NATURAL RESOURCES IN WESTERN SAHARA : A FISHY BATTLE AT THE DOORS OF EUROPE

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Abstract

Western Sahara is a Non-Self-Governing territory of which natural resources are subject to much interest from both parties to the conflict. Their exploitation constitutes a major tool in the negotiations process given its contribution to the establishment of one or the other party's authority on the disputed land. Its inclusion within the territorial scope of two major trade and partnership agreements between the European Union and the Kingdom of Morocco (who control an estimate 80% of the territory) has recently been legally challenged before the Court of Justice of the European Union. The 2016 and 2018 decisions have made clear that Western Sahara and Morocco are two distinct territories and for the agreements to apply to the former, the consent of the Sahrawi people was to be provided. The article discusses the impact of these decisions on the wider political process, highlighting the weaknesses of a system seemingly designed to uphold the rule of law.

Résumé

Le Sahara occidental est un territoire non autonome dont les ressources naturelles suscitent un grand intérêt de la part des deux parties au conflit. Leur exploitation constitue un outil majeur dans le processus de négociation compte tenu de sa contribution à la mise en place de l'autorité de l'une ou

l'autre partie sur le territoire en question. Son inclusion dans le champ d'application territorial de deux accords commerciaux et de partenariat majeurs entre l'Union européenne et le Royaume du Maroc (qui contrôle environ 80% du territoire) a récemment fait l'objet de recours en justice devant la Cour de justice de l'Union européenne. Les décisions de 2016 et 2018 ont clairement établi que le Sahara occidental et le Maroc sont deux territoires distincts et que, pour que les accords s'appliquent au premier, le consentement du peuple Sahraoui devait être fourni. L'article traite de l'impact de ces décisions sur le processus politique au sens large, en soulignant les faiblesses d'un système apparemment conçu pour faire respecter l'état de droit.

Introduction

On February 12 and January 16, 2019, the European Union Parliament approved an important piece of legislation governing trade and licensing, respectively, in agricultural goods and fishery products between interested Member States and the Kingdom of Morocco. Protocols 1 and 4 to the Euro-Mediterranean Agreement and the implementation Protocol to the Sustainable Fisheries Partnership Agreement have been amended to explicitly incorporate the territory of Western Sahara within their geographical scope of application, following two significant rulings from the Court of Justice of the EU (CJEU). Those rulings will be part of the discussion below. Their adoption of the protocols is the latest episode in the judicial saga that had shaken EU institutions to their core.

Western Sahara is a territory in North-West Africa, bordered by Morocco in the north, Algeria and Mauritania in the east and the Atlantic Ocean to the west. A former Spanish colony, it has been listed since 1963 as one of the 17 non-self-governing territories by the United Nations (UN) —however the only such territory without a registered Administrating Power.[1] Morocco has been claiming sovereignty over Western Sahara since it gained independence in 1956 and has formally annexed around 80% of its territory, over which it exercises de facto control in contravention of the International Court of Justice's (ICJ) advisory opinion of 1975. The "Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro" (POLISARIO) as a national liberation movement and through the self-proclaimed Sahrawi Arab Democratic Republic (SADR) has been campaigning since its creation in May 1973 in favour of independence through a referendum on self-

[1] Spain unilaterally rejected any international responsibility towards the territory in a letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations addressed to the Secretary General, (A 31/56, S/11997). The declaration has been archived amongst UN Secretariat Working Papers on Non-Self-Governing Territories (NSGTs).

determination to be supervised by the UN. Western Sahara's soil is rich in phosphates (Morocco currently being listed among the world's leading suppliers[2]) and its 1 200 km long coastline is rich in fishery products, one of the richest in the world. Iron, uranium, gold, petrol, gas and sand are also resources to be found as potentially exploited by state and private companies alike for major profits. Therefore, it is subject to much interest from both parties to the conflict and has increasingly constituted a major tool in the negotiations process given its contribution to the establishment of one or the other party's authority on the disputed land.

By tackling the issue of natural resources before national and regional courts, the SADR is not only aiming at advancing its pawns in the political chess game outside the peace process' framework – which has by and large been described as frozen (Ojeda Garcia *et al.* 2017 : 35) - but it is also shaping Morocco's external relations with its main economic and financial contributors, the European Union. If the right of a people entitled to self-determination to access their natural resources is not actively implemented, one can question the serious impediment in the enjoyment of basic human rights, such as the right to adequate food (Morten Haugen 2007 : 73). Most importantly, if natural resources of a non-self-governing territory cannot be disposed of freely by the people in question, this can constitute a grave breach of that very same right to self-determination (Hancock 2003: 75), which has been reiterated continuously in UN resolutions dealing with the question of Western Sahara.[3] Additionally, and as will be discussed, international humanitarian law (IHL) arguably applies in the case of Western Sahara[4], meaning that, for some, a certain set of laws – more protective of its recipients – lies upon the "Occupying Power". The UN General Assembly has been clear on its position on the role of an Occupying Power with regards to natural resources. In its Resolution 40/52 related to the case of Namibia, it stated that "any administrating or occupying power that deprives the colonial peoples of the exercise of their legitimate rights over their natural resources or subordinates the rights and interests of those peoples to foreign economic and financial interests violates the solemn obligations it

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[2] According to report from the United States Geological Survey (USGS), Morocco has recently produced more phosphate than the US in tone/year.

[3] Resolution 38/40 of 1983 recalls the commitment of Morocco's king to accept the holding of a referendum to enable the exercise of the right to self-determination ("*Question of Western Sahara*", A/RES/38/40 (7 December 1983)), which had been stated in General Assembly Resolution 2229 (XXI) of 1966 ("*Question of Ifni and Spanish Sahara*" A/RES/229 (XXI), (20 December 1966)).

[4] Morocco is occupying Western Sahara "according to international humanitarian law", as stated in the findings of the December 2016 CJEU decision in paragraphs 35 and 105. However, much debate exists over the applicability of IHL in the case of Western Sahara (Council v Front Populaire pour la libération de la Saguia-el-Hamra et du Rio de Oro (Front POLISARIO), [2016], C-104/16 P).

has assumed under the Charter of the United Nations" [5] (para. 2). The CJEU, in both its landmark decisions, has echoed this position as will be discussed in this article.

In view of this judicial and political context, which will be detailed further, and in the absence of explicit human rights protection mechanisms within the mandate of the UN Mission for the Referendum in Western Sahara (MINURSO), this article will offer a legal analysis of the latest rulings on the question of natural resources in Western Sahara, their outcome and their impact on the wider geopolitics of the conflict. In fact, given the "winner-take-all" nature of the Settlement Plan and the referendum, the peace process had become a war by other means (Zunes and Mundy 2010 : 32). This is a perfect reflection of the background political affray occurring in the case of Western Sahara since the UN has been involved in the political process. The author will argue that, despite the law setting out rather clear principles at various levels, it is not and will not be serving the wider peace process if the political will to implement these judgments does not correlate with that of finding a long-lasting solution to the conflict in Western Sahara.

A unique context:

The UN Mission for Referendum Western Sahara is the only UN contemporary (post-Cold War) peacekeeping mission that does not explicitly include observation and reporting of human rights violations. In October 2018, the UN Security Council unanimously extended the mission's mandate for the 44th time since its creation in 1991 without any explicit human rights monitoring and/or reporting prerogatives and no support from the Office of the High Commissioner for Human Rights. Yet, the operation has not fulfilled its initial mission: "organising and ensuring free and fair elections then declaring its official outcome" in order for the people of Western Sahara to express their "inalienable right to self-determination". This anomaly with the mandate of MINURSO has increasingly been the subject of much debate among the parties involved and other observers and more particularly with regards to exploration and exploitation of natural resources in a territory legally and internationally recognised as a non-self-governing one. One can even argue that no specific decision of the UN Security Council is needed to create these mechanisms as such a capacity is inherent in the terms of the 1991 Settlement Plan and that appropriate measures in the

[5] The 1985 resolution, related to the activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Namibia and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in Southern Africa.

territory towards a referendum inherently means an assuring and therefore monitoring of human rights.

The uniqueness of the conflict in Western Sahara however does not stop there: not only can human rights violations not be reported and monitored by UN personnel on the ground, but no UN Member State currently holds responsibility and accountability for the support of its people in order to "attain a full measure of self-government" since Spain's unilateral withdrawal in 1976. Simultaneously, none of the UN Member States have recognised Morocco's claim of sovereignty over the territory of Western Sahara and its internationally recognised borders stop where that of Western Sahara begin. Therefore, the territory in question – rich in phosphates, fish and other resources - is non-self-governing, under no official administration by the former colonial power, mostly occupied by Morocco[6] (which no Member State has recognised) and yet now officially included within the territorial scope of two major trade agreements between the EU and the Kingdom of Morocco.

Yet, the natural resources dimension of the right to self-determination has been reaffirmed by the International Law Commission in 2001. In addition, according to the UN Food and Agriculture Organisation, "human rights principles and language are being used to support resources access claims as rights-based approaches to empower individuals and groups to gain or maintain access to natural resources" reaffirming that all human rights are interdependent and interrelated. It is therefore ascertained that the right to access natural resources – whatever they may be – constitutes a basic human right to which a people seeking to implement its right to self-determination is entitled. The right to self-determination, alongside peace and security, human rights and sustainable development, constitutes one of the four basic principles and purposes of the United Nations according to the very first article of its Charter as well as the ICCPR and ICESCR. Therefore, being a fundamental human right, one way of discussing its implementation/monitoring is arguing that it should not rely upon the content of the MINURSO mandate or any Court ruling but rather on the legal body of rights set out by the UN Charter. The General Assembly Resolution 1514 (XV) established the international condition of colonial conflicts and set the right to self-determination as a tool for peoples under foreign domination in order to gain freedom. More recently, the ICJ in its advisory opinion on the Chagos Islands has shared the view that "there is a clear relationship between Resolution 1514 (XV) and the process of decolonization following its adoption" (para. 150) adding that the resolution has a "declaratory character with regard to the right to self-determination as

[6] General Assembly resolution 34/37 of 21 November 1979 "urges Morocco to join in the peace process and to terminate its occupation of the territory of Western Sahara".

a customary norm" (para. 152). Consequently, one could also argue that it is the duty not only of the international community as a whole through the Organisation but of all UN Member States individually to ensure the right of self-determination be implemented in accordance with Paragraph 2 of Resolution 2621 (XXV) affirming that "Member States shall render all necessary moral and material assistance to the peoples of Colonial territories in their struggle to attain freedom and independence".

In this context, it is unclear who or which entity is or should be responsible at present for ensuring that natural resources be exploited appropriately to benefit the people under occupation. Some have argued that Spain remains the Administrating Power and its unilateral withdrawal does not comply with international law (Trillo de Martin-Pinillos 2007 and Ruiz Miguel 2018). What is definite however, is the importance that the question of ownership and administration of natural resources in Western Sahara has over the dynamics of the conflict and its potential resolution. This article will examine next the CJEU's decisions and the impact they have had on the wider political battle over this specific question.

The CJEU's 'tip toe' approach

The two landmark decisions that shook up EU institutions from the Council to the Commission and the Parliament refer to two different agreements signed between the EU and the Kingdom of Morocco, namely: the 2000 Association Agreement covering, in some parts, agricultural products "originating in Morocco" and the 2007 Partnership Agreement on fishery products, tacitly renewed twice and which expired on 14 July 2018. Both agreements were challenged on the basis that the Kingdom of Morocco was importing into EU Member States' markets or allowing to be imported into the EU Single Market (in the fisheries case), products originated in Western Sahara, which it legally does not administer. In the Fisheries Partnership Agreement case, Morocco was reportedly delivering fishing licenses in the waters adjacent to Western Sahara to ships flying EU flags. Both decisions were rendered within 14 months of each other, at a time when other courts worldwide also ruled on natural resources related issues, somehow echoing the CJEU's first appeal decision of December 2016.

On December 21, 2016, the CJEU, in the EU-Morocco Association Agreement final decision, noted that "in view of the separate and distinct status guaranteed to the territory of Western Sahara under the UN Charter and the principle of self-determination of peoples", it cannot be held that the term "territory of the Kingdom of Morocco", which defines the territorial

scope of the Agreements, encompasses Western Sahara.[7] The case was brought to the Court by the national liberation movement of Western Sahara (POLISARIO), recognised as the sole representative of the Sahrawi people according to United Nations resolution 34/37 previously mentioned[8] - and constant UN practice - and whose claim was firstly denied in a Court decision of 2015. The three apparent objectives of tackling the Association Agreement on legal grounds seem to have been: (i) to reinforce POLISARIO as the sole representative of the people of Western Sahara ; (ii) to isolate France on the diplomatic level and diminish its position as Morocco's number one ally in the conflict ; and (iii) to legally support the UN resolutions on the issue at a regional level (European Union). By taking on the case, the Court implicitly stated the standing of the POLISARIO Front before it.[9] Although the agreement was not ruled invalid, the main achievements of the 2016 appeal decision were highly remarked upon by observers from all sides at the time :

The two territories are separate and distinct ;

Morocco has no sovereignty over Western Sahara ;

The occupation asserted by the UN Resolution 34/37 is used as background to the argumentation (therefore a de facto administrating power does not exist) ;

The implementation of the agreement "must receive the consent of such a third party" (Western Sahara) regardless of the fact that it is beneficial or detrimental to them (para. 106).

On February 27th, 2018, the CJEU reiterated some of these statements in its second Grand Chamber decision regarding natural resources in Western Sahara. The case originated in the United Kingdom, before the UK High Court and concerned the validity of the Fisheries Partnership Agreement between the EU and the Kingdom of Morocco. It was made less than a year after the 2016 appeal decision and in two proceedings between Western Sahara Campaign UK — an independent NGO working to advance the Sahrawi's right to self-determination — and the Commissioners for Her

[7] In paragraph 92 of the judgment, the Court states that this was maintained by the Commission as well as pointed out by the Advocate General in points 71 and 75 of his Opinion.

[8] See reference note 6.

[9] Paragraph 105 of the Court's decision refers to the right to self-determination and POLISARIO as the representative of the people of Western Sahara.

Majesty's Revenue and Customs (HMRC) and the Secretary of State for the Environment, Food and Rural Affairs. The objective was to reinforce litigation on the matter and bring a domestic challenge against HMRC in order to have a ruling invalidating a preferential tariff agreement granted by the UK government to products sourced in Western Sahara. The case was filed with the understanding that the UK taxpayer and consumer was not treated fairly given that some products were allegedly not complying with EU legal standards.

The CJEU was asked to answer four questions by the referring court in England, two of which were dropped given that the initial case was brought in 2015 and meanwhile the Court had ruled on the POLISARIO's Association Agreement case. The two remaining questions related to:

the validity of the Partnership Agreement in the light of the right of self-determination and

the entitlement for the applicant, a human rights NGO, to challenge the validity of trade acts on the ground of breach of international law by the EU (para. 86 & 87).

As far as the first question is concerned, the court ruled that the agreement is deemed valid because it is not applicable to Western Sahara and to its adjacent waters and that, if the territory of Western Sahara were to be included within the scope of the fisheries agreement, it would be "contrary to certain rules of general international law" (para. 63). The Grand Chamber considered that the second question required no answer since it did not find the EU violated international law based on its analysis of the first question.

The conclusions reached by the Court did not quite match the Advocate General's opinion issued a few weeks prior to the ruling in this case. Although not legally binding, these opinions rendered before the judges deliberate are nonetheless very influential and followed in the majority of cases (Craig and de Bruca 2011). In his landmark opinion from January 2018, the Advocate indeed concluded that both EU-Morocco treaties were invalid because they constituted a breach of the "European Union's obligation to respect the right to self-determination […] and its obligation not to recognise an illegal situation resulting from a breach of that right and not to render aid or assistance in maintaining that situation".[10] His

[10] Paragraph 212 of the Opinion insists on the incompatibility of the Fisheries Agreement and its Protocol with Article 3(5) TEU, the first subparagraph of Article 21(1) TEU, Article 21(2)(b) and (c) TEU and Articles 23 TEU and 205 TFEU, which impose on the EU the obligation that its external action is to protect human rights and strictly respect international law.

argumentation went as far as including a key principle of international and human rights law previously discussed : the right of a people entitled to self-determination to exploit their natural resources (Griffioen 2010 : pp139-143). He concluded that "the contested acts do not put in place the necessary safeguards in order to ensure that that exploitation is carried out for the benefit of the people of that territory" (para. 293). The opinion of the Advocate General outlined the right to self-determination (the scope of which is currently contested under international law) in light of the use of the law of military occupation (so-called International Humanitarian Law, IHL). The Court, however, adopted a narrower approach by not invalidating the agreement in question, sidestepping the evidence and reiterating that the territory of Western Sahara did not fall within the scope of the disputed agreement therefore avoiding answering a heavily politically charged question (Kassoti 2017 : 23-42). It held that the inclusion of Western Sahara would however be contrary to the principle of the relative implementation of the treaties in international law as well as the principle of self-determination (para. 63). Consequently, the case had two major legal implications :

extending the territorial scope of the agreement would be contrary to international law ; and

the limited scope of interpretation of the concept of jurisdiction and the lack of clarity around the process of consultation that could be undertaken given the possible implementation of IHL due to the transfer of population (duty of non-recognition).

This case was the first time a request had been made under the preliminary reference procedure for a review of the validity of international agreements concluded by the EU, including the principle of equal rights and self-determination of peoples. The territory of Western Sahara had until then been always included de facto in the implementation of economic and sectorial cooperation agreements between the EU and Morocco. Yet, the Court did not invalidate the contested agreements despite the Commission recognising that around 91.5% of fish imported under the 2007 agreement originate from the waters adjacent to Western Sahara (para. 70 of the Advisory Opinion).

In both cases, even though the highest court in the EU justice system has restated its attachment to what can be described as a basic principle of international and human rights law (McCorquodale 1994 : pp.857-885) and undeniable founding principle of the UN Charter, it did not find any violation, given that Western Sahara was not explicitly included within the territorial scope of the agreements. However, if it was to be included without the consent of the Sahrawi people, it would do so in breach of general international law (para. 13, 38). By doing so, the Court has simply tried to

avoid raising a diplomatically charged question involving a key trading partner by reading, to the letter, the contested agreement (Gehring 2018) Akin to the request for an advisory opinion sent to the ICJ in 1975, it seems that the initial purpose of both legal actions to clarify the situation over the status of the territory, the stakeholders and ultimately the administrational arrangements of natural resources was not reached. Worse still, they have constituted the basis for further disagreements between the parties and the trigger for much contested re-negotiations of both treaties between the EU and Morocco. The CJEU's judicial decisions in the case of Western Sahara have not had (and will not have) the intended impact on the question of natural resources if the interpretation used by the Court is not considered to be applied to the facts on the ground (as evidenced by the defendants as well as the claimants) but remains restricted to a parsing of the trade agreements drafted between Morocco and the EU.

The law serving politics?

We argue that the law, aimed at establishing standards and resolving disputes while protecting liberties and rights, is not serving to advance the political process in the case of Western Sahara. Some had even questioned the usefulness of requesting an opinion from the ICJ in 1975, claiming that it would not have influenced "the policy to be followed in order to accelerate the process of self-determination" given that this was well defined in the resolutions on decolonization of the territory (Soreta Liceras 2014 : 90-91). However clear the law may be, how the decisions are going to be implemented in the political spectrum is a question that falls within a scope fed by other considerations. In brief, various points made by the Court in its decisions from 2016 will be raised and used in the confrontation between POLISARIO relying on legal considerations on one side, and the Commission and trade concerns on the other. In this context, three main issues will expectedly be challenged. The first relates to the requirement for "consent" set by the Court in contrast to the process of "consultation" undertaken by the Commission. Considering the legal status of Western Sahara as a non-self-governing territory awaiting decolonization under a process led by the United Nations, it is rather puzzling to see the EU Commission's premeditative attempts to replace the consent of the people of Western Sahara - as principal condition set by the CJEU for the implementation of any agreement to Western Sahara as a third party- with a consultation process with various "stakeholders". Indeed, POLISARIO is one of the 112 groups and individuals that the Commission named as

'consulted' in the documentation that it sent to member states but of those, 94 of them claim to have never taken part in a consultation.[11]

The second point that will soon be the subject of much contestation is the misuse of "people" versus "population". The Commission's Staff Working Document related to the re-negotiations following the Court ruling does not address the issue of consent, and instead purely "focuses on the benefits for the population of Western Sahara" (p. 7). The term "population" is used four times in the CJEU's 2016 decision[12] and the Court never suggested that the 'population' of Western Sahara (which is of an entirely different composition than the 'people' as defined by international law) is relevant to the matter. The CJEU makes no reference, at any point, in its judgments, to the population of the territory, which theoretically include settlers as well as indigenous people, when setting the requirement for consent.

Finally, and most importantly, the claims of benefit made by the Commission is at the centre of discussions around potential future legal actions regarding the newly amended agreements. Although it is an irrelevant factor in the absence of the consent of the people of Western Sahara according to the CJEU (para. 106 of the 2016 decision previously mentioned), the EU Commission repeatedly used the issue of potential economic and development benefits as an argument to obtain the support of the EU Council and EU Parliament for the proposed extension of EU-Morocco agreements to Western Sahara. The Commission could not provide any statistics to uphold its claims of benefits. The Staff Working Document even made three essential acknowledgements denying the very same claimed benefits. First, it noted that it is impossible to distinguish products originating in Western Sahara from those originating in Morocco (1st paragraph, page 9 of the accompanying report). Second, the Commission stated it has no direct means of investigating the territory of Western Sahara in addition to fully depending on data provided by Morocco (4th Paragraph, page 9 of the accompanying report). Third, the Commission said that it was impossible to define Sahrawis from non-Sahrawis when it comes to the employment benefits (1st paragraph, page 25 of the accompanying report). However, the Court was rather clear that the requirement of consent applied "without it being necessary to determine whether such implementation is likely to harm [the third party] or, on the contrary, to benefit it."

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[11] According to a publication by Western Sahara Resource Watch, an international network of organisations researching and collecting data on foreign companies involved in the territory of Western Sahara.

[12] The Court only refers to the indigenous population (paras. 25, 91), the production of products not to be detrimental to the population of that territory (para. 47) and that the population of that territory enjoyed the right to self-determination under general international law (para. 105).

In Western Sahara, a credible and independent environmental impact assessment has never been conducted for agriculture and fish-processing industries nor for fisheries activities. This is evidently deeply problematic, since the model of export oriented, resource intensive agricultural production will significantly draw on already limited natural resources, notably water. This can gravely prejudice environmental sustainability of the territory regardless of ownership, further risking the inalienable right of the Saharawi people over their national resources. In addition to this visible absence of impartial assessments, the Commission's work after the CJEU's judgments was tainted by suspicions of conflict of interest by the lead MEP first appointed for the task, Patricia Lalonde. She was even forced to quit a few weeks before her report was due to be tabled at the International Trade Committee and being discussed in plenary and is currently under investigation alongside three other MEPs involved.[13]

Both CJEU decisions implicitly denied the argument of legitimacy of Morocco's administration of the territory, but the Court did not say what should replace it as a legal and practical matter. Even though it did reiterate the importance of the right to self-determination as a general principle of international law, the Court made careful consideration as to whom should ensure this right is implemented. And it is indubitably not the CJEU itself. This ambivalent position from the Court is characteristically driven by wider geopolitical considerations. Both cases have caused a shock to EU-Morocco relations. Both rulings were followed within hours by a joint statement from Federica Mogherini (the EU's high representative for foreign affairs and security policy) and the Moroccan foreign minister Salaheddine Mezouar, expressing pleasure that the cases had been resolved and looking forward to the resumption of trade with Morocco, while reaffirming the parties' commitment to strategic partnership.[14] The statements made no mention of Western Sahara, or the content of the ruling. They referred instead to other areas of cooperation, notably migration and security, key aspects of Morocco's arguments in exchange for the EU's support for a status quo in Western Sahara. Of note, the Moroccan agriculture minister Aziz Akhannouch warned the EU a few weeks after the 2016 CJEU's decision that it would suffer the consequences if it was to prevent trade of agricultural products with the Kingdom of Morocco.[15] Worse still, a record number of over eight hundred migrants crossed into Ceuta and Melilla between

[13] Nielsen describes in his 2018 article this was made public.

[14] The joint statements have now been removed from the EU External Action website (https://eeas.europa.eu/search/site/Salaheddine%20Mezouar_en)

[15] Reported by BBC News on February 7, 2017, "*Le Maroc met en garde l'UE si elle ne respecte pas l'accord Agricole signe en 2012*", available from https://www.bbc.com/afrique/region-38890320

February 17 and 19 of 2017[16] based on figures from the European Border and Coast Guard Agency Frontex. It seems rather clear that there is more to it than a simple dispute over fishing licenses and that administration of natural resources is almost equivalent to administration of the territory.

Beyond the European Union and the example of phosphate

Beyond the European Union, two cases appear to have weakened Morocco's position on its de facto administration over natural resources in Western Sahara and on the territory in general. The two cases originated in May 2017 in South Africa and Panama. Both courts involved were asked by Sahrawi authorities – the SADR government, notably – to declare that transiting shipments of phosphate rock were properly a Sahrawi resource. The cases were founded on the fact that the SADR would have standing – a right of audience – because the countries involved had recognised the Sahrawi state.[17] The objectives were similar in both cases :

To uphold Sahrawi sovereignty over resources in support of self-determination ;

To act in recognising states/jurisdictions ;

To obtain court declarations of illegality (similar objective to the CJEU cases) ;

To dissuade global purchasers from potentially risky trade ;

To recover the cargos.

The South Africa case of May 1, 2017 concerned the Marshall Islands-registered NM Cherry Blossom cargo, which had been seized at Port Elizabeth earlier that year. The case entailed the POLISARIO as a defendant against the New Zealand managing company as a simple civil legal claim about the right to ownership. A preliminary order ex parte had been sent to the ship owners once the cargo entered the South African territorial seas. The

[16] Reported by Sonia Moreno on February 21, 2017, *"El 'coladero' de Ceuta aviva la sospecha de un pacto entre Rabat y Madrid para presionar a la UE",* El Español, available from https://www.elespanol.com/espana/20170221/195480454_0.html

[17] 84 UN Member States have at one point or another recognised the Sahrawi Arab Democratic Republic.

judgement of South Africa's High Court, which was a first instance trial court and heard the preliminary application to detain the cargo, was again clear on a critical point : "Morocco has no claim to sovereignty over Western Sahara" (para. 40). The Court reaffirmed that the Kingdom's "claim to sovereignty as a result of its occupation of the territory is incompatible […] with international law" (para. 40). On February 23, 2018, the South African High Court declared that the SADR was the owner of the whole cargo of phosphate, which has then remained at anchor in Port Elizabeth at a high financial cost for the operators of the vessel.[18]

In the Panama case of May 17, 2017, the Panama registered m.v. Ultra Innovation had been detained upon leaving the Panama Canal. An order had been issued by the Panama Maritime Tribunal on the basis that the ship itself had illegally profited from carrying a cargo of some 55,000 tonnes phosphate rock to Canada. However, some days later, ship (and cargo) were released and the cargo eventually unloaded at its final destination. The Panama case was therefore less successful for the claimant but all the same confirmed the Sahrawi people's sovereignty over its natural resources ; denied the Panama canal to transiting shipments since May 2017 ; diminished the number of purchasing companies in the aftermath of the ruling (Canada, Venezuela, Colombia and Australia's single company) ; contributed to the WSCUK case in front of the CJEU and constituted a precedent for the SADR to act as a State.

What is next for the natural resources in Western Sahara?

The law has never been clearer, whether it be at European or international level. Its implementation, however, is made difficult, if not impossible, by unnecessary political motivated by economic and financial interests. Several EU-based operators are risking financial, legal and reputational damages if the EU does not comply with its internal rule of law and the same can happen at a more global level. If the status quo is maintained and the right to self-determination granted to the people of Western Sahara is not realised through an UN-led referendum, the organisation will be held accountable for this escalation.

Further legal actions have been taken during the course of 2018 by POLISARIO in the CJEU ; namely two new actions for annulment of two decisions from the Council through the EU judicial system. The first action

[18] Order issued in the High Court of South Africa (Eastern Cape Local Division, Port Elizabeth) on Friday, 23rd February 2018 in the Case No. 1487/2017 and available from https://wsrw.org/files/dated/2018-02-23/20180223_south_africa_ruling.pdf

was lodged in March 2018 against the decision of the Council to withdraw the requirement for permission to collect local authorisations under the Aviation Agreement. That decision was taken in 2006 and is still not in force but is applied in practice. The agreement was presented to the EU parliament in 2017 and was ratified then signed by the Council. In the Association Agreement case as well as the fisheries case, the substantial involvement of the EU was brought to light. Even though figures were not clear, evidence of involvement had been provided (including by the Commission itself) but the Court refused to take into account the substantial aspect and decided to stick to the letter of the agreement that didn't mention Western Sahara. When it comes to the Aviation Agreement, the question is now the scope of jurisdiction and the idea that the EU has been allowing retroactively the implementation of a decision to allow that agreement to extend to Western Sahara for the past 10 years. The second relates to the Fisheries Agreement : it was not necessary to just renegotiate an operative protocol but the entire Partnership Agreement. We can expect the POLISARIO to pursue a new case to gain political leverage in this regard. The main issues that will be tackled relate to the competence or the legal grounds for the EU (Council and Commission) to enter into an agreement which expressly operates in or extends to the territory of Western Sahara. The field of argument will therefore be whether the Council and Commission have ensured or acted in light of an ascertained proper consent of the 'local population'.

The EU will potentially have to face the consequences of including the annexing power in the renegotiation of the agreements. The concept of "consultation" can indeed arguably amount to a negation and violation of the right to self-determination, access to natural resources and to the territorial integrity of Western Sahara as a third party to the Partnership Agreement and Fisheries Agreement under the Vienna Convention on the Law of Treaties recalled by the CJEU. The EU Parliament has yet voted in favour of this inclusion at the start of this year in the newest version of both agreements.

There are mechanisms in place elsewhere in the world that could (or should) inspire the main stakeholders involved in the resolution of the conflict in Western Sahara. The UN Security Council established the Development Fund of Iraq through Resolution 1483 of May 22nd, 2003 soon after the United States-led coalition forces occupied Iraq in April 2003. This mechanism was structured to comply with international humanitarian law, despite deficiencies in its implementation reported by many observers. The Fund was held by the Central Bank of Iraq and independently audited by accountants approved by the International Advisory and Monitoring Board. Most importantly, the revenue collected could be used solely to benefit the people of Iraq. No comparable mechanism exists with regard to any of the

resources of Western Sahara despite demands from the Sahrawi side (Kamal 2015).

With the failings of the international legal system in responding to the conflict, perhaps a closer look into human rights issues in this case should be taken given the absence of human rights monitoring prerogatives in the case of MINURSO. However, in the case of the protection of group rights, "it is only through the realization of this very basic right of people to determine, with no compulsion or coercion, their own future, political status and independence that we can begin to address others such as dignity, justice, progress and equity".[19] The plunder of natural resources in Western Sahara arguably contributes directly to the prolongation of the occupation, the strengthening of the military presence of Morocco in the territory and ultimately, the maintenance of a status quo (Smith 2015). A fair recommendation to be made would be that the General Assembly's Fourth Committee call for the appointment of a United Nations rapporteur for natural resources in Western Sahara, to work in conjunction with the Personal Envoy of the Secretary-General and to consider United Nations administration of natural resources and revenues from such resources pending the self-determination of the Saharawi people, recognised over and over again in the United Nations resolutions. Following Mr Horst Kohler's resignation in May, it is however difficult to assume that any position within the UN Mission for the Referendum in Western Sahara remains safe.

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[19] The 40th meeting of the UN 3rd Committee on self-determination which took place in November 2013 discussed the right of peoples to self-determination as well as the elimination of racism, racial discrimination, xenophobia and related intolerance.

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