



EU-Morocco Fisheries Agreement: The unforeseen consequences of a very dangerous turn

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After six years of negotiations, the Fisheries Committee of the European Parliament voted, on Monday 15 of May, in favour of a largely criticised Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco. One week later, on Monday 22 May, the Agreement was endorsed by the Fisheries Ministers of the EU.

The vote has been preceded by months of debate in the mass-media over the legality of such Agreement and by the launch of an international campaign opposing the Agreement (*Fish Elsewhere!*, see: www.fishelsewhere.org). It has also generated divisions among the members of the EU. Sweden opposed vehemently the Agreement, while Finland, Ireland and The

Netherlands expressed their concerns and asked for a close scrutiny of the implementation of the Agreement in order to ensure that it benefits the local population of the Western Sahara territory. The legal bases upon which the Agreement is founded have also been strongly criticised by several European leading lawyers such as Spanish Law Professor and expert in the Western Sahara dispute Carlos Ruiz Miguel (see: "[Is the EU-Morocco fishing agreement an attempt by Spain to legalise Moroccan Occupation of the Western Sahara?](#)") and leading French lawyers group SHERPA (see: "[ANALYSE JURIDIQUE Fisheries Partnership Agreement](#)"), well-known for prosecuting oil company Total over forced labour abuses in Burma.

The Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco is considered as highly problematic, if not openly illegal, by several state and non-state actors, since it includes the waters of the disputed Western Sahara. The Territory of the Western Sahara, included since 1963 in the list of non self-governing territories of the United Nations according to Chapter XI of the Charter (A/5514, Annex III), remains nowadays a territory *de facto* divided and contested. In addition, since 1966, the UN clearly established that the future of the Western Sahara territory should be decided through a self-determination referendum.

In February 1976, Spain withdrawn from the Territory, after signing an accord (known as the Madrid Accord) and transferring unilaterally (that is, without the knowledge and sanction of the UN and without consulting the population of the Territory, following the procedures established by the UN for the non self-governing territories) the interim administration of the Territory to Spain, Morocco and Mauritania. Such unilateral transfer of the administration has never been recognised by the UN, and has never been mentioned in any UN's Assembly General document or Security Council resolution regarding the Western Sahara dispute. As the Under-Secretary-General for Legal Affairs, Hans Correll, has clearly stated in his Legal Opinion regarding the exploitation of natural resources in the Western Sahara addressed to the Security Council in January 2002 (S/2002/161):

The Madrid Agreement did not transfer sovereignty over the territory, nor did it confer upon any of the signatories the status of an administering Power - a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the territory to Morocco and Mauritania in 1975, did not affect the international status of Western Sahara as Non-Self-Governing Territory.

In fact, as the recent EU Legal Opinion about the EU-Morocco Fisheries Agreement, signed by EU legal advisors Ricardo Passos, Gabrielle Mazzini and Gregorio Garzon Clariana, acknowledged "Spain is still reported on the list of the *de iure* administering powers" (SJ-0085/06, D (2006)7352, 10, page 3) and "[i]n addition, despite the *de facto* control exercised over the largest part of the territory, Morocco has never formally acquired the status of administering power" (*Ibid.*, 11, p.3, emphasis added).

But, if on the one hand, this transfer of administration was never legally sanctioned, on the other, as the EU Legal Opinion suggests rightly (see previous quote), this transfer of administration has never been *de facto* effective either, since neither Mauritania (until 1979, when it renounced to its claims and abandoned the Territory after signing an agreement with the Frente Polisario and recognising the Saharawi Arab Democratic Republic) nor Morocco had effective control over the entire Ter-

ritory at any single moment during the last three decades. Since Spain left the Territory, large portions of the disputed Western Sahara have remained under the *de facto* military control of the Frente Polisario and the *de facto* civil administration of the Saharawi Arab Democratic Republic (RASD), founded in 1976 and admitted as a full member of the African Union (then OAU) in 1984. Morocco's control of the Territory, as the Legal Opinion of the EU rightly and clearly points out in point 11, has only been effective in "the largest part" of the disputed Territory, but never over the whole Territory.

This fact introduces a new and very dangerous element that the EU should have considered with extreme caution before ratifying the Agreement on Monday 22 May, since nowadays, the Territory of the Western Sahara remains divided in two separated areas, separated by a 2,600 kilometre long military wall constructed by Morocco during the 1980s, and known in the UN's terminology as "the berm" (see MINURSO Map of the Western Sahara, annex 1). The area west of the berm is under the *de facto* administration of Morocco and the area east of the berm is under the *de facto* administration of the Polisario Front / Saharawi Arab Democratic Republic.

Morocco and the Frente Polisario are recognised by the UN as the two parties of the conflict. The UN has never recognised the sovereignty of neither the Saharawi Republic nor Morocco over the entire Western Sahara Territory. However, the

UN's peacekeeping mission in the Western Sahara (MINURSO) has always recognised on the ground the *de facto* division of the Territory into two sectors and has worked since 1991 with both the Moroccan authorities and the Polisario authorities in the monitoring of the ceasefire in the areas that remain under the control and administration of each party. As a symbolic element that exemplifies such *de facto* acceptance of the division of the territory, it can be mentioned that, if on the one hand, MINURSO's peacekeeping offices in El Aaiun (west of the berm) have both the flags of the UN and Morocco, on the other hand, in Tifariti or Bir Lehlu (east of the berm) the flags hanging from MINURSO's offices are those of the UN and the Saharawi Arab Democratic Republic / Frente Polisario. If in some areas of the Territory MINURSO has to coordinate its actions with the Moroccan administration, in others it has to do the same with the Polisario /SARD authorities. Obviously, this does not imply that the sovereignty of the Morocco or Polisario /SADR over the Territory under their *de facto* control is endorsed by the UN, but simply the fact that Morocco and the Polisario / SADR are the actors *de facto* administering different parts of the disputed Territory.

The previously mentioned Legal Opinion of the EU provided the foundation for the signature of the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco based on the following elements:

- 1. The acknowledgment of Morocco as the *de facto* administering power of the Western Sahara (37.a, page 7).
- 2. The understanding, based on Hans Correll Legan Opinion, that “the exploitation activities in Non Self-Governing Territories violate the principles of international law if they disregard the interest and wishes of the people of the Non Self-Governing Territory” (40, page 8).
- 3. The assertion that “the *de facto* administration of Morocco in Western Sahara is therefore under the obligation to comply with the rights of the people of the Western Sahara” (37b, page 7).
- 4. The interpretation that this “does not mean that the agreement is, as such, contrary to the principles of international law. At this stage it cannot be prejudiced that Morocco will not comply with its obligations under international law vis-à-vis the people of Western Sahara. It depends in how the agreement will be implemented”. (42, page 8).

The first point is very problematic since it attempts to introduce in the policy practice of the EU the highly dangerous concept of “*de facto* administering power”, as opposed to both the concepts of sovereign power and *de iure* administering power. In terms of international law, those powers administering a territory *de facto*

but not *de iure* are defined as occupying powers and therefore have no rights over the occupied territories. As the UN Secretary General has recently and clearly formulated, “no member of the United Nations had recognized [the Moroccan] sovereignty” over the Western Sahara (S/2006/249), and as the EU Legal Opinion recalls “Western Sahara has the status of a non self-governing territory under article 73 of the UN Charter” (37a, page 7). As Morocco is neither sovereign nor *de iure* administering power, the only ground on which the EU can negotiate and sign an agreement with Morocco that includes the Western Sahara waters is as the actor which exercises the *de facto* control of such portion of a disputed Territory. But this European Union attitude raises many questions that should have been considered very carefully before the final endorsement of such a problematic agreement by the Council of Ministers:

- Does this practice mean that the EU will recognise all non-sovereign and non-*de iure* actors (either state actors or non-state actors) as legitimate parties with which to negotiate and sign agreements for the exploitation of natural resources in the areas that fall under the control of such non sovereign and non *de iure* but *de facto* administrative actors?

- If the EU does not intend to recognise the legitimacy of other

de facto administrators to negotiate and sign agreements for the exploitation of natural resources in areas under the *de facto* control of such state or non-state actors, then the grounds on which the case of Morocco is different should be explained in detail. Why, as neither sovereign nor *de iure* administrator of the Western Sahara, is the case of Morocco different from other possible cases in Africa or elsewhere where the parties involved are also the *de facto* administrative actors of a portion of disputed land?

- If the EU recognises that Morocco is the *de facto* administrator of the “largest” portion of the Western Sahara Territory, situated on the western part of the berm that divides the territory (approximately 2/3 of the Western Sahara), this would imply – if no further clarification is given, and by now no clarification has been provided – that the EU is also recognising either the Frente Polisario as a non-state actor (recognised by the UN as a party in the Western Sahara dispute) or the Saharawi Arab Democratic Republic as a state actor (recognised by the African Union and several states worldwide) as the *de facto* administering powers of the “smaller” portion of the Western Sahara Territory situated on the eastern part of the berm (approximately 1/3 of the Territory). Does the EU intend to recognise the Polisario / SARD as *de facto* administrator of a part of the non self-governing Terri-

tory of the Western Sahara? Does the present Partnership Agreement mean that the state or non-state actors that control the Territory to the east of the wall will be legitimised to negotiate with the EU in the future over the exploitation of the natural resources in these areas? On the other hand, if the EU does not intend to recognise the Polisario / SARD as *de facto* administering powers of a part of the Western Sahara, on what legal grounds can it justify this position at the light of the present Agreement with Morocco?

- If the only obligations under international law of a *de facto* administering power is to benefit in some way the people of the administered Territory, does it mean that, for example, any *de facto* administering power that invest part of its gains in the exploited territory (building roads, for instance) is acting according to international law? Does it mean that the exploitation of the natural resources of the areas of the Western Sahara under *de facto* control of the Polisario / SADR comply with international law as long as the benefits will be spent developing, for example, the infrastructures of that part of the Territory?

The aforementioned questions and issues should have been carefully evaluated and answered by the EU before committing itself to the ratification of an agreement that might have unforeseen consequences for the future of the Western Sahara

dispute and for the stability of the African continent, since the Fisheries Agreement with Morocco seems to legitimise the signature of agreements for the exploitation of natural resources between the EU and pow-

ers which although *de facto* administrators are not recognised by international law to have neither sovereign nor *de iure* right over the Territories they control or will control in the future.

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