier Relationship, Agrium has leverage associated with its position as a customer in a supplier relationship with OCP/Phosboucraa. This leverage has been used, and can continue to be used, to mitigate potential or actual human rights risks and impacts associated with the Supplier Relationship.

Evidence exists that Agrium possesses and has used its leverage to prevent or mitigate potential or actual negative human rights impacts. The effects of this leverage can be seen, for example, in OCP/Phosboucraa's efforts to identify benefits and impacts of their operations (through the KPMG Report, for example). This work has been undertaken, in large part, to respond to customers like Agrium which have exercised leverage through instruments such as the Supplier Code and direct discussions on these topics.

The Reviewers conclude that the interest and concern of customers like Agrium in international human rights issues, including the right to self-determination, has encouraged OCP/Phosboucraa's community investment and employment programs in the region, and efforts to demonstrate that resources are being developed for the benefit of the people of the region. In this way, this exercise of leverage can promote positive human rights impacts to the benefit of people of the region, in accordance with international human rights standards.

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<sup>67</sup> New Model at 49.

<sup>68</sup> UN Guiding Principles, Principle 13.

<sup>69</sup> Shift, Respecting Human Rights Through Global Supply Chains (New York, 2012).

Leverage has also been exercised through the Supplier Relationship to increase the transparency of OCP/Phosboucraa's activities in Western Sahara. At the encouragement of Agrium, OCP launched a new website containing information from the KPMG Report. This publication is in direct response to stakeholder concerns expressed by Agrium in its relations with OCP/Phosboucraa, including through this Assessment. OCP/Phosboucraa's co-operation with this Assessment process was also encouraged by the leverage associated with the Supplier Relationship.

Agrium can continue to exercise its leverage and consider ways OCP/Phosboucraa can be encouraged to increase transparency and engage with relevant stakeholders on these issues, and continue to take steps to meet human rights expectations that have bearing upon the Supplier Relationship.

Recognizing the leverage that has and continues to be exercised in the Supplier Relationship, other possible steps Agrium could take include:

- Continue to apply the Supplier Code to encourage adherence to international human rights standards;
- Continue to encourage transparency regarding the Supplier Relationship to facilitate monitoring of human rights issues;
- Continue to conduct regular human rights assessment and monitoring of the Supplier Relationship; and
- Continue to encourage engagement with legitimate stakeholders on these issues.

The existence of leverage to address Agrium's linkage to possible or actual negative human rights impacts means that ending the supply relationship is not compelled by the UN Guiding Principles at this time.

A summary of the decision making methodology on this question is set out at **Exhibit A** below.

# Exhibit A: Exercising Leverage in a Crucial Business Relationship<sup>70</sup>

	Have Leverage	Lack Leverage
<b>Crucial Business Relationship</b>	<b>A</b> Step 1 → Mitigate the risk that the abuse continues/recurs Step 2 → If unsuccessful, move to “B”	<b>B</b> Step 1 → Seek to increase leverage Step 2(a) → If successful, seek to mitigate risk that the abuse continues/recurs Step 2(b) → If unsuccessful, consider ending the relationship; or demonstrate efforts made to mitigate abuse, recognizing possible consequences of remaining
<b>Non-Crucial Business Relationship</b>	<b>C</b> Step 1 → Try to mitigate the risk that the abuse continues/recurs Step 2 → If unsuccessful, take steps to end the relationship	<b>D</b> Step 1 → Assess reasonable options for increasing leverage to mitigate the risk that the abuse continues/recurs Step 2 → If impossible or unsuccessful, consider ending the relationship

Applying this reasoning, if Agrium’s exercise of leverage ceases to adequately mitigate human rights impacts, the Supplier Relationship should be reviewed on this basis.<sup>71</sup> Such a review should consider: (i) how crucial the Supplier Relationship is to Agrium’s operations, (ii) the severity of any human rights abuses identified, and (iii) whether terminating the Supplier Relationship might also have negative human rights consequences.<sup>72</sup>

## (c) Tracking

Based on the foregoing findings, tracking of possible linkages of the Supplier Relationship to human rights impacts would be appropriate. This would involve identifying appropriate indicators and monitoring new developments and feedback received on the Assessment, on an ongoing basis.

## (d) Communication

Consistent with the UN Guiding Principles, Agrium should communicate how it is addressing concerns of potential negative human rights impacts arising from its purchase of phosphate rock mined in Western Sahara. The form and extent of this communication will depend on factors including the identity of persons or entities to whom the communications are being made, the confidentiality of information in the Assessment and legitimate commercial considerations. The Reviewers are of the view that the reporting done in relation to this Assessment meets the expectations of the UN Guiding Principles regarding communication. The communication process should be ongoing and be of a form and frequency that

<sup>70</sup> See United Nations Human Rights, Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (New York and Geneva: United Nations, 2012) at page 50.

<sup>71</sup> UN Guiding Principles, Principle 19.

<sup>72</sup> UN Guiding Principles, Principle 19.



reflect human rights impacts and provides information that is sufficient to evaluate the adequacy of Agrium's response to the particular human rights impacts involved.

## **6. Recommendations and Conclusions**

Based on the foregoing, the Reviewers conclude that Agrium is not compelled by the UN Guiding Principles to end the Supplier Relationship and could continue sourcing phosphate from OCP/Phosboucraa consistent with the UN Guiding Principles on the basis that:

- Agrium is not causing or contributing to potential or actual negative human rights impacts in Western Sahara by the Supplier Relationship; and
- Agrium has leverage to mitigate potential or actual negative human rights impacts linked to the Supplier Relationship, including the promotion of transparent development of natural resources in accordance with international standards.

Should Agrium continue to source rock from OCP/Phosboucraa on this basis, the Reviewers recommend that Agrium:

- Continue to exercise its leverage to encourage compliance with internationally recognized human rights;
- Continue to engage with stakeholders to address the risks associated with Agrium's possible linkage to actual or perceived negative human rights impacts;
- Monitor the situation and regularly re-evaluate areas of potential or actual human rights impacts; and
- Communicate with stakeholders, as appropriate and with regard to legitimate confidentiality interests, how Agrium is addressing negative human rights impacts arising from its purchase of phosphate rock mined in Western Sahara, in accordance with the UN Guiding Principles.

If and when negative human rights impacts are identified that cannot be addressed adequately by Agrium's leverage over OCP, the continued relationship with OCP/Phosboucraa should be re-evaluated, with particular regard to the severity of the negative human rights impact, how crucial the Supplier Relationship is to Agrium's operations, and whether terminating the relationship in itself would have any negative human rights impacts.



## **APPENDIX A – SUPPLIER CODE OF CONDUCT DUE DILIGENCE**

### **REVIEW FINDINGS**

#### **1. Governance and Management Systems**

The Reviewers considered OCP/Phosboucraa's governance and management systems in relevant areas of human rights consistent with Agrium's Supplier Code. OCP and Phosboucraa each have their own board of directors, but the companies have common management of human resources, health and safety standards and compliance. Overall, OCP/Phosboucraa was found to have high organizational capacity and competency, particularly within the OCP/Phosboucraa legal department. OCP/Phosboucraa has implemented a number of compliance and risk management review and improvement processes, including in relation to overall risk management as well as health and safety and environment. Procedures for an internal compliance audit were revised by OCP/Phosboucraa in February of 2015 and are intended to conform with international auditing standards.

The Reviewers observed that throughout OCP, management and leadership appeared qualified for their roles and adequately resourced to carry out OCP's risk management objectives. The company has also invested in consulting services, where outside resources are required for particular projects. A good example of this investment is the retainer of Dupont Sustainability Solutions to assess employee health and safety standards at OCP/Phosboucraa, and the subsequent creation of a joint venture between Dupont and OCP to implement internationally recognized standards throughout OCP's supply chain. Another example is the use of Jacobs Engineering S.A. (a 50-50 Joint Venture between OCP and Jacobs Engineering) to develop a comprehensive health and safety and environmental management plan for OCP related construction projects.

The Reviewers are not aware of any concerns of specific human rights abuses committed by OCP/Phosboucraa, beyond the fact that they are engaged in mining operations in a disputed territory. Workers' rights are a focus of ongoing due diligence through Agrium's Supplier Code. No red flags were raised about workers' rights issues as a result of the site visit or other components of the Assessment.

#### **2. Labour and Working Conditions**

##### **(a) Legal Framework**

The legislation used as a benchmark in this assessment is the Moroccan Labour Code and its regulations, since they are only available source of law for the region of Western Sahara which is controlled by Morocco. This legislation sets out key legal requirements for employment relations in Morocco, and Moroccan controlled Western Sahara. The Labour Code guarantees minimum statutory standards in terms of wages, working hours, and prohibition on discrimination in the workplace on grounds of sex, regional or social background, trade union activities or membership, and health and safety in the workplace. This legislation appears consistent with international standards and no deficiencies were identified in the course of the Assessment.

##### **(b) Wages and Working Conditions**

OCP/Phosboucraa has a payroll of \$85 million per annum and employs 1,902 employees in Western Sahara. Five hundred new hires are planned before the end of Q1 2016, a very strong majority of which will be locals according to OCP/Phosboucraa (more than 90%). Approximately 50 local companies provide OCP/Phosboucraa with services, accounting for an additional 450 jobs indirectly associated with OCP/Phosboucraa operations in the its supply chain in Western Sahara.

Generally speaking, it was revealed through research and the site visit that employment with OCP/Phosboucraa is highly sought after and it is considered a top employer in the country and the

region. Workers in the Western Sahara region earn up to 25% more than their peers in Morocco, in part to encourage relocation to the territory of skilled persons and to compensate employees for working in a more challenging and remote area. Wages and working conditions at OCP typically exceed those that would be found with other employers in the region.<sup>73</sup>

In Western Sahara, there is relatively high unemployment (noted in research studies to be between 15% to 20%).<sup>74</sup> As such, the Reviewers found that the employment opportunities offered by OCP/Phosboucraa are important and valuable to people in that region.

The Reviewers were informed of social programs offered to Phosboucraa employees, including education, housing and social benefits. This includes housing facilities for close to 600 families, a subsidized elementary school and a club and leisure centre under development in Laayoune. Other benefits include mortgage loans, medical benefits, training, and educational programs.

Written employment contracts are not required under Moroccan law. According to OCP's senior management, written employment contracts are the norm within OCP/Phosboucraa. These contracts are provided to employees in their language of choice, the working language including French or Arabic primarily. The terms of OCP's model employment contracts were reviewed by the Reviewers and observed to conform with applicable requirements. OCP/Phosboucraa's employment related policies and internal regulations appear consistent with the Moroccan Labour Code.<sup>75</sup>

Under Moroccan law, all employment contracts must be for an indefinite period, a fixed period, or to perform specific undertakings.<sup>76</sup> Salary is determined by agreement between parties or collective labor agreement, subject to the Code's provisions on minimum wage.<sup>77</sup> In non-agricultural activities, the regular work week is 44 hours.<sup>78</sup> Overtime hours and hours worked during public holidays entitle workers to wage increases and indemnities.<sup>79</sup> The Reviewers obtained no information suggesting that OCP/Phosboucraa does not comply with these standards and when specifically asked OCP represented that there was compliance with these areas of the law.

In Morocco, persons terminated from employment have legal protection consistent with international standards such as the Convention No. 158 on Termination of Employment (1982) and Recommendation (No. 166) on termination of employment. That being so, in the country of Morocco generally, it has been observed that in practice, protection for those who lose their jobs may not meet international standards.<sup>80</sup> This is not an issue specific to OCP and the Reviewers have no information suggesting that OCP/Phosboucraa does not comply with legal requirements with respect to terminations of employment.

OCP/Phosboucraa's standard supply and contractor agreements require suppliers and contractors to comply with the law, including laws and regulations with respect to labour standards. These agreements also address health and safety and environmental compliance and the implementation of best practices in risk management. The model contracts reviewed by the Reviewers give OCP/Phosboucraa the right to audit suppliers and contractors for compliance with contractual provisions and to sanction violations of the agreements. In discussions with Phosboucraa management at the Boucraa mining site, the Reviewers

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<sup>73</sup> USDS Western Sahara, 2014 at 15.

<sup>74</sup> New Model.

<sup>75</sup> The Reviewers are qualified to practice law only in the Canadian Provinces of Ontario and Quebec. Any views expressed as to any laws or any matters governed by any laws other than the laws of the Province of Ontario and Quebec and the federal laws of Canada applicable therein are based solely on a general understanding of the law and its application.

<sup>76</sup> *Code du Travail (Maroc)*, Art. 16 (*Code du Travail*).

<sup>77</sup> *Code du Travail*, Art. 345.

<sup>78</sup> *Code du Travail*, Art. 184.

<sup>79</sup> *Code du Travail*, Art. 201.

<sup>80</sup> Universal Periodic Review of Morocco, Joint Report submitted on November 21, 2011 by Robert F. Kennedy Centre for Justice & Human Rights et al. at 9 (*Kennedy Report*).

were advised that contractors who failed to meet safety standards were suspended until they had implemented required changes. Since most contractors doing business with OCP/Phosboucraa are small in size, the Reviewers were informed that the threat of contract termination gives OCP/Phosboucraa considerable leverage in demanding compliance with contractual requirements.

### **(c) Non-Discrimination**

The right to equal pay for equal work without discrimination is recognized in the Moroccan Labour Code.<sup>81</sup> In general, employers are prohibited from discriminating against any worker on the basis of race, colour, sex, disability, marital status, religion, political opinion, association with trade unions or labour groups or social status in recruiting new workers,<sup>82</sup> setting wages, providing social benefits, taking disciplinary measures or terminating existing workers.<sup>83</sup>

Despite this, there are allegations of discriminatory employment practices across Morocco and Western Sahara, attributable in part to inadequate resources for enforcement of existing law.<sup>84</sup> As well, while women in Morocco have the right to enter the workforce and join trade unions, the Moroccan Labour Code restricts their participation in night shifts<sup>85</sup> and in terms of the types of work women can engage in, such as working in quarries or underground mines.<sup>86</sup>

In the New Development Model for the Southern Provinces issued in October 2013, the Moroccan Economic, Social and Environmental Council noted discrimination against women in Western Sahara in terms of access to employment (bias and stereotypes favoring the recruitment of men and absence of affirmative action for women's recruitment; discrimination against citizens of Western Sahara in terms of access to public service jobs (police, security forces) and lack of protection against discrimination for disabilities).<sup>87</sup>

No specific instances of discrimination have been publicly levelled against OCP, other than in relation to historically low hiring rates of Saharawi persons by Phosboucraa operations. OCP/Phosboucraa acknowledges that historically there has been a low proportion of Saharawi people employed by the company in Western Sahara, which has changed over time. As illustrated in detail in the KPMG Report, there is now a clear trend towards a larger percentage of employees at Phosboucraa representing Saharawi people. The KPMG Report concludes that Phosboucraa has gradually increased the number of locals<sup>88</sup> from 4% of the overall workforce in 1977 to 59% by December 31, 2013 (currently stated by OCP to be 62.5%). This increase in the headcount of local employees has been achieved through a policy of prioritizing employment of local workers and significant hires of local staff from January 2011 onwards. These figures do not take into account subcontractors who have been employed by OCP/Phosboucraa since 1999 and who, according to the findings of the KPMG Report, are Locals.

The Reviewers were informed during the site visit that since 1997 Phosboucraa has given priority to local recruitment. The Reviewers were also informed that following an agreement reached between

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<sup>81</sup> *Code du travail*, Art. 346.

<sup>82</sup> *Code du travail*, Art. 478.

<sup>83</sup> *Code du travail*, Art. 9.

<sup>84</sup> Universal Periodic Review of Morocco, Joint Report submitted on November 21, 2011 by Instance Marocaine des Droits Humains (IMDH) and Cairo Institute for Human Rights Studies (CIHRS) at para 26; Kennedy Report at 8-9; United States Department of State, Morocco 2014 Human Rights Report, online: USDS <<http://www.state.gov/documents/organization/236826.pdf>> at 37.

<sup>85</sup> *Code du travail*, Art. 172.

<sup>86</sup> *Code du travail*, Arts. 179-182.

<sup>87</sup> Ad-hoc Committee Report at 47.

<sup>88</sup> The KPMG Report defines these employees as "Employees whose family originated from Moroccan territory located south of Geulmin (or from Guelmin) before 1976 (including Western Sahara). This is opposed to "Employees from the North" which are defined to mean "Employees whose family originated from Moroccan territory located north of Guelmin before 1976."

Phosboucraa and representatives of “Old Status” workers (those whose families resided in Western Sahara prior to 1976), Phosboucraa hired 595 persons with familial connection to Old Status families.<sup>89</sup>

Of the total number of current Phosboucraa employees, OCP states that 1,188 personnel are considered to be from the Western Sahara region. The KPMG Report identifies a trend towards greater numbers of self-identified Saharawi workers, with 78% of new hires between 2001 and 2011 being from the Western Sahara region. According to OCP/Phosboucraa, the company’s training centres in Laayoune have increased the pool of qualified labour from the region to draw from, which contributes to greater hiring of locals. OCP/Phosboucraa state that new hiring initiatives will include more than 90% local persons.

The KPMG Report also identifies efforts to recruit local employees into Phosboucraa management. An upward trend is evident of local employment at all levels of Phosboucraa, with 19 local family “old status” employees involved in top management in 2013, versus only one from 1990 to 2003.

Phosboucraa recruitment and training policies have focused on increasing the level of skills and qualifications of local workers, particularly through a technical training centre in Laayoune, created in 1995. The KPMG Report concludes that Phosboucraa’s salary scale and base salary are the same for all workers in the same professional group and at the same level of seniority, suggesting no discrimination against local workers in regards to pay for similarly situated workers.

#### **(d) Freedom of Association and Workers’ Organizations**

Both the Moroccan Constitution<sup>90</sup> and the Labour Code protect freedom of association and unionization. Professional unions may be freely established by people in the same profession or trade, regardless of the number of workers in a company or an institution.<sup>91</sup> The right to strike is recognized in both the Constitution<sup>92</sup> and the Code, and workers cannot be terminated for exercising their right to strike.<sup>93</sup>

Moroccan unions representing workers in the phosphate sector are active in the Western Sahara region. Public statements by OCP indicate that its employees are represented by four main labour unions, covering 20% of its employees.<sup>94</sup> Specific policies are in place at OCP/Phosboucraa providing for representation of personnel vis-à-vis management. Procedures are set out for election of these representatives. As such, worker grievance mechanisms are available to employees, both union and non-union.<sup>95</sup> No specific issues regarding freedom of association were identified by the Reviewers.

#### **(e) Occupational Health and Safety**

Under Moroccan law, employers must protect the health and safety of workers.<sup>96</sup> To this end, an employer like OCP/Phosboucraa has the obligation to provide protective equipment, a supply of drinking water and healthy hygienic conditions for all workers.<sup>97</sup>

The due diligence revealed that occupational health and safety management is a clear priority for OCP/Phosboucraa. Significant efforts have been made since 2012 to improve occupational health and safety, establish a safety culture, monitor and track health and safety issues and implement a world class

<sup>89</sup> OCP Presentation, “OCP Group Phosbourcraâ” at 34.

<sup>90</sup> *Constitution de Maroc*, Art. 29 (**Constitution**).

<sup>91</sup> *Code du Travail*, Art. 398.

<sup>92</sup> *Constitution*.

<sup>93</sup> *Code du Travail*, Art. 16.

<sup>94</sup> Prospectus, OCP Canadian Offering Memorandum, April 8, 2015 at 31 (**Prospectus**).

<sup>95</sup> OCP Corporate Document, *Titre V – Représentation du Personnel*, OS 768 – Mis à jour du 1.1.2005.

<sup>96</sup> *Code du Travail*, Art. 281.

<sup>97</sup> *Code du Travail*, Art. 281.

occupational health and safety program at OCP/Phosboucraa. To this end, in 2013, OCP engaged external consultants, Dupont Sustainability Solutions (“**Dupont**”), to undertake a complete occupational health and safety review and system development, which is now substantially completed. This initiative, known as the “zero accident” project, was designed to provide OCP/Phosboucraa with a modern environment, health and safety management systems, including organizational leadership, policies and procedures, training and auditing. The resulting program applies to all OCP/Phosboucraa operations and no distinctions exist between Khouribga and Boucraa mine operations were identified by the Reviewers. While the program is substantially implemented, auditing and emergency response standards are currently under development.

As observed by the Reviewers during the tour of operations at both Boucraa and Khouribga, and consistent with an interview with a Dupont representative, the program is being implemented at both facilities in equal measure. The Reviewers were advised that the program conforms with international health and safety best practices with the goal of continuous improvement of the health and safety management system. Incident reporting has increased under the program, likely a result of improvements in the creation of a safety culture at OCP/Phosboucraa.

OCP has publicly stated that it is conducting a comprehensive review of its environmental management system.<sup>98</sup> Examples provided by OCP of its activities in this regard include efforts to reclaim former mine sites in Khouribga, a water treatment plant (also in Khouribga) and the introduction of new technologies in efforts to reduce emissions in both water and air, including large wind power projects in Western Sahara that account for the majority of energy usage of the Boucraa mine.

Supply contracts reviewed by the Reviewers explicitly require compliance with law, including in relation to labour, health and safety and environmental standards. Specific provisions set out in contractor agreements address health and safety and environmental compliance and the implementation of best practices in risk management. These contracts allow for audit and oversight by OCP/Phosboucraa. The company’s construction projects are overseen by international engineering consultancy Jacobs Engineering SA (“**Jacobs**”). The Reviewers were provided and reviewed a comprehensive health, safety and environment program developed by Jacobs to oversee all contractors involved in construction activities. This program appears to meet or exceed international standards.

The Reviewers were informed that OCP has implemented a joint venture with Dupont Sustainability Solutions to provide consulting services to suppliers of OCP in the development of health and safety management systems and training.

#### **(f) Child Labour**

There are no reports of child labour in Western Sahara, including within OCP/Phosboucraa.<sup>99</sup> Under Moroccan law, applicable to OCP/Phosboucraa, children are prohibited from working before the age of 15<sup>100</sup> and no child under 18 may be employed by companies listed by regulation (in hazardous employment), without written authorization delivered to a labour inspector.<sup>101</sup> Children under the age of 16 cannot perform night work between 9:00 p.m. and 6:00 a.m. and must have rest periods of at least eleven (11) consecutive hours.<sup>102</sup> A violation of these provisions may result in fines.<sup>103</sup> Children under the age of 18 are prohibited from working in quarries and in underground mines,<sup>104</sup> in conditions that may hinder

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<sup>98</sup> Prospectus at 28.

<sup>99</sup> See for example, USDS Western Sahara, 2014 at 16.

<sup>100</sup> *Code du Travail*, Art. 143.

<sup>101</sup> *Code du Travail*, Art. 145.

<sup>102</sup> *Code du Travail*, Art. 174.

<sup>103</sup> *Code du Travail*, Arts. 177-178.

<sup>104</sup> *Code du Travail*, Art. 179.

their growth,<sup>105</sup> and in dangerous forms of work or work that undermines their morality.<sup>106</sup> Examples of dangerous forms of work are provided by regulation and include the operation or repair of mechanical equipment and demolition work.<sup>107</sup>

#### **(g) Forced Labour**

The Moroccan Labour Code prohibits forced labor. No reports of such practices, particularly affecting OCP/Phosboucraa, were identified in research.<sup>108</sup>

### **3. Community Health, Safety and Security**

OCP/Phosboucraa mining operations are not geographically located near inhabited areas, making health and safety risks to surrounding communities from mining operations relatively minimal.

Emergency response plans are currently under review and being updated by OCP. Currently, mine operations in Boucraa are equipped with a fire engine, ambulance, medical facilities and trained emergency response personnel.

The Reviewers did not observe any armed security at the Boucraa mine site or related facilities, including the port. The Reviewers are not aware of concerns that OCP or Phosboucraa have employed armed security in Western Sahara, or used or been complicit in the activities of government security forces.

### **4. Land Acquisition and Involuntary Resettlement**

The Reviewers were informed that no active land acquisition or resettlement activity had occurred in relation to Phosboucraa mining operations in Western Sahara in the previous 10 years. This was in contrast to Khouribga, where some land has been expropriated to accommodate expansion of mining activities. OCP management stated that property owners were compensated for any expropriation. Based on the information obtained, as well as publicly available research, this does not appear to be an area of human rights risk.

### **5. Business Ethics and Anti-Corruption**

The best available source of local law with respect to corruption in Moroccan controlled Western Sahara is Moroccan criminal law, which prohibits official corruption.

However, generally speaking, enforcement is reported to be sporadic with, for example, few investigations and no high level prosecutions in 2014.<sup>109</sup> Corruption is generally considered to be a risk of doing business in Moroccan-controlled territories.<sup>110</sup> Morocco is not party to the Extractive Sector Transparency Initiative.

Notwithstanding the general risks related to corruption in the country, evidence indicates that OCP/Phosboucraa has systems in place to manage corruption risks in its corporate governance. Supplier and sub-contractor contracts reviewed specifically prohibit acts of corruption as a condition of the contract. Policies and procedures for internal audit were revised in February of 2015 and are intended to conform with international standards. A corporate wide review of compliance management is being

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<sup>105</sup> *Code du Travail*, Art. 180.

<sup>106</sup> *Code du Travail*, Art. 181.

<sup>107</sup> Royaume du Maroc, *Decrets du 16 Kaada 1425 (29 decembre 2004) fixant l'application des articles du Code du Travail* at 162.

<sup>108</sup> See for example, USDS Western Sahara, 2014 at 15.

<sup>109</sup> USDS Western Sahara, 2014 at 13.

<sup>110</sup> USDS Western Sahara, 2014 at 13.



conducted, which will include policies and procedures on anti-corruption. These policies and procedures appear to be consistent with standards in North American based companies.

## **6. Conclusions and Findings**

Based on the information available and reviewed, the Reviewers conclude that OCP's governance, policies and operations are in conformity with the requirements of Agrium's Supplier Code and international standards, particularly in the areas of labour and working conditions, forced labour, child labour, occupational and community health, safety and security, and anti-corruption. The Reviewers conclude that there are no negative human rights impacts related to these areas of OCP/Phosboucraa's operations and that potential impacts and risks are being mitigated through OCP/Phosboucraa's internal policies and processes.

## APPENDIX B – ASSESSMENT OF ACTUAL OR POTENTIAL IMPACTS

Actual or potential negative human rights impacts in relation to the Supplier Relationship	Assessment
<p>The Supplier Relationship results in the enrichment of Morocco through the sale of the territory's natural resources and revenue gained therefrom and going straight to Moroccan government coffers.</p> <p>Saharawi derive no benefit from natural resource development in Moroccan controlled Western Sahara and there are no advantages or positive effects associated with the fact that foreign companies currently operate in the disputed region in Western Sahara.</p> <p>None of the revenues from these resources are returned to the Saharawi people and no accounting of them is publicly available.</p>	<p>The best evidence available to the Reviewers on this point is provided by the KPMG Report, which shows that the net present value flows to OCP from Phosboucraa in the period between 1977 and 2013 have been negative, indicating that the profitability of Phosboucraa for OCP has been lower than the average inflation rate over this period. The evidence reviewed also indicates substantial investments in Western Sahara, including in community investment and infrastructure, that has and will continue to be made regardless of the profitability of Phosboucraa operations.</p> <p>According to the KPMG Report, over the period from 1977 to 2013, the total Net Present Value of cash-flows spent into Western Sahara by Phosboucraa amounted to approximately \$1.93 billion, composed of personnel costs, operating expenses and capital expenses. This, according to the KPMG Report, is more than double the net cash flows spent into Morocco by Phosboucraa over the same time period.<sup>111</sup></p> <p>As such, the Reviewers conclude based on the evidence reviewed that there is no indication of cause or contribution to a negative human rights impact by the Supplier Relationship on this basis.</p>
<p>Any exploration or exploitation of natural resources in Western Sahara by OCP/Phosboucraa, or agreements/contracts with third parties concerning those resources is illegal.</p> <p>Morocco's development of Western Sahara's resources legitimizes and encourages further acceptance of its "illegal" presence in the territory.</p>	<p>While a comprehensive legal assessment is beyond the scope of this Assessment, and acknowledging the variance amongst legal opinions on this topic, the Reviewers conclude that the test established by the Corell Opinion, which is regularly cited by both sides of the dispute, is persuasive. That test does not conclude that mineral resource activities in a Non-Self-Governing Territory by an administering Power are illegal, as such,<sup>112</sup> but rather that such development is illegal only if conducted in disregard of the needs and interests of the people of that territory.<sup>113</sup> Applying this test, the Reviewers conclude that the fact of</p>

<sup>111</sup> Accounting for the net of cash flows into Phosboucraa from Morocco and those from Phosboucraa to Morocco.

<sup>112</sup> Corell Opinion at paras 14, 21.

<sup>113</sup> Corell Opinion at paras 14, 21.



Actual or potential negative human rights impacts in relation to the Supplier Relationship	Assessment
	<p>Supplier Relationship does not, in itself or automatically, equate to contribution to a negative human rights impact. No causation of actual or potential negative human rights impacts was found.</p> <p>The Reviewers did not identify any evidence that the existence of the Supplier Relationship impacts in any way Morocco's position regarding Western Sahara, or the position of other relevant actors regarding the dispute. As the dispute precedes the Supplier Relationship, it is more probable than not that there is no such contributory relationship. On the contrary, the commercial activities of foreign companies have often increased the profile of the dispute and are regularly used to challenge the activities of the Moroccan government.</p> <p>Groups opposed to mining in Western Sahara have stated that the termination of the Supplier Relationship would de-legitimize Morocco's claim to the territory. Such a political objective is not consistent with the "rights based" focus of the UN Guiding Principles and does not indicate cause or contribution of potential or actual negative human rights impacts by the Supplier Relationship.</p>
Any development of natural resources prior to a political settlement decreases availability of non-renewable resources to the Saharawi people if and when they eventually realize self-determination.	In considering this issue, the Reviewers noted that the prevailing benchmark of the Corell Opinion is not consistent with the conclusion that any and all development prior to political resolution is <i>prima facie</i> impermissible. The more relevant question is whether mineral resource activities in a Non-Self-Governing Territory by an administering Power are being conducted in regard of the needs and interests of the people of that territory. See also analysis in section 5(a)(ii) above. As a result, the Reviewers conclude that there is no indication of cause or contribution to a negative human rights impact by the Supplier Relationship on this basis alone.
Natural resource development encourages migration of non-Saharawi to Western Sahara and is used to sustain those non-Saharawi populations.	The Reviewers noted that migration flows are not caused or contributed to by the Supplier Relationship, but are instead associated with State action and the ongoing territorial dispute which precede and transcend the Supplier Relationship. The trend towards increased focus on hiring of local persons also indicates that employment opportunities are not being used to lure workers

Actual or potential negative human rights impacts in relation to the Supplier Relationship	Assessment
	from Morocco to Western Sahara. No evidence was identified to suggest that migration would be altered by existence or non-existence of the Supplier Relationship itself. As such, there is no indication that this particular potential or actual negative human rights impact is caused or contributed to by the Supplier Relationship.
Purchases of phosphate are a source of public discontent and the expression of criticism is repressed by the Moroccan Government.	This concern relates primarily to State impacts on human rights regarding freedom of expression. No evidence was identified by the Reviewers to indicate that such issues are caused or contributed to directly or indirectly by the Supplier Relationship.
Ceasing all foreign purchases of phosphate would be symbolic and clearly demonstrate that the country is not part of Morocco.	This illustrates a political objective that is not based upon a human rights analysis called for under the UN Guiding Principles. As such, even if true, this objective does not indicate cause or contribution to a negative human rights impact by the Supplier Relationship.
Ceasing all foreign purchases of phosphate would diminish Morocco's interest in the continued occupation of the territory and facilitate a peaceful solution.	There is no indication that the political dispute regarding sovereignty over Western Sahara would be resolved if the Supplier Relationship were to cease or, indeed, if all phosphate mining activity were to cease. The status of the territory has been an issue since the era of Spanish colonization, well before phosphate mining commenced in the region. Any failure to resolve the ongoing political dispute transcends and predates the Supplier Relationship. There is no indication of contribution to a negative human rights impact by the Supplier Relationship.
Ceasing all foreign purchases of phosphate would strengthen the movement of human rights in Western Sahara.	No evidence was identified of a contributory relationship between the Supplier Relationship and any State failure to protect human rights generally, which transcends the resource development question and predates the Supplier Relationship. As such, there is no indication of contribution to a negative human rights impact by the Supplier Relationship on this basis.
Half of the Saharawi people do not live in Moroccan controlled Western Sahara, but rather in the camps at Tindouf and therefore experience no benefit to	See analysis in section 5(a)(ii) above. Based on this reasoning, the Reviewers conclude that there is no indication of contribution to a negative human rights impact by the Supplier Relationship on this

Actual or potential negative human rights impacts in relation to the Supplier Relationship	Assessment
development.	basis.
<p>Development of phosphate has occurred without prior informed consent, and engagement with the Polisario Front, which is the “unique and only representative of the Saharawis.”</p>	<p>“Prior” consultation or consent for phosphate development is not possible as such activity has been occurring since 1972, commenced by the Spanish company INI. Phosphate mining in Western Sahara is distinct from new exploration or resource extraction proposed by foreign companies entering into contracts with the Moroccan government.</p> <p>The SADR and Amarpnws have stated that mining will continue in the event of a political resolution of the territorial dispute. No indication has been given that such activities would be ceased pending a process of free prior and informed consent, as that concept is generally understood in the application of international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples.</p> <p>The dispute pertains to control of resource rights and the overarching question of sovereignty. These issues are tied to the ongoing geopolitical dispute, or the processes followed by OCP/Phosboucraa, which predates and transcends the Supplier Relationship.</p> <p>The Reviewers conclude that there is no cause or contribution to a negative human rights impact by the Supplier Relationship on this basis.</p>

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