



INSIGHT

THE EMPIRE STRIKES BACK: THE COUNCIL DECISION AMENDING PROTOCOLS 1 AND 4 TO THE EU-MOROCCO ASSOCIATION AGREEMENT

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ABSTRACT: This *Insight* focuses on the newly adopted Council Decision amending Protocols 1 and 4 to the EU-Morocco Association Agreement which extends the territorial scope of the Association Agreement to expressly include Western Sahara. The purpose of this *Insight* is to assess the compatibility of the Council Decision with international law. The main argument advanced here is that the Council Decision is problematic from an international law point of view as it arguably violates the EU's duty of non-recognition and non-assistance in the commission of internationally wrongful acts.

KEYWORDS: Council Decision amending Protocols 1 and 4 to the EU-Morocco Association Agreement – duty of non-recognition – duty of non-assistance – Western Sahara – self-determination – exploitation of natural resources.

I. INTRODUCTION

In the past two years the “frozen” Western Sahara conflict and its consequences for the trade relations between the EU and Morocco have been steadily gaining attention. The EU's trade agreements with Morocco have come under the scrutiny of the Court of Justice in the context of proceedings challenging their *de facto* application to Western Sahara. In 2016, in *Front Polisario*,¹ the Court concluded that the EU-Morocco Association² and Liberalization Agreements³ did not extend to the territory of Western Sahara. In a

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¹ Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council of the European Union v. Front Polisario*.

² Euro-Mediterranean Agreement of 26 February 1996 establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (EU-Morocco Association Agreement).

³ Agreement of 13 December 2010 in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural

similar vein, the Court found in its 2018 judgment in *Western Sahara Campaign UK*⁴ that the Fisheries Partnership Agreement⁵ as well as the 2013 Fisheries Protocol⁶ did not cover the territory of and waters adjacent to Western Sahara. More recently, in an order delivered on 30 November 2018, the Court followed the approach adopted in *Front Polisario* and in *Western Sahara Campaign UK* and held that the territorial scope of the EU-Morocco Aviation Agreement⁷ does not include the territory in question.⁸

The Court's reasoning in these cases has been vociferously criticised by the overwhelming majority of commentators.⁹ One of the main criticisms levelled against the Court's line of argumentation was that the Court applied international law rules without taking into account how these rules are actually applied in international judicial practice in order to avoid pronouncing on the politically charged question of the factual application of the Agreements to Western Sahara.¹⁰

A new and noteworthy twist to the Western Sahara saga was the adoption in July 2018 of a Council Decision amending Protocols 1 and 4 to the EU-Morocco Association

products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (Liberalization Agreement).

⁴ Court of Justice, judgment of 27 February 2018, case C-266/16, *The Queen on the application of Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for food and Rural Affairs*.

⁵ Fisheries Partnership Agreement of 28 February 2007 between the European Community and the Kingdom of Morocco.

⁶ Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the 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 between the European Union and the Kingdom of Morocco (2013 Fisheries Protocol).

⁷ Euro-Mediterranean Aviation Agreement of 20 December 2006 between the European Community and its Member States, of the one part, and the Kingdom of Morocco, of the other part (Aviation Agreement).

⁸ General Court, order of 30 November 2018, case T-275/18, *Front Polisario v. Council of the European Union*, paras 31-41.

⁹ See for example E. KASSOTI, *The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 23 *et seq.*; J. ODERMATT, *Council of the European Union v. Front populaire pour la libération de la sagaïa-el-hamra et du rio de oro (Front Polisario). Case C-104/16P*, in *American Journal of International Law*, 2017, p. 73 *et seq.*; G. VAN DER LOO, *Law and Practice of the EU's Trade Agreements with 'Disputed Territories'*, in S. GARBEN, I. GOVAERE (eds), *Interfaces Between International and EU Law*, Oxford: Hart Publishing, 2019 (forthcoming), p. 1 *et seq.*; P. HILPOLD, *Self-Determination at the European Courts: The Front Polisario Case or the Unintended Awakening of a Giant*, in *European Papers*, 2017, Vol. 2, No 3, www.europeanpapers.eu, p. 907 *et seq.* See *contra* E. CANNIZZARO, *In Defence of Front Polisario: The ECJ as a Global Jus Cogens Maker*, in *Common Market Law Review*, 2018, p. 569 *et seq.*

¹⁰ E. KASSOTI, *The Council v. Front Polisario Case*, cit., pp. 30-40; J. ODERMATT, *Council of the European Union*, cit., pp. 736-738.

Agreement¹¹ following a proposal submitted by the Commission in June.¹² What is of particular importance here is that the Council Decision purports to amend the EU-Morocco Association Agreement in order to “expressly provide a legal basis so that products originating from Western Sahara could benefit from the same trade preferences as those from Morocco”.¹³ The Decision aims to legally sanctify the EU’s long-standing practice of treating products coming from Western Sahara as those from Morocco¹⁴ – a practice that could no longer continue following the Court’s conclusion in *Front Polisario* to the effect that the Association Agreement does not cover the territory as a matter of law. Thus, in essence, the Decision purports to extend the territorial scope of the Association Agreement to expressly include Western Sahara. In December 2018 the Committee on International Trade recommended that the Parliament should give its consent to the Council Decision and the European Parliament gave its consent thereto on 16 January 2019.¹⁵

The purpose of this *Insight* is to assess the compatibility of the Council Decision with international law. The main argument advanced here is that the Council Decision is problematic from an international law point of view as it arguably violates the EU’s duty of non-recognition and non-assistance in the commission of internationally wrongful acts.

II. THE EU’S OBLIGATION OF NON-RECOGNITION AND THE CAPACITY OF MOROCCO TO CONCLUDE AGREEMENTS EXTENDING TO WESTERN SAHARA

In *Front Polisario* the Court of Justice affirmed the right of the Saharawi people to self-determination¹⁶ – thereby echoing the conclusion reached by the International Court of

¹¹ Council Decision (EU) 2018/1893 of 16 July 2018 regarding the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

¹² Commission Proposal for a Council Decision regarding the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, COM/2018/481 final.

¹³ Annex to the Proposal for a Council Decision regarding the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, SWD(2018) 346 final, point 1. Council Decision 2018/1893, p. 3.

¹⁴ Council Decision 2018/1893, p. 2.

¹⁵ European Parliament Press Release of 10 December 2018, *Trade Committee advocates lower tariffs in Western Sahara*, www.europarl.europa.eu. European Parliament, Text adopted by Parliament on 16 January 2019, 1st reading/single reading, oeil.secure.europarl.europa.eu.

¹⁶ *Council of the European Union v. Front Polisario*, cit., para. 89.

Justice (ICJ) in its advisory opinion on *Western Sahara* over forty years ago.¹⁷ However, the Court of Justice failed to address the wider implications that this right entails for Morocco's capacity to conclude agreements on behalf of the territory and, more fundamentally, for third parties, such as the EU, wishing to enter into trade relations with Morocco that extend to the territory in question. The Court's failure to address these issues has allowed room for the Council and the Commission to claim that the express extension of the territorial scope of the Association Agreement to Western Sahara does not imply recognition of Moroccan "sovereignty over Western Sahara".¹⁸ However, this claim needs to be assessed against the legal framework governing Morocco's legal status vis-à-vis Western Sahara as well as that governing the EU's obligations towards the territory because of this status.

There is little doubt that Morocco is the occupying power of Western Sahara – a territory which it formally annexed in 1976.¹⁹ Under international law, the annexation of territory severely impedes the exercise of the right to self-determination and constitutes, therefore, a breach of the obligation to respect that right.²⁰ Morocco's forcible acquisition of Western Sahara and its breach of the right of the Sahrawi people to self-determination, a right that is widely recognised as a peremptory norm of international law,²¹ gives rise to the duty of non-recognition – a duty incumbent upon third parties, including the EU.²² The duty of non-recognition requires third parties to abstain from

¹⁷ International Court of Justice, *Western Sahara*, advisory opinion of 16 October 1975, para. 162.

¹⁸ Council Decision 2018/1893, p. 5, point 10. Proposal for a Council Decision COM (2018)481, p. 5.

¹⁹ General Assembly, Resolution 34/37 of 21 November 1979, Question of Western Sahara, UN Doc. A/RES/34/37, para. 5. See also General Assembly, Resolution 35/19 of 11 November 1980, Question of Western Sahara, UN Doc. A/RES/35/19, para. 3. South Africa, Eastern Cape High Court of South Africa (Eastern Cape Local Division, Port Elizabeth), judgment of 15 June 2015, *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV 'Cherry Blossom' and Others*, [2017] ZAECPEH 31, para. 38 (available at www.saflii.org). African Union, Legal Opinion on the legality in the context of international law, including the relevant United Nations resolutions and organization of African Unity/African Union 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, Annex to the letter dated 9 October 2015 from the Permanent representative of Zimbabwe to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/786, para. 21. On occupation see generally E. BENVENISTI, *The International Law of Occupation*, Oxford: Oxford University Press, 2012; T. FERRARO, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, in *International Review of the Red Cross*, 2012, p. 133 *et seq.*

²⁰ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, paras 115-122.

²¹ International Law Commission, Draft articles on the Responsibility of States for Internationally Wrongful Acts of 3 August 2001, UN Doc. A/56/10, in *Yearbook of the International Law Commission*, 2001, Vol. II, p. 85, para. 5.

²² *Ibid.*, p. 66, para.1. On the duty of non-recognition, see generally M. DAWIDOWICZ, *The Obligation of Non-Recognition of an Unlawful Situation*, in J. CRAWFORD, A. PELLET, S. OLLESON (eds), *The Law of Interna-*

entering into treaty relations with the non-recognized regime in respect of the unlawfully acquired territory.²³ In this light, it is difficult to escape the conclusion that by extending the territorial scope of the EU-Morocco Association Agreement to expressly include Western Sahara, the EU falls foul of its international law duty of non-recognition – despite the claim that such extension does not imply the recognition of Moroccan sovereignty over the territory.

Even if, *arguendo*, one were to take this claim at face value, the question of the legal capacity in which Morocco could conclude an agreement with the EU that would include the territory of Western Sahara remains open. In other words, on what basis other than sovereignty could Morocco validly conclude an agreement with the EU in respect of Western Sahara? A careful reading of the Council Decision as well as of the Commission proposal shows that, according to the Council and the Commission, Morocco is the administering power of the territory and thus, it is able, in this capacity, to enter into treaties with third parties applicable to the territory.²⁴ Indeed, under international law, administering States have treaty-making capacity over non-self-governing territories under their administration.²⁵ However, the administering State of Western Sahara since 1963, when the UN added the territory to its list of non-self-governing territories, has been Spain, and not Morocco.²⁶ The status of ‘administering power’ is a legal status granted by the UN and in the absence of such recognition a State cannot proclaim itself to be one.²⁷ Spain’s attempt to repudiate its status as an administrative power of Western Sahara in 1976 was without legal effect since this status was conferred upon Spain by the UN and “constitutes a status which Spain alone could not have unilaterally transferred” – as confirmed in the 2002 legal opinion issued by the UN Under-Secretary General for Legal Affairs and also acknowledged by Advocate General Wathelet in his Opin-

tional Responsibility, Oxford: Oxford University Press, 2010, p. 677 *et seq.*; S. TALMON, *The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in C. TOMUSCHAT, J.-M. THOUVENIN (eds), *The Fundamental Rules of the International Legal order: Jus Cogens and Erga Omnes Obligations*, Leiden: Martinus Nijhoff, 2005, p. 99.

²³ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion of 21 June 1971, paras 122, 124.

²⁴ Both the Council Decision and the Commission proposal expressly characterise Western Sahara as a “non-self-governing territory, large parts of which are currently administered by Morocco”. See Council Decision 2018/1893, p. 2, point (3); Proposal for a Council Decision COM (2018)481, p. 9, point (3).

²⁵ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Hans Corell, addressed to the President of the Security Council, UN Doc. S/2002/161, para. 24. Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16 P, *Council of the European Union v. Front Polisario*, paras 74-79.

²⁶ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, cit., para. 5.

²⁷ Arts. 73 and 74 of the UN Charter.

ion in the *Front Polisario* case.²⁸ The UN still recognises Spain as the *de jure* administering power of Western Sahara and Spain has relied on this status to extend its international jurisdiction in criminal matters to crimes committed in Western Sahara.²⁹ As explained above, Morocco militarily occupies the territory. Consequently, the assumption that Morocco is the administering power of Western Sahara and thus, it can conclude agreements extending thereto is erroneous. As a final note, it should be added here that the ability of administering powers to conclude treaties with respect to non-self-governing territories under their administration is restricted from the moment when the activities of a national liberation movement acquire “an international impact”, namely “from the moment when they constitute ... an abnormal event which compels [the State] ... to resort to means which are not used normally to deal with occasional disturbances”.³⁰ The fact that an armed conflict broke out between Front Polisario, the main Sahrawi national liberation movement, and Morocco once the latter’s armed forces entered the territory in 1976 means that this criterion is satisfied *in casu*.³¹ Thus, even if Morocco were recognised as having the legal status of an administering power, its ability to conclude treaties would have been restricted.

In this light, the claim that the express extension of the EU-Morocco Association Agreement to Western Sahara does not imply recognition of Moroccan sovereignty over the territory included in the text of the Council Decision under discussion remains unconvincing. As discussed above, such an extension of the territorial scope of the Agreement would be contrary to the EU’s duty of non-recognition under international law and Morocco, as the occupying – and not the administering – power of Western Sahara, does not have treaty-making capacity over the territory.

III. THE COUNCIL DECISION AND THE QUESTION OF EU COMPLICITY IN THE UNLAWFUL EXPLOITATION OF NATURAL RESOURCES OF WESTERN SAHARA

One of the main arguments underpinning the Court’s refusal to acknowledge the extension of the EU-Morocco Association Agreement to Western Sahara in the context of the *Front Polisario* case was the operation of the principle of the relative effect of treaties (*pacta tertiis*).³² According to the Court, the status of Western Sahara as a non-self-

²⁸ Opinion of AG Wathelet, *Council of the European Union v. Front Polisario*, cit., paras 188-191.

²⁹ See the decisions by the Spanish Audiencia Nacional (National High Court), decision of 4 July 2014, Auto No. 40/214, available at www.ligaproderechoshumanos.org; and Summario1/2015, 9 April 2015, available at www.rightsinternationalspain.org.

³⁰ Arbitration Tribunal, award of 31 July 1989, *Case concerning the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal*, para. 51.

³¹ Opinion of AG Wathelet delivered on 10 January 2018, case C-266/16, *The Queen on the application of Western Sahara Campaign UK v. Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for food and Rural Affairs*, footnote 207.

³² *Council of the European Union v. Front Polisario*, cit., paras 100-107.

governing territory means that it is a third party in relation to the EU and Morocco and thus, any agreement between them could not be applicable to the territory in the absence of express consent by its people.³³ Although the State-centric nature and conceptual roots of the principle of *pacta tertiis* cast doubt on the Court's finding that it applies to relations between recognised subjects of international law and non-State actors (such as Western Sahara),³⁴ the requirement of consent of the people of Western Sahara is still relevant in assessing the lawfulness under international law of the Council Decision at bar. More particularly, the element of consent is relevant in examining whether the express extension of the agreement to Western Sahara means that the EU is responsible by way of complicity in the unlawful exploitation of Western Sahara's natural resources.

In this respect, it needs to be noted that Morocco's long-standing practice of exploiting Western Sahara resources for its own benefit and in disregard of the wishes and interests of the people of Western Sahara constitutes a breach of the Saharawi peoples' right to permanent sovereignty over their natural resources and of the principle of usufruct under international humanitarian law.³⁵ The conclusion of an agreement that facilitates the import into the EU of products obtained in conditions that do not respect the international law rules governing the exploitation of natural resources of a non-self-governing territory under occupation could arguably further encourage Morocco's unlawful conduct – as acknowledged by the General Court in *Front Polisario*.³⁶ Thus, through the adoption of a Council decision expressly extending the territorial scope of the EU-Morocco Association Agreement to Western Sahara, the EU could be in violation of its international law duty not to render aid or assistance in the commission of an unlawful act.³⁷ It needs to be noted here that international law does not prohibit any activity related to natural resources undertaken by an occupying power. The relevant international legal framework provides that an occupying power may enter into agreements with third parties regarding the exploitation of the natural resources of a non-self-governing territory under its control under the conditions that this exploitation must be in accordance with the wishes of the peoples of the territory and that it must be for the

³³ *Ibid.*, paras 106-107.

³⁴ E. KASSOTI, *The Council v. Front Polisario Case*, cit., p. 36.

³⁵ For a detailed discussion, see E. KASSOTI, *Between Völkerrechtsfreundlichkeit and Realpolitik: The EU and Trade Agreements covering Occupied Territories*, in *Italian Yearbook of International Law*, 2016, pp. 144-148. See also Report submitted by Western Sahara Resource Watch and the Association for the Monitoring of Resources and the Protection of the Environment in Western Sahara in view of Morocco's third cycle Universal Periodic Review, 27th session of the Human Rights Council, May 2017, available at www.upr-info.org.

³⁶ General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council of the European Union*, paras 230-238.

³⁷ International Law Commission, Draft articles on the Responsibility of International Organizations, with commentaries, in *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two, p. 66.

benefit of that people.³⁸ Thus, in assessing whether the EU is complicit in the unlawful exploitation of the natural resources of Western Sahara through the adoption of the Council Decision under discussion, the question of whether the abovementioned conditions are met needs to be addressed.

Does the Council Decision furnish any evidence as to whether the extension of the territorial scope of the EU-Morocco Association Agreement to Western Sahara is in accordance with the wishes of the people of Western Sahara? Recital 10 of the Council Decision states that “the Commission, in liaison with the European External Action Service, has taken all reasonable and feasible steps in the current context to adequately involve the people concerned in order to ascertain their consent to the agreement”.³⁹ In its Report on benefits for the people of Western Sahara, a document accompanying the Commission’s proposal, the Commission adds that “the Moroccan authorities have consulted all national, regional and local institutions concerned, to raise awareness and obtain their approval and consent”.⁴⁰ The conclusion drawn from these consultations was that “the majority of the social, economic and political stakeholders [...] stated that they were in favour of extending the tariff preferences in the Association Agreement to Western Sahara”.⁴¹

Significantly, however, Front Polisario expressly rejected the extension of the agreement to the territory.⁴² The UN has recognised Front Polisario as the official representative of the people of Western Sahara since 1979⁴³ – a fact also acknowledged by Court of Justice in its *Front Polisario* judgment.⁴⁴ Front Polisario’s objections cast considerable doubt on whether the criterion of consent of the peoples of the territory was fulfilled *in casu*. This proposition is further buttressed by the statement made by Sweden shortly after the adoption of the Council Decision. According to the statement: “In view of the rejections to the consultation process and/or the draft agreement, and particularly the objections of Front Polisario, the official representative of the people of Western Sahara in the UN process, Sweden is not satisfied that the outcome of the consultation process can be said to constitute the free and informed consent of the people of Western Sahara”.⁴⁵ The same view is also reflected in the opinion delivered by the Legal Service of the European Parliament: “it seems difficult to confirm with a high degree of certainty whether these

³⁸ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, cit., para. 24; African Union, Legal Opinion (2015), para. 64.

³⁹ Council Decision 2018/1893, p. 5, point 10. See also Proposal for a Council Decision COM (2018)481, p. 10, point 10.

⁴⁰ Commission Staff Working Document, Report on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara of 15 June 2018, SWD(2018) 346 final/2, p. 1.

⁴¹ Council Decision 2018/1893, p. 5, point 10.

⁴² Commission Staff Working Document (2018), p. 31; Council Decision 2018/1893, p. 5, point 10.

⁴³ General Assembly, Resolution 34/37, para. 7.

⁴⁴ *Council of the European Union v. Front Polisario*, cit., paras 35, 105.

⁴⁵ Council Doc. 10891/18 ADD2, Statement by Sweden, 13 July 2018.

steps [taken by the Commission] meet the Court's requirement of consent by the people of Western Sahara, also taking into consideration that the conclusion of a positive consent is reached despite of the negative opinion expressed by the Polisario Front".⁴⁶ Furthermore, the claim that a high number of relevant stakeholders were consulted prior to the adoption of the Decision does not seem to comport with reality. The annex attached to the Commission's Report on benefits for the people of Western Sahara lists a number of stakeholders that allegedly took part in the consultation process – including amongst them a number of high-profile pro-Sahrawi civil society organizations such as Western Sahara Resource Watch, Western Sahara Campaign UK as well as a delegation of 85 Sahrawi groups.⁴⁷ However, all these groups have flatly denied taking part in the consultation process and have made public their correspondence with the Commission and the European External Action Service in an effort to clarify their position.⁴⁸ In a statement released in July 2018, 93 out of the 113 civil society actors listed in the Commission's Report stated that they have not been consulted.⁴⁹

In a similar vein, it is questionable whether the extension of the territorial scope of the Association Agreement would actually benefit the people of Western Sahara. According to the Council Decision, the extension of tariff preferences to products originating in Western Sahara "will have a positive overall effect for the people concerned".⁵⁰ However, who are the people concerned? Under international law, the holders of the right to self-determination, and its corollary, that of the permanent sovereignty over natural resources⁵¹ are the indigenous population, *i.e.* the Saharawi people,⁵² and not the local population, which mainly consists of Moroccan settlers transferred into the territory in violation of international humanitarian law.⁵³ Again, the Court's failure to

⁴⁶ Opinion of the Legal Service of the European Parliament, 03 September 2018, para. 26, available at www.wsrw.org.

⁴⁷ Commission Staff Working Document (2018), p. 34.

⁴⁸ Western Sahara Resource Watch, *Here, the EU Commission is lying about WSRW - and 93 other groups*, 14 June 2018, available at wsrw.org. Western Sahara Resource Watch, *Unison Condemnation of the EU Commission from Western Sahara groups*, 03 February 2018, available at wsrw.org. Western Sahara Campaign UK, WSC Communication with the European External Action Service, 17 July 2018, available at www.smalgangen.org.

⁴⁹ Network of 93 Sahrawi civil society actors, *EU-Morocco Trade Agreement on Western Sahara: The Commission Ignoring the EU Court, Misleading Parliament and Member States and Undermining the UN*, 2 July 2018, available at www.wsrw.org, p. 2.

⁵⁰ Council Decision 2018/1893, p. 4, point 9.

⁵¹ General Assembly, Resolution 1803 (XVII) of 14 December 1961, Permanent sovereignty over natural resources, UN Doc. A/RES/1803 (XVII).

⁵² *Western Sahara*, *cit.*, para. 48.

⁵³ Opinion of the Committee on Development for the Committee on Fisheries of 08 November 2011 on the draft Council decision on the conclusion of a Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco,

address the broader international legal framework of the dispute, and more particularly, the status of Morocco as the occupying power of Western Sahara and its practice of illegally introducing settlers into the territory, has created uncertainty as to *who* exactly should benefit from the extension of the territorial scope of the agreement.

This uncertainty is reflected both in the Council Decision, which fails to clarify who exactly are the “people concerned”, but also in the Commission’s Report on benefits for the people of Western Sahara. The latter expressly acknowledges that “the term ‘people concerned’ is liable to different or even divergent interpretations [...] In any event, we decided to start by assessing whether the agreement helped trade between Western Sahara and the EU”.⁵⁴ By conceding this, the Commission in essence conceded that the scope of its study on benefits for the people of Western Sahara does not focus on the indigenous population but also covers the local population at large – which also includes Moroccan settlers. This conclusion is further reinforced by the Commission’s own acknowledgement that: “It is clearly impossible to say that the overall economic impact [...] would systematically and directly benefit indigenous people. It can only be *assumed* that they would benefit, *at least indirectly*”.⁵⁵ However, this falls short of the obligation of ensuring that the exploitation of the territory’s natural resources benefits the people of Western Sahara according to international law. Furthermore, the envisaged extension of trade preferences is not complimented by a robust mechanism guaranteeing that Morocco transfers all accrued benefits to the Saharawi people. The Commission proposal merely provides that the EU and Morocco will exchange information at least once a year by means of an Association Committee set up under the Agreement for the purpose of assessing its effect on the people concerned.⁵⁶ However, as the Legal Service of the European Parliament stressed in its Opinion “these arrangements are limited to the assessment of the impact and do not involve specific mechanisms for remedying possible shortcomings of the effect of trade preferences for the people of Western Sahara”.⁵⁷

Overall, the foregoing analysis shows that the Council Decision contravenes the legal framework pertaining to the exploitation of natural resources of a non-self-governing territory under occupation and thus, by adopting it, the EU may be aiding and assisting in the commission of internationally wrongful acts.

www.europarl.europa.eu. See also Art. 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) of 12 August 1949.

⁵⁴ Commission Staff Working Document (2018), p. 9.

⁵⁵ Commission Staff Working Document (2018), p. 18. (Emphasis added).

⁵⁶ Proposal for a Council Decision COM (2018)481, p. 8.

⁵⁷ Opinion of the Legal Service of the European Parliament (2018), para. 29.

IV. CONCLUSIONS

This Insight discussed the compatibility of the Council Decision extending the territorial scope of the EU-Morocco Association Agreement to Western Sahara with international law and concluded that the Decision is problematic on a number of grounds. More particularly, it was shown that the Decision contravenes the EU's duty of non-recognition as well as the duty not to render aid or assistance in the commission of a wrongful act. Arguably, the Decision is not surprising given the EU's long-standing 'realpolitik' approach towards the situation in Western Sahara.⁵⁸ At the same time it is difficult to escape the conclusion that, at least to some extent, the CJEU has permitted the continuation of this approach through its failure to address the violation of international law rules by Morocco in Western Sahara and, more fundamentally, the consequences flowing from the breach of these rules for third parties wishing to enter into trade relations with Morocco. Certainly, the Council Decision in question is by no means the end of the Western Sahara saga; Front Polisario has already indicated that it will refer the matter back to the CJEU.⁵⁹ It is hoped that the next time the Western Sahara dispute comes before the Court, the Court will not hesitate to take into account the broader international legal framework of the dispute – thereby ensuring that the EU in its future trade relations with Morocco stays well within the bounds of international law.

⁵⁸ J. CRAWFORD, *Legal Opinion: Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories*, 24 January 2012, para. 131, available at www.tuc.org.uk.

⁵⁹ Front Polisario, Press Release of 10 December 2018, available at wsrw.org.

