

Mr. Simon Thomson
Chief Executive Officer
Cairn Energy PLC
50 Lothian Road
Edinburgh, Scotland
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Brussels, 29 June 2016

Dear Mr. Thomson:

Cairn Energy and petroleum development in occupied Western Sahara

Western Sahara Resource Watch (WSRW) writes further to our letters of 19 February 2014 and 13 April 2016. We do so in the context of Cairn Energy's Ms. Paula Pratt's recent exchanges with our Board Chair, Ms. Joanna Allan.

Our purpose in writing is two-fold, namely, to ensure clarity in the record of WSRW's engagement of Cairn Energy, and to again express in the strongest terms the necessity of Cairn Energy withdrawing from an illegally occupied Western Sahara.

Over the past decade, WSRW (and other credible, independent non-government organizations) have insisted that the Saharawi people of Western Sahara, defined by the UN as the last case of decolonisation in Africa, are sovereigns to their resources. We have insisted that the threshold to enter into development, trade or export of the territory's resources is the clear consent of the Saharawi people to such activities, and a corresponding benefit to them. The sad reality of 2016 is that these resources, a rich ocean fishery and phosphate mineral rock chief among them, continue to be plundered while the annexation of the territory continues apace.

We regret the delay and confusion Cairn Energy has experienced in engaging WSRW in the matter.

Let us start by addressing our letter of 19 February 2014. Until this 26 April, when our Ms. Allan received a communication from Ms. Pratt, we had not received Cairn Energy's reply to it. On 26 April, a letter purportedly dated 21 February 2014 was provided to us. (The letter is addressed to our International Coordinator in Brussels, Ms. Sara Eyckmans.)

We would like to mention we did not receive this letter in 2014. According to the metadata of the document, the file was created and revised on 25 April 2016.

Nevertheless, we have at last entered into discussion of the merits of Cairn Energy's claim to be involved in petroleum exploration in occupied Western Sahara.

In its letter, Cairn states: "The [2002] UN Legal Opinion views Morocco as the territory's de facto administrative power and as such, can issue licences for resource exploitation". Such an assertion is wrong. And it is the central point of the matter. The UN Legal Opinion has no such conclusion nor has the UN said it is to be read as such. The Legal Opinion plainly, in its closing paragraph (paragraph 25), notes that continuing petroleum exploration in Western Sahara would be illegal – contrary to international law – unless done with (again) both the consent of and a benefit to the people of Western Sahara. It should be added that Morocco rejects being defined or obligated to act as an administrative power in the occupied area of Western Sahara.

As such, we seek your explanation of the point. The basic question, our first of five questions to you, is this: How does the 2002 UN Legal Opinion justify or extend to allowing petroleum exploration in occupied Western Sahara in the face of sustained Saharawi individual, civil society and government protest?

Addressing the matter of petroleum development in occupied Western Sahara must now account for recent legal developments. These include the African Union Peace & Security Council's 27 March 2015 statement about Western Sahara and the AU legal opinion of the following October. There is next the confirmed extension (that is, the uninterrupted continuity) of international criminal law in Western Sahara as a result of two decisions of Spain's criminal appeals court, the *Audencia Nacional*, on 4 July 2014 and 9 April 2015. To be clear, and to avoid sensationalism, the second of the two decisions is one to approve the continuing investigation (as a matter of Spanish criminal law and therefore the International Criminal Court process) into allegations of war crimes and crimes against humanity in the early occupation of Western Sahara by Morocco. WSRW urges a close reading of the two decisions: They offer an important historic and ethical perspective to how we understand Western Sahara to be originally – and now – occupied.

The third development in recent months is the 10 December 2015 decision of the Court of Justice of the European Union in *Frente Polisario v. European Council*. The judgment is readily explained. In a 2012 case brought by the Polisario Front, the Court has struck down the European Council's decision to extend an EU free trade arrangement with Morocco to goods originating in Western Sahara. There are two things in the judgment which are notable. The Court confirmed that Morocco has no international mandate and is not recognized by the international community as being properly present in Western Sahara. The inexorable result of this conclusion is that Western Sahara is *occupied*. The territory, in other words, has no other status as a matter of law. (Its people, of course, have the status both of being non-self-governing, and that half of them in coastal Western Sahara, being occupied.) Quite aside from the 2002 UN Legal Opinion, occupying states have no right, title or legitimacy to offer up resource exploration licenses, and much less to assure interested third party corporations that they can be assured of legal protection when resource development is pursued.

Second, the Court accepted the evidence of a nexus or connection with resource development in Western Sahara and human rights abuses of the Saharawi people under occupation. We commend to you a reading of the judgment in this respect. Here is a part of what the Court concluded: The exploitation of resources in the territory is a "part of the goal to change Saharawi society." (See paragraphs 237 ff of the judgment.) Any casual, disinterested observer would understand this. That is because the cost to occupy Western Sahara far outstrips any economic return or rent Morocco – or indeed some or all of the people, Saharawi and illegal settlers alike, receive from resource activities in the territory. (The cost to Morocco's treasury of the military occupation alone is probably more than three times the gross annual revenue from all resources in recent years, as academic observers have found.)

As with the International Court of Justice's 1975 conclusion in the *Western Sahara Advisory Opinion*, we have in the CJEU judgment clear reasoning that Morocco is not lawfully in Western Sahara. It follows that what Morocco promises about the durability (setting aside the ethical aspects) of licenses and permissions and a promised eventual return for resource development is illusory; a chimera.

Capping these developments, we refer you to the most recent report of the UN Secretary-General, in April this year, to the UN Security Council, about Western Sahara. There can be no question, in reading the report, of concluding that Morocco has failed to meet its obligations under international

law. *More than this, and necessarily of concern to Cairn Energy and its investors:* Morocco has clearly defaulted in the commitment it made in 1991 to the holding of a referendum for the Saharawi people to exercise their right of self-determination. You can see this in the record of the time, including the terms of the agreement – for an agreement it was – between the UN, Morocco and the Polisario Front to conduct a referendum under UN management. Our point is that a Morocco so evidently acting outside international law is a Morocco also outside its own declared commitments. We think that would give cause for concern to any contractual counterparty seeking to explore resources in Western Sahara. And that party's investors.

There is more, of course, and we do mean to grapple with Cairn Energy's assertion that a local population has been engaged. You may know that, in making a periodic review of Morocco's human rights performance under the leading international treaty concerned, the *International Covenant on Economic, Cultural and Social Rights*, the treaty body's Committee (the CESCR) concluded in October 2015 that Morocco is obligated to "guarantee respect for the principle of the prior, free and informed consent of the Sahraouis, and thus that they are able to exercise their right to enjoy and utilize fully and freely their natural wealth and resources."

The matter of free, prior and informed consent, something all can agree is consistent with the two-fold obligation detailed in the 2002 UN Legal Opinion, brings us to the matter of Cairn Energy's purported local consultations. Cairn Energy claims an experience with stakeholder approach and "local community consultation" from other settings. Of course, the Saharawi people are no mere stakeholders. As we know, and can more and more accept given the foregoing recent developments, they are sovereigns to their resources. It is they alone who are in the ascendant, as the CESCR has reminded us.

And so it is that we come to the second point of this letter. Cairn Energy notes an apparent legitimacy in the Moroccan strategy for "developing" Western Sahara, suggesting the territory is underdeveloped: in need of "job creation" and "private sector investment". Our second question to Cairn Energy is, then, how your company believes these Moroccan strategies and needs are in line with the wishes of the Saharawi people. And, our third question, how Saharawi civil society groups which seek or advocate for self-determination have been involved in the shaping of the strategies.

Cairn Energy states further that "The partners are committed to transparency and benefits sharing should exploration be successful". Our fourth question to Cairn is how your company and its investors can be assured that the Saharawi people presently under occupation in coastal Western Sahara together with those Saharawi in refugee exile will derive benefits. How, in other words, will they as sovereigns "share" in resource development? We mean the question seriously and not rhetorically. It is a question capable of a reasoned answer. In a land occupied by (substantial) military force, where the occupying state has denied its own commitments to the status of that land, how can there be an assertion that there will be a just, or equitable, or legitimate or legal "sharing"? How does Cairn even know whether the Saharawis are willing to share the resources that you are exploring?

Fifth, we would like to have a clarification from Cairn Energy as to why the company systematically refers to Western Sahara as being part of Morocco. This has been done on its website overviews of international operations, in company presentations, in press releases and in annual reports ever since before its farm-in on the Western Sahara block, up until today. We have collected some examples of this on our website: <http://wsrw.org/a105x3511>

We regret to say that such systematic representation of the territory does not give credibility to Cairn having studied the matter of Western Sahara at all. We are, in fact, concerned if Cairn has

outsourced the due diligence aspects of this operation to Kosmos and to the Moroccan government. We question your assertion that your partner, and the operator on the block, Kosmos Energy “from the beginning of their involvement in the region, have spent time and considerable resource to develop a thorough understanding of the complex and nuanced situation.”

As late as 2011, seven years after it entered Western Sahara, Kosmos still has not managed to place its contract in the right country, but systematically referred to Western Sahara as Morocco’s “Southern Provinces”. “We do not need to talk to you”, the leadership of Kosmos explained to members of WSRW on the phone at the time when it was still a private company.

Numerous letters have since been sent to Kosmos from Saharawi civil society organisations and from the Saharawi liberation movement. Even though Kosmos has now changed policy, and started to respond to requests, Kosmos still fails to address their concerns. Kosmos systematically misrepresents the UN Legal Opinion, and has since its entry into Western Sahara systematically failed to take into account the wishes of the Saharawi people. Several seismic services companies that worked on this block have later regretted their involvement, as no local consent had been sought.

In the spirit of renewed dialogue between our two organizations, we propose two things. The first is an ongoing and publicly transparent discourse. WSRW commits to continuous engagement of Cairn Energy, and to publishing not only our correspondence to you, but yours in reply to us. And we therefore call on Cairn Energy to reciprocate. In this same spirit, we seek to meet with you at an early opportunity. Legal and political developments about Western Sahara – the Saharawi people – are proceeding apace, and therefore a constancy of discussion is mutually beneficial.

The second is regarding the development of your operations. In a statement given to Upstream Online on 15 April 2016, Cairn stated that “We are far beyond applying for a new licence. We’re actually deep in negotiations for a new agreement called Boujdour Maritime that covers nearly the same area (as Cap Boujdour).” Naturally, any such talks with the government of Morocco are profoundly unethical and wrong, and we are concerned over such a statement. We seek to know how Cairn Energy will engage the Saharawi people over any continued activity of presence in occupied Western Sahara. Here, we hope to learn of tangible, credible plans to actually meet with Saharawi people – civil society organizations, individuals and governing entities alike – both in Western Sahara proper and the refugee camps at Tindouf, with the purpose of seeking their consent.

We are grateful for Ms. Pratt’s responses to us from this April and for your thoughtful attention to what we have written here. It is our hope that Cairn Energy can speedily reply to us in this most consequential of matters.

Sincerely,



Joanna C. Allan

Chair of the Board
Western Sahara Resource Watch

c: His Excellency Ambassador Christopher Ross
Personal Envoy of the United Nations Secretary-General for Western Sahara

Her Excellency Kim Bolduc
Special Representative of the United Nations Secretary-General for Western Sahara
and Head, UN Mission for the Referendum in Western Sahara

Mr. Iain Tyler, Chair of the Board of Directors
Cairn Energy PLC