

Investment in Morocco and opportunities for companies in the Western Sahara

Morocco's advance as a regional trade and finance hub

Morocco has made significant strides in its development objectives over the last decade. This progress has been anchored by a concerted strategy to economically and politically integrate Morocco internationally, including through enhancing its position as a platform for business within the North Africa region and the rest of the continent. The establishment of the Casablanca Finance City as a center for companies with pan- African operations and the increased number of free trade agreements between Morocco and other African countries attest to this strategy. Morocco offers investors access to a free trade market of 55 countries representing around one billion consumers and 60 percent of global GDP. Furthermore, the government has advanced a number of initiatives to encourage public-private partnerships (PPP), including a new PPP law, geared towards development in key economic sectors, including agriculture, energy, fisheries, mining, infrastructure, transportation and tourism.

However, the ambiguous position of the Western Sahara has hitherto qualified the success of Morocco's integration efforts. In this regard, recent legislation by the US Congress may have opened up US government engagement in the Western Sahara, with the potential to encourage investment by US companies and with possibly others to follow.

Ambiguity for international business in the Western Sahara

The Western Sahara is a territory of around 100,000 square miles in the west of North Africa. Although European companies are present in several sectors, in general, international companies have been reticent to do business in the Western Sahara due to the uncertainty surrounding its international legal status. Since 1963, the Western Sahara has been on the United Nations list of non-self-governing territories, which implies an overlay of international law considerations for companies investing or operating there.

Since 1991, Morocco has invested hundreds of millions of dollars providing essential services and infrastructure in the territory. Additionally, King Mohammed VI of Morocco recently announced plans to dramatically increase investment in the Western Sahara. The Moroccan American Trade & Investment Center estimates Morocco will promote investments of \$7 billion over the next ten years in Western Sahara. Infrastructure will be a major component of these investments, expected to include new rail, highway and air links as well as a new seaport. Other projects include new government buildings, a stadium, hospitals, schools, a university and solar and wind power generation. These projects are designed to integrate further Western Sahara with northern Morocco and open the territory to tourism and business.

United States law and policy on the Western Sahara

The US executive branch considers the Western Sahara to be disputed territory and, as such, to be neither independent nor part of Morocco. As a result, the US government and its agencies—such as the State Department, the Commerce Department, the Trade & Development Agency, Overseas Private Investment Corporation (OPIC) and US EXIM Bank—have generally refrained from support to US companies pursuing commercial opportunities in the Western Sahara. However, the US government does not oppose US companies working or investing in the territory and US companies have invested in the region, notably in the energy sector.

The US Congress and the White House have used recent omnibus appropriations acts to begin funding US development projects in the Western Sahara. The Omnibus appropriations bill is the vehicle to define when, and under what circumstances, certain federal appropriated funds shall be available for assistance for the territory of the Western Sahara. The relevant language appears in the Department of State, Foreign Operations and Related Programs Appropriations Act which is included as a Division of the omnibus appropriations acts for each fiscal year.

In the Fiscal Year 2012 Consolidated Appropriations Act, the US government's perspective on the unresolved situation in the Western Sahara was a constraint on certain US government funding to Morocco, in that Congress established a requirement that the Secretary of State submit a progress report to the House and Senate Appropriations Committees before obligating funds under the Foreign Military Financing Program for Morocco.

Thereafter in the FY 2014 Consolidated Appropriations Act, the US Congress liberalized this position and provided that, subject to a requirement for the Secretary of State, in consultation with the USAID Administrator, to report to the Congressional Appropriations Committees, funds appropriated under the Bilateral Economic Assistance account that are available for assistance to Morocco should also be available for assistance to the territory of the Western Sahara.

Furthermore, in the FY 2015 Consolidated and Further Continuing Appropriations Act, the US Congress strengthened the language with respect to providing assistance to the Western Sahara under the Bilateral Economic Assistance account by making it clear that such appropriated funds "shall be made available", changed the FY 2014 reporting requirement to a consultation requirement and limited the uses of appropriated funds under the Foreign Military Financing Program to the purposes requested in the White House's FY 2015 Congressional Justification for the State, Foreign Operations and Related Programs Appropriations Act:

(g) MOROCCO—(1) Funds appropriated under title III of this Act shall be made available for assistance for the Western Sahara: Provided, that not later than 90 days after enactment of this Act and prior to the obligation of such funds the Secretary of State, in consultation with the Administrator of the United States Agency for International Development, shall consult with the Committees on Appropriations on the proposed uses of such funds.

(2) Funds appropriated by this Act under the heading "Foreign Military Financing Program" that are available for assistance for Morocco may only be used for the purposes requested in the Congressional Budget Justification, Foreign Operations, Fiscal Year 2015.

This resulted in the first ever US government RFP in late 2015 for Title III funds for services to be performed in the Western Sahara under the umbrella of the Middle East Partnership Initiative (MEPI).

The FY 2016 Consolidated Appropriations Act, the most recent omnibus appropriations act in the United States, includes the same provisions as the FY 2015 omnibus, namely, funds appropriated under the Bilateral Economic Assistance account "shall be made available for assistance for the Western Sahara" and funds available for Morocco under the Foreign Military Financing Program may only be used for the purposes requested in the FY 2016

Congressional Budget Justification. The Congressional report accompanying the bill included specific language supporting investment in the Western Sahara stating: “The Committee also encourages the Administration to support private sector investment in the Western Sahara.”

The evolution in the U.S. Congressional laws indicate subtle—but directionally material—changes in the US federal appropriations climate becoming more favorable to funds for the Western Sahara, at least with respect to bilateral economic assistance funding. While this statutory evolution does not directly determine the exercise of the respective mandates of US agencies such as US EXIM Bank or OPIC, which are not subject to this budgetary appropriation, it does signal a more open environment for companies with a nexus to present to these agencies a case for financial support with respect to commercial engagement in the Western Sahara.

In any case, investors need to consider carefully whether their investment into Western Sahara would be covered by a relevant investment treaty. The US-Morocco Free Trade Agreement (FTA), for example, does not cover the Western Sahara from the US government point of view. However, because Morocco considers the Western Sahara an integral part of its territory, Morocco would presumptively grant FTA treatment to investment from US companies in Western Sahara despite the US government’s stance. Essentially, in these circumstances, US companies can anticipate FTA treatment, but not the backing of the US government in relation to official investment dispute settlement procedures.

The Western Sahara merits consideration by investors and exporters

Given that the development of the Western Sahara is a long-standing priority of King Mohammed VI, one can expect a higher priority from the Moroccan administrative agencies for projects in the Western Sahara. More generally, Morocco has a history of successful investments in infrastructure, including the TangerMed port and ongoing rail and highway modernizations. Morocco has attracted major foreign investors. It has privileged access to the EU market through its Association Agreement and to the United States via the Free Trade Agreement. Furthermore, increased investment in the Western Sahara could strengthen Morocco's successful efforts to become an African hub for trade and finance.

As a result of the international issues described above, the Western Sahara presents relatively more complex legal considerations. However, the territory's greenfield potential and Morocco's support backed by a positive track record for infrastructure and economic development are factors leading more foreign companies to consider investment or operation in the Western Sahara and within the wider region.

While this note focuses on the potential effects of recent US legislation on US government and private engagement in Morocco, there are also potential implications for Morocco's international trade and finance with other parts of the world. Given the scope of the opportunities in the Western Sahara and Morocco as a whole, now is an appropriate time to reevaluate the legal and business case for pursuing commercial opportunities there.

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