



The Dilemma of the EU's Future Trade Relations with Western Sahara

Caught between strategic interests and international law?

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Following the Court of Justice's Polisario rulings, the EU is facing thorny legal and political challenges to include Western Sahara in its trade agreements with Morocco.

On 27 February 2018, the Court of Justice of the European Union (CJEU) delivered a new judgement in [Case C-266/16 Western Sahara Campaign UK](#) concerning the territorial application of an EU-Morocco agreement to Western Sahara, giving rise once again to diplomatic tensions between the EU and Rabat. The Court concluded that neither the Fisheries Agreement (2006) nor the associated Protocol (2013) are applicable to the waters adjacent to the territory of Western Sahara. The Court closely followed the analysis it had made in [C-104/16 Council v. Front Polisario](#), in which it held that the [EU-Morocco Association Agreement](#) (AA) and the 2012 agreement liberalising (processed) agricultural and fishery products (the "[Liberalisation Agreement](#)") do not apply to Western Sahara. Whereas the Court clarifies the role of international law in the EU's external policies in these fascinating cases, it leaves the European Commission in a very difficult situation, both legally and politically, to deal with the policy-consequences of these judgments.

Western Sahara is recognised as a non-self-governing territory in accordance with Article 73 of the UN Charter, and the right to self-determination for such territories, Western Sahara in particular, has been stressed several times by different UN Resolutions and the International Court of Justice (e.g. its [Advisory Opinion of 1975 on Western Sahara](#)). The largest part of Western Sahara is still controlled by Morocco, which considers this territory to be an integral part of its sovereign territory, while the Front Polisario (the liberalisation movement seeking independence of Western Sahara) controls the remainder. Although the EU and its member states have never recognised Moroccan sovereignty over Western Sahara, the EU has *de facto*

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been applying the EU-Morocco Liberalisation Agreement and Fisheries Agreement to (the waters adjacent to) Western Sahara, as confirmed by both the Council and the Commission.

The EU-Morocco Association Agreement and the Liberalisation Agreement

In *Council v. Front Polisario*, the Court set aside in appeal the judgement of the General Court ([Case T-512/12 *Front Polisario v. Council*](#)), which argued that the AA and the Liberalisation Agreement apply to the territory of Western Sahara. The CJEU found the opposite to be the case, concluding that in view of the “separate and distinct status” guaranteed to the territory of Western Sahara under international law (e.g. the Charter of the United Nations and the principle of self-determination), it cannot be held that the term “territory of the Kingdom of Morocco”, which defines the territorial scope of the AA and the Liberalisation Agreement, encompasses Western Sahara and, therefore, that those agreements are applicable to that territory. Moreover, the CJEU recalled the principle of the relative effect of treaties under which a treaty must neither impose any obligations nor confer any rights on third States without their consent (i.e. the *pacta tertiis* principle codified in Article 34 Vienna Convention of the Law of the Treaties). The Court previously relied on this principle in its famous [Brita](#) case when arguing that products originating in the occupied Palestinian territories do not fall within the territorial scope of the EU-Israel AA. In *Council v. Front Polisario*, the CJEU argued that the people of Western Sahara must be regarded as a ‘third party’ within the meaning of this international law principle and, because the people of Western Sahara did not express any such consent, that the AA and the Liberalisation agreement cannot be interpreted as including Western Sahara.

This ruling upset the Moroccan government because it undermines its long-standing territorial claim over Western Sahara. The EU High Representative and the Moroccan Minister of Foreign Affairs adopted a joint statement which “took note” of the Court’s judgment and declared that they would “work together on any issue relating to its application in the spirit of the EU-Morocco privileged partnership”.¹ Remarkably, despite this judgement, the EU is eager to extend the application of these agreements to Western Sahara and to continue to grant products from Western Sahara preferential treatment on the same terms of products covered by the Liberalisation Agreement. In order to comply with the Court’s ruling, the Council authorised the Commission on 12 May 2017 to negotiate an agreement “on the adaptations of protocols to the EU-Morocco Association Agreement”.² The negotiations were finalised on 31 January 2018, and the text of the agreement has been initialled (but has not yet been made public).

This agreement basically provides that products originating in Western Sahara will continue to benefit from preferential treatment in the same way as products covered by the Liberalisation Agreement. However, the Council’s negotiation mandate stresses that the agreement must comply with the outcome of the Court’s judgement, benefit the people of Western Sahara and

¹ Déclaration conjointe par Federica Mogherini et le Ministre des Affaires étrangères et de la coopération du royaume du Maroc Salahddine Mezouar, 21 December 2016.

² Recommendation for a Council Decision authorising the opening of negotiations on the adaptation of protocols to the Agreement between the European Union and the Kingdom of Morocco (ST 9093 2017 INIT 12) May 2017 (document not accessible).

support the United Nations process on Western Sahara. In view of these requirements, the Commission is also finalising two reports that will accompany the Commission's proposal for a Council decision to sign the agreement.³ The first report will analyse the economic impact of this agreement on Western Sahara. Commission representatives have already revealed before the INTA (International Trade) Committee of the European Parliament that the report will conclude that the agreement will result in considerable benefits for the people of Western Sahara, and that not extending the preferential treatment to products originating in this territory would have a negative impact on trade and investment in Western Sahara. The second report will analyse the involvement of – and support from – the people of Western Sahara for this agreement (i.e. the extension of preferential treatment to products originating in Western Sahara). Considering the Court's judgement, in particular its conclusion in relation to the *pacta tertiis* principle, securing the consent of the people of Western Sahara is essential in order to comply with the Court's ruling – and EU and international (treaty) law in general.

This will be the most challenging aspect of this undertaking as it raises difficult legal and political questions about who is actually the legitimate representative of the people of Western Sahara for the purpose of giving consent to this agreement. In order to analyse whether the people of Western Sahara support this agreement, the EEAS has set up a consultation procedure including meetings in Rabat with interlocutors of 'the people of Western Sahara'. EEAS officials have stressed that the list of interlocutors includes not only Front Polisario (which is recognised as the representative of the people of Western Sahara by the UN General Assembly), but also members of the regional councils from Western Sahara, socio-economic stakeholders, research institutes, economic operators, development agencies and civil society organisations focusing on human rights. The findings of these meetings will be presented in the report. In order to comply with the Court's judgement, however, the EU will need to be creative in finding a way to obtain the express consent of this diverse group to be bound by this agreement.

It will also be crucial for the Commission and the Council to be as transparent as possible about this process, in particular towards the European Parliament, which in the end will need to approve this agreement. The European Parliament had earlier in 2011 rejected the extension of a previous Protocol to the Fisheries Agreement (see below) because it considered, *inter alia*, that it was unclear whether the agreement benefited the population of the disputed Western Sahara region. The Chairman of the INTA Committee, Bernd Lange, complained in February of this year about the lack of transparency in the negotiations on the adaptation of the AA protocols, stating that the agreement was negotiated "behind closed doors".⁴ Moreover, several of the Committee's members expressed concern about the compliance of this agreement with the Court's ruling and even suggested labelling requirements similar to those applicable to products originating from the occupied Palestinian territories, or to ask the CJEU for an Opinion whether the envisaged agreement is compatible with EU law.

³ EEAS and DG Trade officials discussed this agreement and these two reports during the INTA Committee meeting, 19 February 2018 (see <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20180219-1500-COMMITTEE-INTA>).

⁴ INTA Committee meeting, 19 February 2018, *ibid*.

The Fisheries Agreement (and associated Protocols)

In line with its reasoning in *Council v. Front Polisario*, the Court also argued in *Western Sahara Campaign UK* that the (waters adjacent to the) territory of Western Sahara is not included within the scope of the Fisheries Agreement or the associated Protocols as this would be contrary to the UN Convention on the Law of the Sea and certain rules of general international law applicable between the EU and Morocco, including the principle of self-determination and the *pacta tertiis* principle. In a joint declaration adopted just after the judgement of the CJEU, HR Federica Mogherini and the Moroccan Minister for Foreign Affairs Nasser Bourita noted that “the spirit of close and sincere consultation that has guided the process of adapting the agricultural agreement has created a valuable reservoir of trust for deepening the partnership” and they expressed “their willingness to negotiate the necessary instruments in relation to the fisheries partnership”.

It appears that, similar to the AA and the Liberalisation Agreement, the EU also wants to extend the territorial application of the Fisheries Agreement to Western Sahara. On March 21st, the Commission adopted a recommendation to negotiate an amendment to the Fisheries Agreement and to conclude a new Protocol (as the current one will expire in July 2018).⁵ A Commission’s *ex-post/ex-ante* evaluation study concluded that the renewal of the Protocol would be beneficial for both the EU and Morocco, including Western Sahara.⁶ The document states that “the EU position is that it is possible to extend the bilateral agreements with Morocco to Western Sahara under certain conditions”. Although the proposal mentions that it takes into account the ruling of the Court, the annexed draft negotiating directives mention that one of the key objectives of the negotiations will be to provide access “to the waters adjacent to the non-self-governing Territory of Western Sahara”. The Commission proposes the inclusion of a mechanism to ensure that it is sufficiently informed on the geographical and social distribution of the socio-economic benefits under the agreement in order to ensure that the agreement is beneficial for “the people concerned”. Most likely, this mechanism has to monitor – and guarantee – that the EU’s financial contribution to Morocco (in return for the fishing rights) is allocated sufficiently to benefit the people of Western Sahara.⁷ Moreover, according

⁵ European Commission, ‘Recommendation for a Council Decision to authorise the Commission to open negotiations on behalf of the European Union for the amendment of the Fisheries Partnership Agreement and conclusion of a Protocol with the Kingdom of Morocco (COM(2018) 151 final (including the proposed negotiating Directives)).

⁶ Evaluation rétrospective et prospective du Protocole à l'accord de partenariat dans le domaine de la pêche durable entre l'Union européenne et le Royaume du Maroc. Final report, September 2017 (F&S, Poseidon and Megapesca).

⁷ The Parliament’s legal service argued, mainly on the basis of the 2002 Opinion issued by the UN Under-Secretary General for Legal Affairs and Legal Counsel (the [Corell Opinion](#)), that Morocco, as a “de facto administering power”, is responsible for the economic development of Western Sahara and that the Protocol is compatible with international law as long as “a certain amount of the financial contribution [granted by the EU] is allocated by Morocco to the benefit of Western Sahara population” (Legal Service of the European Parliament, Legal Opinion: Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the fisheries Partnership Agreement in force between the two parties, SJ-0665/13,D(2013)50041, 04 November 2013, para. 29).

to the proposal, the agreement needs to support the efforts of the UN to find a solution providing for the self-determination of the people of Western Saharan and include a human rights clause. Significantly, the draft negotiating directives also mention that the Commission needs to ensure that, at the time of its proposal for signature and conclusion, “the people concerned by the agreement have been adequately involved”. In light of the Court’s judgement (in particular in relation to the *pacta tertiis* principle), the people of Western Sahara need to give their consent. This poses again the same challenges and legal questions as the Commission is facing with regard to the Liberalisation Agreement: Who is the legitimate representative of the people of Western Sahara for the conclusion of this agreement (and is it up to the EU to make this determination)? And how can their consent be obtained in a transparent way? The Council approved the decision authorising the Commission to launch negotiations on 16 April 2018,⁸ and the first round of negotiations are taking place in Rabat from April 18th to the 23rd.

No easy answers

The Court has ruled that the different agreements concluded between the EU and Morocco do not apply to Western Sahara, as this would be contrary to certain rules of general international law and the right to self-determination of the people of Western Sahara. Remarkably, however, the EU aims to continue to apply these agreements to Western Sahara by modifying their territorial scope. The Commission is being pushed in this direction by several member states, such as Spain (as the majority of EU fishing vessels in Western Sahara are Spanish) and France (which has traditionally maintained strong political ties with Morocco). Moreover, the EU does not want to jeopardise its diplomatic relations with Morocco, which is a key strategic partner for the EU in combatting terrorism and controlling migration in North Africa. In addition, the EU is still hoping to relaunch the negotiations on the EU-Morocco Deep and Comprehensive Free Trade Area.⁹

At the same time, however, the Commission (and the EU in general) needs to comply with international law and the Court’s case-law related to Western Sahara and it must support the efforts of the UN to find a solution providing for the self-determination of its people. This is only possible if ‘the people of Western Sahara’ give their consent to modify the territorial scope of these agreements to include Western Sahara, which presents the Commission and EEAS with thorny legal and political challenges. It also appears that the ‘Polisario saga’ for the CJEU is not yet over. In a [statement](#) issued on April 16th, Front Polisario reiterated its opposition to the inclusion of Western Sahara in the renegotiation of the EU-Morocco Fisheries Agreement and announced that it will initiate new legal proceedings before the CJEU to challenge this new agreement.¹⁰

⁸ 3612nd Council meeting, Agriculture and Fisheries, Luxembourg, 16 April 2018.

⁹ On the EU-Morocco DCFTA, see G. Van der Loo, “[Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco](#)”, Euromesco Paper No. 28, European Institute of the Mediterranean, March 2016.

¹⁰ Moreover, another action against the 2013 Fisheries Protocol brought by Front Polisario before the General Court is still pending (Case T-180/14, *Front Polisario v Council*).

In essence, the Commission must pursue the EU's strategic interests and support the economic and political situation of the people of Western Sahara, while simultaneously complying with the Court's rulings and international law. In any event, if the Commission and Council want to avoid the agreement's rejection by the European Parliament, they will need to be fully transparent on how they proceed in striking this difficult balance.