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(Non-)Negotiable? Consent and objective economic benefit in EU trade with Western Sahara

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photo: WSRW

Agenda

- 1 Timeline
- 2 Council Decision (EU) 2019/217 of 28 Jan 2019
- 3 Commission Report of 11 June 2018
- 4 Front Polisario v Council 2021 (General Court)
- 5 (Some) conclusions

Preliminary remarks

- 1 Terminology
- 2 Limitations
- 3 Assumptions

1

Recent events in EU trade with Western Sahara

Timeline

2000/2012

- EU-Morocco AA (2000) + Liberalisation Agreement (2012) enter into force, products originating in WS de facto „benefit“ from the tariff preferences as Moroccan products

2016

- CJEU rules that the EU-Morocco AA applies to the territory of Morocco *alone*, WS as a non-self-governing territory has a separate and distinct status and is not included in its application

2017

- Council authorises the Commission to negotiate amendments to the agreements
- On two conditions:
 - 1) conduct impact assessment**
 - 2) people concerned are adequately involved**

Timeline

2018

- Report on benefits for the people of Western Sahara published
- Proposes to amend the agreements to explicitly include WS because it would socio-economically benefit its inhabitants

2019

- Sustainability Fisheries Partnership Agreement enters into force
- Other amendments and extensions enter into force

2019

- Front Polisario challenge the Council decisions amending and extending application to WS + the granting of fishing quotas

Timeline

2021

- *Front Polisario v Council 2021*
- General Court invalidates several Council decisions amending or extending EU-Morocco treaties

2023/2024

- appeal before the CJEU still pending, hearings were held 23/24 Oct 2023, AG Opinion expected for March 2024
- especially questions of representation and standard of consent under appeal

2

Council Decision (EU) 2019/217 of 28 January 2019

Establishing the standard of benefit

(6) It should be ensured that the trade flows developed over the years are not disrupted, while establishing appropriate guarantees for the protection of international law, including of human rights, and sustainable development in the territories concerned. (...) . An agreement between the European Union and the Kingdom of Morocco is the only means of ensuring that the import of products originating in Western Sahara benefits from preferential origin, given that only the Moroccan authorities are able to ensure compliance with the rules necessary for the granting of such preferences.

(7) (...) The effects of tariff benefits on employment, human rights and the exploitation of natural resources are very difficult to measure as they are by nature indirect. Moreover, it is not easy to obtain objective information on this issue.

Establishing the standard of benefit

- objective impact assessment
- Council refers to the Commission report which had established the standard of objective economic benefit
- concedes the empirical difficulty of establishing such advantages or disadvantages given the lack of reliable data
- concedes the indirect regulatory effect of granting tariff preferences
- relevant factors: employment, human rights and exploitation of natural resources

On measuring benefit

(8) Nonetheless, the assessment indicates that, overall, the advantages for the economy of Western Sahara arising from the granting of the tariff preferences laid down in the Association Agreement to products originating in Western Sahara, such as the powerful leverage effect it represents for economic growth and thus social development, outweigh the disadvantages raised in the consultation process, such as the extensive use of natural resources, especially underground water reserves, for which measures have been taken.

(9) It has been assessed that the extension of tariff preferences to products originating in Western Sahara will have a positive overall effect for the people concerned. It can be expected that this effect should continue and may even be enhanced in the future. The assessment indicates that extending the benefit of tariff preferences to Western Saharan products will promote the conditions for investment and foster substantial and rapid growth favourable to local jobs. The existence in Western Sahara of economic and production activities that would benefit greatly from the tariff preferences laid down in the Association Agreement shows that failure to grant tariff preferences would significantly jeopardise exports from Western Sahara, especially those of fishery and agricultural products. It is assessed that by stimulating investment, the granting of tariff preferences should also have a positive impact on the development of Western Sahara's economy.

On measuring benefit

- ‘powerful leverage effect [...] for economic growth and thus social development’
 - liberal assumptions, e.g. empirically non-proven link between economic growth and social development
- ‘people concerned’
 - no information provided for who actually exploits natural resources in Western Sahara and how its sustainable or equitable exploitation is ensured
- ‘failure to grant tariff preferences would significantly jeopardise exports from Western Sahara, especially those of fishery and agricultural products’
 - overwhelming majority of fish stocks under Moroccan administration
 - already being increasingly depleted by European vessels

On representation

(10) Having regard to the considerations on **consent** in the ruling of the Court of Justice, 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.** Wide-ranging consultations were conducted and the majority of the social, economic and political stakeholders **who participated in the consultations** stated that they were in favour of extending the tariff preferences in the Association Agreement to Western Sahara. Those who rejected the idea felt essentially that such an Agreement should affirm Morocco's position on Western Sahara. However, the text of the Agreement does not imply that it recognises Morocco's sovereignty over Western Sahara. The Union will also continue to step up its efforts in support of the process, initiated and pursued through the United Nations, working towards a peaceful resolution of the dispute.

On representation

- only those who participated were included in the considerations of the Commission
- Front Polisario explicitly rejected EU trade
- Commission patronized the concerns raised in the consultations
- NGO overwhelmingly stated that they had in fact never been consulted even though they were listed by the Commission (see WSRW Report)

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The Commission Report

Commission Report on benefits for the people of Western Sahara (2018)

‘[...] As the people of Western Sahara have the right to self-determination, it is not for the EU to carry out a local census or decide who to count as part of the population; (...) this analysis focuses on the benefits for the population of Western Sahara, as preferences are granted to products from a given territory, with advantages associated mainly with that territory.’ (p. 7)

Commission Report on benefits for the people of Western Sahara (2018)

- 'most people now living in Western Sahara are very much in favour of the extension of tariff preferences to products from Western Sahara under the EU-Morocco Association Agreement' (p. 31)
- 'positive opinion [...] expressed by Western Saharan elected representatives to national, regional and local bodies following the awareness and consultation exercise carried out by the authorities among Moroccan institutions' (p. 31)
- 'shared by a large majority of grass-roots socio-economic organisations in the region' (p. 32)

Implementation reports (2020 and 2021)

- Explicitly not address the consultation process carried out in 2018 to assess the consent of the ‘concerned population’ – only the objective economic benefit
- Main tool for the elaboration of the implementation reports is the exchange of information with Morocco
- ‘information from other available sources collected during a technical visit that took place in September 2021 to the region of Dakhla-Oued Ed-Dahab in Western Sahara has also been used, as well as information received from various representatives of the population concerned.’ (p. 3, 2021 Report)
 - ‘Sahrawi’ is mentioned only four times in the 2021 Report, two on ‘Sahrawi refugees’
- All sites visited are located in the Moroccan-occupied territory of Western Sahara

Implementation reports (2020 and 2021)

- ‘Western Sahara shows the characteristics of a market economy in expansion, and the main industries are fishing and fish processing, phosphate mining, agriculture (especially earlygrowing fruit and vegetables and pastoral nomadism), trade and craft industries.’ (p. 13)
 - OCP Group, 95 % Moroccan-State-owned, accesses around 70% of the worldwide phosphate reserve
 - Western Saharan coastal area accounted for approximately 73% of the quantity of Morocco’s annual coastal and artisanal catches in 2020 (WSRW)

Implementation reports (2020 and 2021)

- ‘(...) Phosphate production is a major industry in Western Sahara. However, there are no exports of Western Saharan phosphates to the EU. This is due to the fact, as indicated in the 2018 report, that there is not yet a production in Western Sahara of processed phosphate products and that there is no interest in the EU to process raw phosphates from Western Sahara. Raw phosphates from Western Sahara are likely to be used in Morocco to manufacture phosphate derivatives that are then exported to the EU under preferences as the processing carried out in Morocco is sufficient to confer preferential origin under the Association Agreement with Morocco.
- Therefore, in respect to phosphates, the Agreement has had no impact, and this sector is therefore not analysed in this report.’

Implementation reports (2020 and 2021)

- ‘The report thus confirms that the Agreement is resulting in benefits for Western Sahara and its population in terms of exports, economic activity and employment.’ (p. 5, 2021 Report)
 - Less than half of the Sahrawi still live in Western Sahara, it is unclear how the exact demographic makeup of the Moroccan-occupied part of the territory (around 80% of Western Sahara) looks like

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Front Polisario v Council 2021 **(General Court)**

On Sahrawi representation

- Representativeness of Front Polisario
 - UN recognition (para. 92)
 - participation in UN-led negotiations with Morocco (para. 92)
 - FP entered into several 'commitments under international law', such as peace agreements or as a party to the Geneva Conventions (para. 94)
 - FP participates on behalf of the Sahrawi in several other international fora, such as the African Union (para. 95)
 - regularly engages in exchanges with the Commission on matters relating to the situation of Western Sahara (para. 98, c.f. Commission Report of 2018)
 - Link with the SADR would in any event not deprive FP of its independence and liability (para. 104)

What is the relevant violation?

- Art. 266 TFEU, obligation of EU institutions to implement CJEU decisions
 - paragraph 106 of the CJEU decision of 2016
 - ‘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.’

How to review the violation?

- scope of judicial review of the Court is limited with regard to principles of customary international law
 - manifest error of assessment concerning the conditions for applying the rule of custom (para. 343)
 - = EU institutions which have adopted the act in question must be able to show before the EU Courts that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate

How to review the violation?

1) infer from the principle of self-determination that WS separate and distinct status must be respected and

2) infer from the principle of relative effect of treaties that the people of that territory must consent to any agreement which would be implemented on that territory (para. 348)

- both conditions were set out by the Court (in 2016) as ‘clear, unconditional and precise obligations imposed on the institutions’ in relation to the Sahrawi as a third party
- the margin of appreciation of the Council is limited by these clear obligations

How to review the violation?

- while the Council was right to assess who to consult with and how the consent should be expressed...
- ‘...the sole purpose of the consultations conducted by the Commission and the EEAS was to obtain the opinion of the ‘people concerned’ on the agreement at issue and not the consent of the people of Western Sahara to it.’ (para. 366)
- ‘the Council does not focus, in the present case, on the consent of a third party to the agreement at issue, within the meaning of paragraph 106 of the judgment in *Council v Front Polisario*, but on the favourable opinion of a majority of local people.’ (para. 317)
- representatives elected under the Moroccan constitutional order do not qualify as representatives of the Sahrawi people (para. 375)

How to review the violation?

- while the Council was right to assess who to consult with and how the consent should be expressed...
- ‘...it was not for the Council to decide whether the said consent could be waived without infringing that requirement.’ (para. 349)
- even Corell’s Legal Opinion cited by the Commission and Council supports this standard of consent:
 - ‘[...] exploitation of the natural resources of non-self-governing territories infringes the principles of international law that apply to those territories if that exploitation is undertaken in disregard of the interests and wishes of the peoples of those non-self-governing territories.’
 - ‘[...] It follows expressly that the prospecting and exploitation activities carried out in Western Sahara must be consistent not only with the interests of the people of that territory but also with their will and that, failing this, they are contrary to those principles.’ (para. 389)

What is the violation?

- ‘It follows from all of the foregoing that, in adopting the contested decision, the Council did not take sufficient account of all the relevant factors concerning the situation in Western Sahara...
- ...and wrongly took the view that it had a margin of appreciation to decide whether it was necessary to comply with the requirement that the people of that territory must express their consent to the application of the agreement at issue, as a third party to that agreement, in accordance with the Court’s interpretation of the principle of the relative effect of treaties in relation to the principle of self-determination.’ (para. 391)

On the bindingness of the Court's interpretation

- '[T]he European Union constitutes an autonomous legal system.
- It follows that the institutions cannot avoid the obligation to comply with the Court's interpretation of the rules of international law that apply to agreements relating to a non-self-governing territory by substituting for that interpretation different criteria derived from a letter from the UN Legal Counsel to the Security Council, which is, moreover, non-binding.' (para. 385)
 - Art. 19 (1)(2) TEU: [The CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed.
 - Special feature of the EU legal order – does the CJEU have the last say in international law interpretation for all other EU institutions?

Challenges of the pending appeal (Commission and Council)

- **Hearings at the CJEU, 23 and 24 October 2023**
 - Commission upholds the standard of benefit and questions the determinedness of Sahrawi peoplehood
 - UN Resolutions recognizing FP as their representatives are recalled to only be non-binding
 - Commission and Council use the 'berm' as a delimitation for the implementation of its preferential tariffs when trading goods originating from Western Sahara, not its internationally recognized borders
 - resubmit that the legal basis of the status and of Moroccan authority follows from Art. 73 UN Charter, suggesting the legal concept of 'de facto administering power' exists

5

(Some) conclusions

Five conclusions

Representation matters.

01

Five conclusions

A box within a box within a box.

02

Five conclusions

Bad data, bad results.

03

Five conclusions

Only yes means yes.

04

Five conclusions

The EU *is* a (post-)colonial power.

05



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