The EU illegal exploitation of Western Sahara natural resources

Davide Contini

Western Sahara Resource Watch

Abstract

The European Court of Justice (ECJ) ruling of the 21st of December 2016 (C-104/16 P Polisario vs Council) states that Western Sahara has a separate and distinct status from Morocco and hence no trade agreement concluded between the European Union (EU) and Morocco can be applied to Western Sahara. Therefore, the EU has started negotiating with Morocco to adapt the protocols of the Association Agreement (AA) in order to comply with the abovementioned judgement.

Notwithstanding, at the same time, the EU approved, *inter alia*, the Aviation Agreement, which includes Western Sahara territory under Moroccan jurisdiction.

This paper aims to explain reasons and means of the EU's double play in the Western Sahara conflict. On the one hand, the EU reiterates the official position of "its support to the United Nations (UN) Secretary-General's efforts to achieve a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara". However, on the other hand, the EU continues to include Western Sahara in the territorial scope of its agreements with Morocco.

This strategy entails the implicit acceptance of Morocco's territorial model, which prevails over the rights of the Sahrawi people to a referendum on self-determination, demanded by the UN since 1966.

The review of academic literature along with the analysis of primary sources, such as EU's official documents and diplomatic archives, examines the Western Sahara conflict within the framework of post-colonial relations between Morocco and the EU.

The dispatches of the French Ambassador Colin De Verdière of the Eighties as well as the written answers of European High Commissioner Mogherini reveal that European diplomacy has continuously tried to avoid the possibility of a Sahrawi state, with the consequent advance of the Moroccan project of large autonomy.

This political ambiguity, which persists from the Seventies to the present day, makes the referendum on self-determination an intentionally missed objective, as the decolonisation of the territory is.

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Introduction

On 16 July 2018, the EU Council approved the amended version of Agricultural Agreement that will include Western Sahara. By doing so, the EU is disregarding the ruling of the EU highest Court that stated that Western Sahara is not part of Morocco.

This work focuses on the reasons and means of the EU's double play vis-à-vis Western Sahara, African last colony. From the end of the Second World War until today, the EU, and in particular France and Spain, have connived with the Moroccan occupation of the territory. Together with Morocco, the EU has chosen non-resolution as the solution to the failed decolonisation of the territory. It allowed the gradual progress of Moroccanization of the territory and the advancement of the plan of large autonomy to be granted to Western Sahara.

To demonstrate this, the first part of the paper explores the extent of the EU's trade agreements and, more specifically, the agreements concluded with the Kingdom of Morocco and their legal flaws, as emerged from the ECJ rulings of December 2016 and February 2018. Secondly, a qualitative analysis using both direct and indirect sources, reviews the historical and current events linked to the Western Sahara conflict and Morocco's central role in European foreign policy.

The dynamics that have recurred over the last 50 years show that both the denied decolonization of Western Sahara and the support for Moroccan theses are a priority on the European agenda.

1. The political scope of EU-Morocco Agreements

The EU holds several agreements with the Kingdom of Morocco, which is currently the EU's main commercial partner in the Maghreb region. The bilateral agreements signed by the two players are part of the Barcelona Process, whose 1995 Declaration established the Euro-Mediterranean Partnership (EMP). The latter was supposed to lead to a Free Trade Area (FTA) by 2010 (Balboni, 2008) through "a multilateral frame [which] complements bilateral relations based on Association Agreements" (Pace, 2006; Remiro & Martinez, 2012). Notwithstanding, the EMP was overtaken by the European Neighbourhood Policy (ENP) in 2003. First designed for the new neighbours of the East following European enlargement, and then extended to the neighbours of the South under French advocacy, the core of the ENP lies in the "differentiated application" (Nidhi, 2009, 51): the EU grants more to those neighbours that come closest to the *acquis communautaire*. In this way, the ENP allowed its beneficiaries to assume the status of "privileged neighbour", being more than a partner but less than a member. The fact that the Kingdom of Morocco assumed this status ought not to be neglected when analysing the EU's double play in the Western Sahara conflict.

1.1. Association Agreements as a foreign policy instrument

Since its creation, the EU has been a model of economic integration in the international arena. The EU's political borders have emerged from the concept of the *acquis communautaire*, defined by the EU itself as "the body of common rights and obligations that are binding on all EU countries, as EU Members. It is constantly evolving and comprises [...] international agreements concluded by the EU and those concluded by the EU countries between themselves in the field of the EU's activities". (EU Glossary, *Acquis*).

The 500 million consumers of the internal market ensure that any domestic policy has an impact beyond EU's borders. In this way, and with an internal regulation based on the *acquis communautaire*, the EU has become not only a model for other regions but also an international power (Peterson, 2008). The EU special feature is that its power is not determined by military means, but by particularly economic and political means. It is hence possible to refer to the EU as "civilian power" or "soft power" when referring to the EU (Peterson, 2008).

The absence of both a European army and a common foreign policy has turned trade agreements in EU's key means of its strategy in the international arena. In this regard, Keukelaire (2001, 2003, 2004) states that trade is the main political means by which the EU carries out a "structural" foreign policy that aims to define, precisely, the structure of international society while allowing the EU itself to act as a "civilian power". Therefore, the economic power replaces the military one in the

pursuit of what Classical Realism identifies as objectives: maintenance and expansion of power. It follows that economic borders become political borders and the case of the agreements with the Kingdom of Morocco is a clear example. Although Western Sahara is under Moroccan occupation according to international and European law, the EU includes the pending territory of decolonisation within the territorial scope of the agreements it has concluded with Morocco in the framework of the above policies. This negligence can be attributed to the centrality of the relations with Morocco in EU foreign policy.

1.2. Review of the main EU-Morocco Agreements

Before analysing some of the agreements currently in force between the EU and Morocco, it should be pointed out that all the different policies launched by the EU (e.g. EMP, ENP, etc.) are part of a long-term path. In fact, the continuity and importance of the relations between the two actors has its bases in the relations that the European powers, and especially France, Spain and Portugal, had with the then Sultanate of Morocco since the fifteenth century (Guermoune, 1988).

On 26 February 1996 Morocco and the EU signed the AA, which enters into force on 1 March 2000. It is the framework agreement for EU-Morocco trade relations, but it provides also an institutional framework, referring to the central aspects of cooperation between the two countries, such as human rights, counter-terrorism, prevention and management of migration flows. In other words, the EU gives political and economic support to Morocco in order to stimulate its trade liberalisation by attracting Foreign Direct Investment (FDI), implementing social policies and reforms (EU–Morocco Association Agreement, 2000). In 2003, when the EU expands the ENP to its Mediterranean neighbours, Morocco begins its ascent towards the status of privileged neighbour. The adoption of an Action Plan requires Morocco to implement a substantial programme of economic and political reforms, the core of which is the reduction of poverty and the deepening of cooperation between the two actors through the establishment of a FTA. Leaving aside the details of the subsequent stages (i.e. Statut Avancé, 2008; MEDA I-II; etc.), the Agricultural, Fisheries and Aviation Agreements are examined for the effectiveness with which they show the Union's negligence towards the Sahrawi case. By assuming the status of privileged neighbour, Morocco secured EU support to its territorial claim.

1.2.1. The Agricultural Agreement

The so-called Agricultural Agreement is actually a protocol within the AA between the EU and Morocco. Approved on February 16, 2012 by the European Parliament (EP), the agreement provides for an increase in trading quotas for a number of products that can be imported at low or

zero tariffs. In particular, the agreement eliminates 55% of tariffs on Moroccan agricultural products and 70% of tariffs on EU agricultural products in 10 years. As mentioned above, it is worth noting that the privileged relationship derives from the preferential tariffs granted by France to its former protectorate and defended by the Hexagon during negotiations at European level since the aftermath of the Treaty of Rome (Spaak, 1956). When voting in the EP, however, Spain, Italy and Portugal, and to a lesser extent the Netherlands and Malta, do not particularly appreciate this protocol given the direct competition of Moroccan fruits and vegetables to their products[1].

According to the EP, "the trade agreement aims to increase trade between the EU and Morocco and support the democratic transition that began following the Arab Spring. In fact, the majority of the deputies affirmed that the agreement should help to solve the social, economic and security problems of the Country" (EP, 2012). Far from changing the country's institutional architecture, the Agreement has consolidated both Morocco as the EU's largest trading partner for fruit and vegetables and EU as the largest market for the Alawite Kingdom. It is sufficient to note that the EU represented 59% of Moroccan exports in 2015, with Spain (22%) and France (18%) as the main importing countries. Equally, the EU accounts for 53% of Moroccan imports.

As far as Western Sahara is concerned, the agreement does not specify whether or not the territory, which has been militarily occupied by Morocco since 1975 following the failed process of decolonisation, falls within the scope of application of the agreement. According to the data provided by Morocco by the 2016 ruling of the ECJ analysed below, Morocco has always exported fruits and vegetables produced in Western Sahara and, what is even more remarkable, the AA developed the agricultural sector in Western Sahara, nearly inexistent hitherto. (WSRW, 2016).

1.2.2. The Fishery Partnership Agreement

The massive use of bilateral Fisheries Partnership Agreements (FPAs) enables the EU to cope with the gradual decline in its fish stocks by fishing where "its partners cannot, or do not wish to fish" (EC, 2012). Nowadays, around 40% of EU catches are made under FPAs, which are mainly concluded with developing countries. These agreements are based on a principle of reciprocity: the EU can fish in the waters of a country to which in return it provides financial and technical support in order to establish sustainable local structures for fishing and processing.

[1]Pointage des votes concernant l'Accord Agricole UE-Maroc approuvé par le Parlement Européen le 16 février 2012. Mission du Royaume du Maroc auprès de l'Union Européenne – Bruxelles, 17 février 2012. Disponible: http://www.arso.org/Coleman/PE-Pointage_votes_accord_agricolebinomes.pdf

The four-year agreement with Morocco, which entered into force in 2007 and expired in 2011 before being renewed after initial rejection by the EP (12.2014), was the subject of a ruling by the CJEU on 27 February, and today brings the two players to the negotiation table since the deadline was set for 14th of July 2018. Leaving aside the technical characteristics of the Agreement, two elements deserve attention: its historical continuity and its political-economic importance for Moroccan territorial claims.

Firstly, it should be noted that, while trade privileges for agricultural products are the legacy of French colonialism in the region, the Fisheries Agreement with Morocco is the result of the long standing partnership in the sector between Spain and the then Sultan of Morocco. According to the Treaty of 28 May 1767 (Garcia Figueras, 1943; Diaz del Ribero, 1975), the Moroccan Sultan granted authorisation to Spain to fish in the waters South of Agadir and he also specified in Article 18 that, although he did not have sovereignty over those territories, in the event of kidnapping or threatening of Spanish fishermen he could exert his influence on the tribes present there. Long-time before their accession to the EU, Spain and Portugal had bilateral agreements with Morocco. Once they joined the Community, it was the EU that took over the negotiations to safeguard strategic good neighbourhood relations. After some partially successful attempts (1988, 1992), the EU and Morocco concluded what the Commission itself calls "by far the most important fisheries agreement between the EU and a third country" (EC, 2012b).

Secondly, the FPA between the EU and Morocco allows Morocco to invest in the occupied part of Western Sahara, which Morocco erroneously labels as "South provinces", a large part of the 30 million euros that the EU pays to Morocco every year (EC, 2017). Using EU payments to promote the territorial development of the occupied territories of Western Sahara, it is hard to believe that the EU would not apply the agreement to Saharan waters. It is enough to consider that 91% of the catches made under the agreement are in Sahrawi waters, as the Commission itself states (EC, 2017). In addition, the Commission lists dozens of sites in Western Sahara as authorised fishing and processing establishments.

Today, the political salience of the Agreement, which aims to legitimise the Moroccan position, is linked to the Spanish colonial heritage and is reflected in Article 11 of the Agreement. Entitled "Area of application", Article 11 states that the FPA shall apply "to the territory of Morocco and to the waters under Moroccan jurisdiction", just as stated in the Treaty of 1767.

1.2.3. The Aviation Agreement

The EU's Aviation Agreements aim to develop a wider European Common Aviation Area, to facilitate the opening of markets and the alignment of aviation legislation, with particular attention to EU's neighbourhood countries.

The Kingdom of Morocco was the first country outside Europe to sign the Aviation Agreement. It has been provisionally in force since December 2006. In February 2014, the EU Commission proposed an amended version of the deal, accounting for changes within the EU (three new Member States since 2006 and the Lisbon Treaty). It is this amended version that went through Parliament last October (WSRW, 2017)

The Aviation Agreement defines the territory of the Kingdom of Morocco as "the land areas (mainland and islands), internal waters and territorial sea under its sovereignty or jurisdiction". It is worth notice that, according to Moroccan domestic legislation, Moroccan sovereignty or jurisdiction include Western Sahara. When the EP approved the aviation deal with Morocco back in 2006, the EU had not yet clarified its legal position on the territorial scope of any of its agreements with Morocco. However, in December 2016, the Court of Justice of the EU ruled that Western Sahara is a "distinct and separate" territory from Morocco (art. 106, C 104/16 P Polisario vs Council). Nonetheless, the airports of Dakhla and El Aaiun, two of Western Sahara's main cities, are integrated within the Moroccan national aviation space and are enlisted as Moroccan airports. Indeed, ever since the agreement entered into force in 2006, up to 2016, the increase in passenger traffic into Western Sahara is around +266% (WSRW, 2017). In this regard, WSRW has found that there are 11 international flights per week into Western Sahara, operated by Binter Canarias and Royal Air Maroc. The flights connect Dakhla and El Aaiun to Gran Canaria. A new connection to France, via Transavia, was opened at the end of October 2017, before being withdrawn by AirFrance-KLM in March. According to some sources, the company decided to cancel the route due to Polisario's lawsuit before Creteil Commercial Court, while others, as the company itself, claim that the low number of passengers using the connection during the winter explains it. Ultimately, the enhancement of aviation ties between the EU and Western Sahara, by facilitating trade in products from this territory, raises - once again - fundamental questions of the political complicity of the EU with Moroccan occupation. It is, hence, an additional proof of the political misuse by the EU of its Agreements.

1.3. The European Court of Justice against the agreements

The various reasons set out above and the pivotal role played by the relations between the EU and Morocco lead the EU to implicitly accept the territorial claims of the Alawite Kingdom to the detriment of international law. As we have seen, the agreements with Morocco de facto include Western Sahara, neglecting the numerous UN resolutions, the Principle of Permanent Sovereignty over Natural Resources and the Principle of Self-determination of Peoples. The case law of the United Nations states that the territorial resources of a territory cannot be exploited without the consent of its representatives.

Therefore, the Polisario Front, the legitimate representative of the Sahrawi people according to the UN, together with various NGOs, in the course of 2000s assumed the question of territorial resources as the major weapon of political and legal opposition to the consolidation of the Moroccan occupation.

As regards the European context, the Polisario Front brought four actions against the EU Council before the EU Court, calling for the annulment of the EU-Morocco Agriculture Agreement, the EU-Morocco Fisheries Partnership Agreement, the EU-Morocco Aviation Agreement and the annulment the Council Decision of 16 April 2018, authorising the EU Commission to renegotiate the Fisheries Protocol with Morocco.

Furthermore, Western Sahara Campaign UK (WSCUK), a solidarity group, brought action in the UK High Court against two British government agencies: Her Majesty's Revenue and Customs (HRMC) and the Secretary of State for the Environment, Food and Rural Affairs (DEFRA). WSCUK argued that the UK was unlawfully allowing products, originating from or processed in Western Sahara, to be imported into the country under a trade agreement with Morocco. (WSRW, 2017b).

To date, the CJEU has issued judgements on the Polisario Front's case on the Agriculture Agreement and on WSCUK's case on the Fisheries Agreement, indicating that these EU agreements do not comply with EU and international law. Other rulings, in particular the one of Polisario Front against the FPA , are expected for later this year.

1.3.1. C-104/16 P of 21.12.2016

The 19th of November 2012, some months after the EP approval, the Polisario Front brings action against EU council (case T-512/12) asking for the annulment of the Council decision concluding the agriculture agreement with Morocco. Three years later, in December 2015, the ECJ annuls the EU-

Morocco agriculture agreement in so far as it applies to Western Sahara. Nonetheless, the EU Council appeals the Court's decision in January 2016.

The case ends, only from a legal point of view, on December 21, 2016, with a final and unquestionable judgment of the ECJ. It annuls the judgement of December 2015 since Western Sahara has no part in the application of the 2000 and 2012 agreements and therefore states that the EU-Morocco Agricultural Agreement is not valid.

Specifically, the ECJ states "the association and liberalisation agreements concluded between the EU and Morocco are not applicable to the Western Sahara". The legal basis for the judgment is the principle of the relative effect of a treaty (Article 34 of the Vienna Convention) and the principle of the self-determination of peoples. In paragraphs 35 and 105 of the ruling, the Court clearly explains that the Polisario Front is the legitimate representative of the people of Western Sahara and that the agreement concluded with Morocco does not comply with international and EU law.

Therefore, the judgment suggests two ways to comply with the law. One alternative is to include the territory of Western Sahara by obtaining the consent of the Sahrawi people, not that of the local population, because these are institutions under Moroccan law illegally established in the decolonised territory. The other way to comply would be to exclude Western Sahara from the territorial scope of the agreement, as, for example, the United States did in its agreement with Morocco. It follows that obtaining the consent of the people of Western Sahara would respect the principle of the relative effect of a treaty; while not applying the Agreement to that territory would not constitute a legal defect.

1.3.2. C 266/16 of 27.02.2018

The case related to the Fisheries Agreement for which the sentence has already been issued (there are two others still pending), begins when in February 2015, Western Sahara Campaign UK brings action in the UK High Court against Her Majesty's Revenue and Customs (HRMC) and the Secretary of State for the Environment, Food and Rural Affairs (DEFRA). After initial and substantive hearings take place at the UK High Court, the latter refers the case to the ECJ in October 2015. More specifically, the UK Judge stated: “I conclude that there is an arguable case of a manifest error by the Commission in understanding and applying international law relevant to these agreements.” (WSRW, 2017c).

The 27th of February 2018, the ECJ judges the agreement inapplicable to Western Sahara. According to the ruling C-266/16, the EU-Morocco Fisheries Agreement is valid as it does not

apply to the waters of Western Sahara. In this case, and in opposition to the Agricultural Agreement's one, the Court's legal analysis is counterfactual and therefore does not take into account the practice of the agreement, but rather the theory on which it is based. If it had judged the practice, the Agreement would have been invalidated because 91% of the catches are made in Western Sahara (EC, 2017). With regard to the theory of the Agreement, the Court analyses the Article 11 entitled "Zone of application", which, as stated above, states that the FPA applies "to the territory of Morocco and to the waters under Moroccan jurisdiction". Since Western Sahara, according to the principle of self-determination of peoples and the relative effect of treaties, cannot be considered as part of the Moroccan jurisdiction, nor, the Court emphasizes, can Morocco be understood as a de facto administrating power because Morocco itself has repeatedly refused such a definition, the Agreement remains valid but cannot be applied to Western Sahara waters. (see Articles 19, 62, 63 and 72 of the judgment).

This implies that in the new protocol the Commission will have to exclude Western Sahara from the territorial scope of the Agreement or, in order to be applied to the territory in question in accordance with the law, will have to obtain the consent of the people of Western Sahara.

2. EU’s everlasting double game *vis-à-vis* Western Sahara conflict

In order to understand the EU's contradictions towards the Saharawi case, we must go back to the intentionally failed decolonisation of Western Sahara. The position of the European Commission, as well as that of some of our representatives in Parliament, is in line with the historical positions of France and Spain of total support for the territorial claims of Morocco.

In fact, although the EU is globally committed to defending human rights, which are a declared objective of the agreements signed with Morocco, it has always decided to be a payer not a player in the Western Sahara conflict. On the one hand, it sends humanitarian aids through DG ECHO to the refugee camps of the RASD, which is a state in exile in the Algerian southeast since 1975, and reiterates its official position of support for the United Nations' efforts to settle the conflict. On the other hand, the Moroccan “solution”, consisting in a large autonomy status to be accorded to the occupied territories of Western Sahara is slowly moving forward through trade agreements.

In the Sixties as today, the huge resources of this territory and the geopolitical position of Morocco motivate the unconditional support of some European Member States and Institutions to the requests of the Alawite Kingdom.

2.1. Some relevant precedents

The Sahrawi case is a leading example of how, while the UN demanded decolonisation, the former colonial powers organised the modalities of post-colonial domination. Through the Madrid Agreement and the alleged "positive neutrality", France and Spain respectively supported *La Marche Verte* and the subsequent "Moroccanization" of the territory, still carried out today through EU's economic aids and compensations.

In 1966 the UN adopted a resolution calling for a referendum on self-determination in the Sahara. However, Spain tried its best to maintain control over the territory, given the richness of the subsoil, its strategic importance for trade with the Canary Islands and Africa, as well as the strong pressure that the Army exerted on Madrid to preserve a piece of the colonial empire. Franco thus proposed a statute of autonomy in 1973, which was accepted and voted unanimously by a pro-Spanish Sahrawi assembly. Nonetheless, the international context was changed, General Franco was old and ill and Morocco was looking for a solution for its internal instability.

Thus, the Spanish Minister of Foreign Affairs Castilla believed that decolonisation would have been the best means of guaranteeing Spain good relations with the Arab countries, as well as a better position for Gibraltar's claim (Hernando De Larramendi, 2016). Furthermore, the USSR also wanted to include the Canary Islands in the pending territories of decolonisation and therefore Spain preferred to leave the African territories rather than the Atlantic outpost. (Villar, 1982) Spain's main objective was to safeguard economic interests in the exploitation of phosphates present in its territory. It was only in the 1960s that the economic potential of phosphate reserves, "among the largest in the world[2]", was discovered.

Archive documents dated 1968-1969 bear witness to Franco-Spanish relations for the exploitation of deposits whose production capacity "can reach, from the first years of exploitation, 10 million tons, that is the same quantity produced by Morocco, currently the world's leading exporter". However, France was concerned about Morocco's anger and opposition if a French company, together with the INI (Istituto Nacional de Industria), would have exploited phosphate reserves and entered a market where Morocco was the leader. Evidence is that the director of the French mines, at the time Claude Daunesse, suggested that "to engage definitively in the affair, political guarantees are indispensable, which presupposes in practice an agreement with the Moroccans[3]".

[2] Note du MAE pour la Direction des affaires économiques et financières, 3 février 1969 Paris, AN 19899566/65. Pierrefitte-sur-Seine. Paris.
[3] Note du Directeur des Mines, M. Daunesse, pour Monsieur le Ministre n°438, 10 mars 1969, AN 19899566/65. Pierrefitte-sur-Seine. Paris

The agreement, still secret, will arrive in 1975, a few days before Franco's death, and following the *Marche Verte* that Morocco organised with the assistance of the Hexagon. In fact, France, which had the role of *gendarme d'Afrique* in the Cold War context, was and still is firmly opposed to the birth of an independent Sahrawi state. The new elected Valéry Giscard d'Estaing considered the birth of a *micro-état* in the Sahel "regrettable[4]". French diplomacy considered that the "creation of a revolutionary Sahrawi state represented a risk of destabilisation for its neighbours, Mauritania and Morocco" and that "a Sahrawi state would mean including a Spanish angle of influence in a French-speaking ensemble stretching from Tunisia to Senegal[5]".

By granting the Sahara to Morocco through the Madrid Agreements of November 1975, Spain secured a 35% share in the phosphate mine of Bou Craa and was allowed to continue its fishing activities in Saharawi waters. At the same time, France avoided the birth of a state too ideologically closed to the revolutionary Algeria, and helped Morocco in its stabilisation process.

During the course of the armed war first and of the ceasefire later, the Western powers continued to support Morocco and to block the attempted UN resolution plans. After the failure of the United Nations plans whose peace mission in the territory, the MINURSO, is the only one without a mandate for human rights monitoring due to the continuous French veto within the Security Council, Morocco presented in 2007 the "Moroccan initiative to negotiate a statute of autonomy for the Saharan region". This proposal is and has always been supported by Spain and France which, still today through the AAs of the EU, try to implement it in order to definitively avoid the possibility of a Saharawi state.

The autonomy's idea is not new. Already in 1982, Hubert Colin de Verdière[6], former French Ambassador to Algeria, wrote: "there is only one way forward for the pursuit of a political compromise: that of a very wide internal autonomy within the framework of Morocco. For the time being, such a formula, which the King has only mentioned, would not seem acceptable to the Sahrawi leadership. But it is, without any doubt, with the indefinite extension of the hostilities, the only conceivable solution[7]".

[4] Daniel, J. interview à M. Giscard d'Estaing. En Nouvel Observateur, 2 février 1976. AN 19870035/21. Pierrefitte-sur-Seine. Paris

[5] Dossier thématique pour le MAE sur le conflit du Sahara Occidental, Tristan d'Albis, 29-30 aout 1979, AN 19850097/7. Pierrefitte-sur-Seine. Paris

[6] At the time of the diplomatic events delegated in the functions of deputy director of the North Africa and Middle East Department.

[7] Confidentiel urgent, MAE-Relations Extérieures Afrique du Nord n°98, Hubert Colin De Verdieère, Paris, 2 mars 1982. AN 19850097/7. Pierrefitte-sur-Seine. Paris.

2.2. Current negotiations

When the ECJ stated that, "in view of the separate and distinct status guaranteed to the territory of Western Sahara […] it cannot be held that the term 'territory of the Kingdom of Morocco' […] encompasses Western Sahara", the EU diplomacy has been urgently mobilised in order to safeguard the pivotal relations with Morocco, now at stake. For the very first time, an EU institution, the EU highest Court, said that Western Sahara is not Morocco. The same day, EU High Representative and Vice-President of the Commission (HR/VP), Federica Mogherini, did a joint statement with the Moroccan Minister of Foreign Affairs in which they highlight that they would have studied the judgement and intervened to amend the protocols of the AA according to the sentence (EEAS, 2016).

Leaving aside EU's declarations, the work of the EC consisted since the beginning in understanding how to circumvent the ruling. In particular, the EC tries both to demonstrate that the local development benefitted from the trade with the EU, and to achieve the consent of the local population. However, the ECJ asked for the consent of the people of Western Sahara. Since Western Sahara is a non-self-governing territory, the local population is very different from the people. While the first is indeed expression of the Moroccan settlers who are under Moroccan institutions and law, the second refers to the Saharawi people who are often not even allowed to enter the occupied territories of Western Sahara.

On the Moroccan side, the Kingdom's narrative concerning the judgment changed over time. While initially presenting this as a victory, the Moroccan government quickly evolved towards issuing threatening statements vis-à-vis the EU. On 6 February 2017, Morocco's Minister for Agriculture released a statement warning that any obstacles to his country's agriculture and fishing exports to Europe could renew the "migration flows" that Rabat has "managed and maintained" with "sustained effort." The treats of Morocco represent a clear evidence of their critical geopolitical position that, *inter alia*, pushed France and Spain before, and that is now pushing the EU, to accept their illegal claims over Western Sahara (El Paìs, 2017).

On 19 April, the EC sent to the 28 EU Member States a Recommendation for a Council Decision for a Negotiation Directive that authorises the Commission to negotiate an adaptation of the protocols of the AA. Consequently, the EP's International Trade Committee (INTA) set up a Monitoring Group in order to give to the Parliament the possibility to examine and discuss with the negotiation process. The recommendation and draft directives were first examined by the Mashreq/Maghreb (MaMa) Working Party at Council level, who reached an agreement in May. While the Swedish delegation indicated its intention to fully comply with the ruling, the EU

Competitiveness Council authorised the Commission to open negotiations on the adaptation of protocols to the Agreement. The first meeting of the INTA monitoring group (MG) took place in the EP when the Council had already approved the mandate the day before. It is important to note that the Parliament does not have a say on according a negotiation mandate to the Commission – this is the prerogative of the Council (Member States). Nonetheless, the Parliament is entitled to see the mandate agreed by the Council, but this was not transmitted to the EP until December. Indeed, during the meeting of the 20th of February 2018 of the INTA Committee, its Chair, the German socialist Bernd Lange opened the sessions saying he was astonished by the marginal role given to the EP by the EC. "It seems there was a deal behind closed doors" Lange stated. It implies that the EC negotiated with Morocco without properly informing the Parliament. Moreover, the EC was repeatedly not able to quantify the amount of trade coming from Western Sahara, the main sectors concerned and the total volume of good originating in Western Sahara that has entered EU after the CJEU ruling. (PQ, 2017)

Many Members of the European Parliament (MEPs) presented Parliamentary Questions (PQs) to the HR/VP. During those two years of negotiations, the answers provided by the Commission are an indisputable proof of the EU double play. As an example, note that HR/VP often responded by repeating "its support to the United Nations (UN) Secretary-General's efforts to achieve a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara". On the other side, the Commission decided not to talk with the Polisario Front, nor with other groups issued from the Saharawi civil society who are not in favour of the way the negotiation and consultation process has been conducted. Not only, but, while conducting the negotiations to comply with the judgement, the EP approved the abovementioned Aviation Agreement with Morocco, in spite of the Commission admitting – in its statement prior to the vote – that the deal covers Western Sahara.

The 16th of July, the EU Institutions furnished the umpteenth proof of their connivance with Moroccan occupation. The Council approved the amended Morocco agriculture deal proposed and negotiated by the Commission following the above-mentioned criteria. The agreement is going to include Western Sahara even though the Sahrawi people did not expressed their consent. The EC provided a list of actors they involved in the process, but neither the Polisario Front nor other actors who are not issued from the Kingdom of Morocco have expressed their consent.

Nonetheless, the EP has to ratify this amended version in order it to be effective. The vote is expected by October and some sources told WSRW that the Standing Rapporteur of the dossier, Mrs Patricia Lalonde, asked for a fact-finding mission in Western Sahara. If the realpolitik suggest

that the EP will approve the amended deal, considering the weight of France in the EU and the Moroccan lobby in Brussels, it is only possible to hope that our representatives in the EP would think about EU lawfulness and transparency.

Concerning the FPA, instead, it is now expired without the two actors having reached an agreement. Whereas Morocco asked more funds to the EU in exchange of a higher fishery quota, some Northern European countries rejected to fish more where the decrease of the stock is affecting the sustainability of the sector. At the end of the day, the FPA is not in force anymore, but the importance of Western Sahara has been marginal in this decision. Therefore, it will not be surprising to have a new FPA, perhaps with Spain on the lead, which will include Saharawi waters. Indeed, negotiations for a new agreement are foreseen at EU level.

Conclusions

This study analysed the reasons behind the EU double play vis-à-vis Western Sahara. After more than forty years, the decolonisation of the territory is the only unconsidered solution to a long-standing stalemate. Instead, the EU posture has been, since decades, a double game of illegality and lack of transparency aiming at granting a very wide internal autonomy to Western Sahara within the Moroccan *ensemble*.

The continuity of the European approach is examined throughout the analysis of the agreements concluded with Morocco, the legal disputes that have affected them and the on-going negotiations to amend them. Archival sources, as well as direct experience at EU level, demonstrate that the EU has favoured the implicit acceptance of Morocco's territorial claims, to the detriment of the Sahrawi people's right to self-determination. In this vein, years before the decolonisation of the Spanish Sahara, France and Spain, backed by the United States, already reached an agreement with Morocco in order to continue exploiting the considerable resources of the disputed land.

From the Fisheries Agreement of 1767 to the European Council’s approval of the amended version of the Agricultural Agreement of July 2018, the dynamics and reasons behind the EU posture towards the Sahrawi case remain invariable. Morocco's geopolitical importance, its central role in the management of migratory flows and in the fight against terrorism, as well as the need for post-colonial policies to continue to exploit external resources, have motivated EU’s willingness to consciously neglect International Law.

In conclusion, it emerges that in the tension between Law and Realpolitik that has accompanied the Sahrawi case since the Seventies, the former perishes under the blows of the latter. The power of the EU and the weight of its member states in the international arena make the Law an eternal

subordinate, reaching the paradox whereby a "civilian power" does not care about its own legislation.

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