

BRIEF: EU-Morocco trade proposal regarding Western Sahara

Commission deceiving Member States and Parliament, lying about ‘consultation process’ and steering towards new court case

Summary:

On 11 June 2018, the EU Commission sent a proposed amendment to the EU-Morocco Trade Protocols to the EU Member States and the EU Parliament for approval. The proposal seeks to extend the scope of the EU-Morocco trade deal into occupied Western Sahara.

The proposed amendment fundamentally fails to respect the ruling by the Court of Justice of the European Union (CJEU) of 21 December 2016 (C-104/16 P), concluding that Western Sahara is not part of Morocco, as the latter has no jurisdiction or sovereignty over the territory. The CJEU had clarified that the people of Western Sahara must be regarded as a ‘third party’ that can only be affected by the implementation of EU-Morocco agreements if they have consented thereto.¹

Nothing in the Commission’s proposal suggests that the Commission has respected the CJEU judgment. Instead of seeking the consent of the people of Western Sahara, the Commission has resorted to a “consultation process” of Moroccan elected officials or Moroccan economic operators. This is not what the CJEU asked for.

The Commission, most importantly, writes untruly about its dialogue with Polisario. This can be documented. The Commission furthermore claims that 112 associations or institutions have taken part in what they call “consultations”, and that there is general support for the agreement. This is incorrect. **Of the 112 associations or groups included in the list of stakeholders attached to the Commission Staff Working Document (SWD(2018) 346 final), 94 have either never been invited by the Commission for such talks, or have specifically refused to meet the Commission**, as such talks fail to meet the CJEU’s prerequisite of consent. Even our organisation is enlisted as having been “consulted” even though we have specifically rejected to meet the Commission and have thus never taken part in a consultation process.

Central to the Commission’s argumentation for the proposal, is that the agreement will “benefit” the local population. This is not relevant, according to the CJEU judgment. What matters, is that the people of the territory consent to being affected by the implementation of an EU-Morocco agreement. Evidently, that is not the case.

Finally, it must be pointed out that it is entirely possible to have a trade agreement with Morocco that does not include Western Sahara, as demonstrated by the USA, Norway, Iceland, Liechtenstein and Switzerland.

¹ Art. 106 of CJEU judgment in C-104/16 P, Council v Front Polisario, reads: *In the light of that information, the people of Western Sahara must be regarded as a ‘third party’ within the meaning of the principle of the relative effect of treaties, as stated in substance by the Advocate General in point 105 of his Opinion. As such, that third party may be affected by the implementation of the Association Agreement in the event that the territory of Western Sahara comes within the scope of that agreement, **without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party.** In the present case, however, the judgment under appeal does not show that the people of Western Sahara have expressed any such consent.*

1. The EU Commission has not obtained the consent of the people of Western Sahara, as ordered by the EU Court of Justice

The Commission has negotiated the proposal with Morocco; *it has made no effort to seek the consent of the people of Western Sahara or to include them in the negotiation process*. While the Commission explicitly acknowledges that it does not recognize Morocco's sovereignty over Western Sahara², it has negotiated the Western Sahara trade arrangement with Morocco, because "given that only the Moroccan authorities are able to ensure compliance with the rules necessary for the granting of such preferences"³. The UN recognized representation of the people of Western Sahara, the Polisario Front, has consistently rejected the Commission's approach of circumventing the people of Western Sahara, and thus denying their right to self-determination.

WSRW believes that it is not a valid argument to enter into an agreement with Morocco just because they are occupying it.

Recommended questions:

- Why has the Commission not undertaken any steps to obtain the consent of the people of Western Sahara to the proposed trade arrangement for Western Sahara?
- The Commission does not dispute that Polisario Front is the UN-recognised representation of the people of Western Sahara. Why has the Commission not included Polisario in the negotiations?
- "The EU regards Morocco as administering the Non-Self-Governing Territory", the Commission Staff Working Document reads. The CJEU has rejected that notion. Can the Commission explain what legal status Morocco has in relation to Western Sahara?
- Morocco does not control Western Sahara in its entirety. Part of the territory, and half the people, live either in parts of Western Sahara not under occupation, or in refugee camps. Have these people consented?

2. Misrepresenting judgment – consulting of irrelevant stakeholders

The proposed amendment was initiated with Morocco on 31 January 2018, after which the Commission opened up for consultation of local stakeholders. So instead of applying the notion of "consent", as the Court stresses, the Commission has undertaken a "consultation".

On top of that, the entire concept of the "people" of the territory has been replaced with the concept of "population", which today consists of a majority of Moroccan settlers, and leaves out the majority of the Western Sahara people that have fled their homeland either during the war or as a consequence of the dire human rights situation under the yoke of Morocco's occupation.

The Court never suggested that the 'population' of Western Sahara is relevant to the matter. In fact, the Court never mentions the population of Western Sahara at all.

² Proposal for a Council Decision relating to the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the EU 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, p.2

³ Ibid, p. 4.

The combination of misrepresenting the two terms of the judgment is massive. Instead of seeking *consent from the people* of Western Sahara (as the CJEU demands) – it has been in ‘consultation’ with the ‘population’, of which a majority are Moroccans.

The consultation meetings took place in Rabat and in Brussels – not in Western Sahara, as the Commission claims several times throughout the staff working document. The list of consulted stakeholders consists of elected Moroccan officials, Moroccan economic operators, and four Moroccan civil society organisations – none of them speak for the people of Western Sahara.⁴ Note that the Commission acknowledges that there are severe restrictions with regard to freedom of expression, demonstration and association in Western Sahara, and that “advocating independence is punishable by fine or imprisonment”⁵, but at the same time withheld only organisations registered with the Moroccan authorities for participation in the consultation process.⁶

An informal meeting with the Polisario Front – the UN recognized representation of the people of Western Sahara – is used to give the impression that Polisario took part in the consultation process. However, Polisario has never taken part in a consultation meeting. Find the mail correspondence between Polisario and the EEAS here.⁷ The Commission is directly lying regarding the nature of that meeting, a meeting that took place at the initiative of Polisario, not the Commission.

In an open letter, 89 Saharawi civil society organisations condemned the Commission’s approach of striking a deal for Western Sahara with Morocco, thus bypassing their people’s right to consent.⁸ The Commission’s statement that “the Commission and the EEAS consulted a broad range of Saharawi civil society organisations, MPs, economic operators and other organisations, including the Polisario Front” is a flat-out lie.

Recommended questions:

- Why did the EEAS only carry out “consultations” in Rabat and in Brussels, and not in Western Sahara or the refugee camps where the people of Western Sahara live?
- In its judgment of 21 December 2016 (C-104/16 P), the Court of Justice of the EU refers to the need to obtain consent from the people of Western Sahara. What are the legal grounds for having a consultation process instead of seeking consent of the people, as stipulated by the Court?
- The EU External Action Service has stated on the record in the European Parliament that it has selected the list of interlocutors with Morocco. On what legal basis have the EU and Morocco made such a list of ‘interlocutors’, considering that Western Sahara is not part of neither the EU nor Morocco?
- 94 of the 112 organisations that the Commission have enlisted in its Annex as “consulted” have either never been invited to consultation meeting, never been contacted by the Commission, or refused to meet the Commission. Why does the Commission claim to have met 112 organisations or individuals, when in fact it has only met 18?

⁴ An analysis of the consulted stakeholders can be found on <http://wsrw.org/a105x4165> (“Exclusive: here are the Moroccan groups that the EU consulted”, 24 May 2018).

⁵ Commission Staff Working Report, p. 10

⁶ Vincent Piket, EEAS’ Head of Maghreb Division, to the INTA Committee, 20 February 2018: “All organisations are registered in Morocco: that was one condition for us: to be able to speak to registered organisations”. His statement to INTA verbatim here: <http://wsrw.org/a105x4113>

⁷ The correspondence between the EEAS and Polisario clearly indicates that the meeting had already been planned at the request of Polisario, prior to the consultation exercise. There is no indication in the EEAS’ emails that this meeting will be used for consultation purposes. Rather, it is presented as an informal meeting. See the EU-Polisario correspondence prior to the 5 February 2018 meeting here. <http://wsrw.org/a105x4179>

⁸ A copy of the letter is published here: <http://wsrw.org/a105x4072> (“Unison condemnation of the EU Commission from Western Sahara groups”, 3 February 2018)

- Throughout the Commission’s brief, Polisario is repeatedly presented as one of the interlocutors that have taken part in the consultation process. Can the Commission present any documentation that Polisario was informed beforehand that the meeting was part of a formal consultation process and that it would be presented as having taken part in – or accepting of - that process, irrespective of their views? Is the meeting invitation sent to Polisario public?
- The list of consulted interlocutors consists of political and socio-economic bodies that the Moroccan government has set up in Western Sahara, in accordance with Moroccan domestic law. On what legal grounds can these actors be considered representative of the people of Western Sahara?
- In terms of consulting civil society groups, only groups that are registered by the Moroccan government were considered as stakeholders to the consultation process. Given that Morocco has been criticized in the UN Human Rights Council for years, for refusing to register groups that advocate Saharawi rights and/or self-determination for Western Sahara, how representative is the list of consulted civil society groups with regard to Western Sahara?
- The Commission refers to the parallel consultation carried out by the Moroccan authorities as having resulted unison support for the planned amendment. What relevance does a consultation of the Moroccan authorities of its own national, regional and local institutions have for Western Sahara?

3. Purported benefits to the territory are legally irrelevant and factually unsubstantiated

The EU Commission claims that the proposed agreement will be to the benefit of the “local populations” and the economy of the territory. However, the CJEU has stated unequivocally that it is not necessary to determine the potential benefits of the agreement to Western Sahara; what matters is that the people of Western Sahara have granted their consent to the implementation of the agreement in their territory.⁹ All arguments relating to the benefits are irrelevant in view of the Court judgment.

Furthermore, by the Commission’s own admission, it cannot provide any facts and figures to back up the claim that the agreement is beneficial to the territory, as “available data is often fragmentary” or “patchy and disparate”.¹⁰ The Commission acknowledges that it is “generally impossible to distinguish Moroccan imports from Western Saharan imports”.¹¹ “There is no independent UN-commissioned analysis of the benefits of international trade agreements for Western Sahara. Moreover, the EU has no competence for or direct means of investigating the territory of Western Sahara”, the Commission admits.¹² The only figures cited in the benefit report, are provided by Moroccan ministries or government bodies. There are no figures on the trade flows to and from Western Sahara. The Commission also admits that it cannot distinguish between the Saharawi and Moroccan populations in terms of employment benefits, yet recognizes that the share of Saharawi employees in the affected sectors is minimal. Not a word is mentioned on the Moroccan ownership structure of the sectors that stand to benefit from the agreement.

Recommended questions:

- What relevance has the attempted study on the proposal’s benefits, in view of article 106 of the judgment stating it is not relevant in order to conclude on the legality of the agreement?
- Why does the Commission Staff Working Document not mention that no benefits from the EU-Morocco agreement will go to half of the people of Western Sahara, living in refugee camps?

⁹ Art. 106 of CJEU judgment in C-104/16 P, Council v Front Polisario, quoted in footnote 1.

¹⁰ Commission Staff Working Document, SWD(2018) 346 final, Report on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara, p. 1 and p. 8.

¹¹ Ibid, p. 9.

¹² Ibid.

4. Poor human rights impact assessment

The Commission Staff Working Document regards the human rights situation in Western Sahara as “generally similar to that in Morocco”, while at the same time acknowledging that there are “some differences in Western Sahara because of the political dispute”. That assessment differs greatly from that of independent observers such as the UN and international NGOs – that is, if they’ve had a chance to visit the territory, which is practically impossible for anyone who does not share Morocco’s stance in the conflict. It should be noted that Morocco in 2017 expelled a large part of the staff of the UN mission in Western Sahara, and that the UN Secretary General and the UN Special Envoy have not been allowed to visit the mission in the territory.

It should be noted that the Commission has no presence in Western Sahara, nor does it carry out regular visits to the territory. Its main interlocutor on the human rights situation is Morocco’s National Human Rights Council – a body established through a decree to the Moroccan government, financed and appointed by the Moroccan authorities, and thus hardly an “independent institution” – as the Commission puts it - with regard to Western Sahara.

The human rights assessment of the Commission includes not a single word on the right to self-determination: a fundamental human right, an obligation *erga omnes* that is the chapeau article of both International Covenants, and the corner-stone principle underpinning the very CJEU judgment that lead to the current need for revising the EU’s position on Western Sahara.

Recommended questions:

- How does the Commission assess the effects of negotiating a trade arrangement for Western Sahara with Morocco, without obtaining the consent of the people of Western Sahara, to their right of self-determination?
- The Staff Working Document (SWD) claims that it is in regular contact with “international organisations and third countries with a presence in Western Sahara”. Can the Commission explain which those are?

5. Very poor environmental impact assessment

The Commission cannot present any independent statistic on the use of resources, notably water, in the sectors affected by the proposed amendment. It goes without saying that cultivating water-intensive crops such as tomatoes and melons in the desert is detrimental for the non-renewable underground water reserves, as has even been raised by Moroccan institutions. The Commission recognizes these concerns in the Staff Working Document¹³, but focuses more on the potential growth of the agro-industry that could result from the inclusion of Western Sahara in the EU-Morocco trade deal - without explaining how that boom will impact on the already scarce water reserves, which are already at risk of depletion.

Recommended questions:

- What measures are taken to mitigate the effects of depleting non-renewable underground water reserves?

¹³ Commission Staff Working Document, SWD(2018) 346 final, p. 18.

6. Undermining the UN process it claims to support, by bolstering Morocco's position

The Commission states that the agreement will be provisionally applied to Western Sahara, pending the resolution of the conflict in the framework of the United Nations. The EU, the Commission argues, fully supports the efforts of the UN Secretary General and his Personal Envoy in order to help the parties come to a politically just, sustainable and mutually acceptable solution that foresees in the right to self-determination for the people of Western Sahara.

Striking a deal with Morocco over Western Sahara without as much as seeking the consent of the UN-recognised representation of Western Sahara, is not providing Morocco with any incentives to genuinely engage in the UN process. In recent years, Moroccan Ministers have been quite clear that the EU's agreements failing to exclude "the Moroccan Sahara" from their application, support Morocco's claim over the territory.

In a hearing in the European Parliament's Foreign Affairs Committee in May 2018, the UN Envoy for Western Sahara, Mr. Horst Köhler, has called on the EU to ensure that any future agreements with Morocco would comply with the CJEU rulings and properly involve the Polisario Front. The Commission's current proposal, is the exact opposite.

Recommended questions:

- The UN urges the parties (Morocco and Polisario) to negotiate an agreement that provides for the respect of self-determination. Does the EU consider it could be complicating the UN peace efforts if it, together with Moroccan government, offers legitimacy to Moroccan institutions in Western Sahara as if these are other representatives of the territory than the one that UNGA has described in resolution 34/37, and which the CJEU refers to in its judgment?
- Considering that the Commission in Annex 1 of the Staff Working Document claims to have consulted 94 Saharawi and pro-Saharawi groups, including its representatives, while it can be documented that it has never done so, how can that affect the image of the EU as an actor that credibly can be seen by the people of Western Sahara as supportive to the self-determination process of the UN?
- Why is the UN Envoy's opinion on the Commission's approach of implementing EU-Morocco agreements in Western Sahara not reflected in the Staff Working Document?

7. The USA and EFTA States have trade agreements with Morocco that exclude Western Sahara

It is possible to have trade relations with Morocco that exclude Western Sahara, without prejudicing the overall relationship with Morocco. Already in 2004, the United States clarified that its Free Trade Agreement "will cover trade and investment in the territory of Morocco as recognized internationally, and will not include Western Sahara".¹⁴

Similarly, the governments of the EFTA States (Norway, Switzerland, Liechtenstein and Iceland) have all declared that the territorial scope of the EFTA-Morocco Free Trade Agreement does not include Western Sahara. And they follow-through: in 2011, a leading Norwegian fish oil importer has been heavily fined for

¹⁴ Executive Office of the President, The United States Trade Representative, 20 July 2004, http://www.vest-sahara.no/files/pdf/Zoellick_FTA_2004.pdf

falsely declaring his imports from Western Sahara as from Morocco – thereby evading approx. €50 million in customs revenues.¹⁵

In spite of their clear positions on Western Sahara, all these countries enjoy excellent relations with Morocco that encompass inter alia trade, readmission and anti-terrorism cooperation.

Recommended questions:

- Why has the European Union not followed the approach of its EFTA partners in relation to Western Sahara?

¹⁵ WSRW.org, Record customs claim against Western Sahara trader, 30 November 2010, <http://wsrw.org/a159x1706> – translation of Norwegian Broadcasting Corporation, 26 November 2010, <http://www.nrk.no/nyheter/okonomi/1.7399586>