

ECJ strengthens Right to Self-Determination

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The European Court of Justice (ECJ) delivered a judgement with potentially far-reaching consequences for companies' liabilities in public international law. On 27 February 2018 (*Case C-266/16 – Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*), the ECJ ruled on the validity of the Fisheries Partnership Agreement between the EU and Morocco (*the Fisheries Partnership Agreement or the Agreement*). The Court concluded that the Fisheries Partnership Agreement was not applicable to Western Sahara and its adjoining waters. Although the underlying circumstances are rather specific, the case deals with general issues of public international law. Companies engaging in commercial activities in this region or other disputed territories should, therefore, carefully examine the judgement's impact on their businesses. The case is a vivid reminder that trade and investment in disputed areas bear significant political and legal risks.

Background: Western Sahara – a Disputed Territory

Western Sahara is a territory situated in the northwest of Africa, which used to be a Spanish colony. Today, the territory is under the *de facto* control of Morocco and is often referred to as "Africa's last colony". Front Polisario, a liberation movement of the Sahrawi people, has organized resistance to Morocco since the mid-1970s. While Morocco considers Western Sahara to be an integral part of its state territory, Front Polisario aims to establish an independent state. Front Polisario have engaged in guerrilla warfare between 1975 and 1991 to further their aim. In 1976, the Front proclaimed the Sahrawi Arab Democratic Republic (*SADR*). While the war ended with an UN brokered cease-fire, the territorial conflict continues to this day. The UN has listed the region as a "Non-Self-Governing Territory".

The Fisheries Partnership Agreement

The Fisheries Partnership Agreement between the EU and Morocco is based on the Association Agreement of 1996, entered into force in 2007, and has since been twice renewed. The EU agreed to pay Morocco a financial contribution amounting to EUR 16 million per annum for access to resources and additional EUR 14 million as support for the fisheries sector in Morocco. It allows EU vessels to engage in fishing activities in accordance with the Agreement and subject to obtaining a fishing licence issued by Moroccan authorities at the request of certain EU authorities. The Agreement defines the area of application as "*the territory of Morocco and (...) the waters under Moroccan*

jurisdiction". In practice, most of the exploitation area provided for by the Agreement relates to the waters adjacent to Western Sahara.

The Western Sahara Campaign UK (*WSC*), an organisation supporting the recognition of the right of the people of Western Sahara to self-determination, initiated the main proceedings before the High Court of Justice. *WSC* argued that the Fisheries Partnership Agreement was illegal in so far as it applied to Western Sahara. The High Court stayed the proceedings and asked the ECJ to rule on the validity of the Fisheries Partnership Agreement.

ECJ: Agreement valid but not applicable to Western Sahara

In its judgement of 27 February 2018, the ECJ reaffirmed that international agreements and customary international law were an integral part of the EU legal order. Further, the ECJ examined the questions posed by the High Court of Justice and thereby reviewed the Fisheries Partnership Agreement. It concluded that it was valid. However, according to the Court, the territory of Western Sahara and the waters adjacent to it do not fall within the territorial scope of the Fisheries Partnership Agreement.

In the opinion of the Court, "territory of Morocco" only includes the "*geographical area over which Morocco exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory such as that of Western Sahara*". The Court thereby confirmed its decision of 21 December 2016 (C-104/16 – *Council v Front Polisario*) on the Association Agreement between the EU and Morocco. In the ECJ's view, a different understanding of the provisions on the territorial scope would be contrary to the principle of self-determination and thus public international law. Accordingly, the waters adjacent to the territory of Western Sahara are, as a matter of public international law, not covered by Morocco's sovereign authority and cannot legally be covered by the phrase "Moroccan fishing zone" referred to in the Agreement.

Consequence: EU Fishing Fleet can no longer fish in Waters of Western Sahara

While the Agreement between the EU and Morocco is valid, the remaining scope of its application is limited. If the territory of Western Sahara is not subject to the Agreement, vessels from the EU will no longer be able to rely on the Agreement to legally fish within the waters off its coast. As regulated in the United Nations Convention on the Law of the Sea (*UNCLOS*), this prohibition extends not only to the territorial sea but also to the 200 nautical mile exclusive economic zone (*EEZ*). The SADR government registered its claims to the territory of Western Sahara's *EEZ* with *UNCLOS* in 2009. It is therefore likely that EU Member State authorities will no longer be able to request Moroccan authorities to grant fishing licences for the waters at issue based on the Agreement. Further, even though the ECJ refrained from answering this question, it is probable that

fish and other products originating in these waters will be precluded from being imported into the EU free of customs duties. As a result, labelling products from Western Sahara as originating in Morocco might result in negative legal consequences.

The ruling has certainly strengthened the status of the right of peoples to self-determination within the EU's legal order and, in particular, the SADR's and Polisario's position. Following the ECJ's judgment, Polisario has already called on all vessels fishing in the waters adjacent of Western Sahara to withdraw immediately from their positions. Polisario has further announced to take legal action in order to recover the financial contribution the EU had paid to Morocco throughout the last decade. The group is currently intensifying its efforts to question Morocco's claim to the territory in various court and administrative proceedings across the world. It has also threatened to take legal action against companies importing goods from Western Sahara.

Impact on Trade and Investment in Disputed Territories

The case decided by the ECJ illustrates that companies should bear in mind the complex legal challenges that can arise when engaging in commercial activities in disputed territories. Disputed territories and the right to self-determination play a pivotal role in different regions across the globe and thus pose a constant challenge and threat to trade related to these areas. Moreover, the case displays that engaging in commercial activities within the legal framework of EU law by no means provides impregnable legal certainty and does not preclude conflict with an array of international legal principles. Preemptively assessing questions of European and international law can prevent frictions and uncertainty down the line.

BLOMSTEIN will continue to monitor these developments closely and will provide updates on significant developments. Please do not hesitate to contact [Roland M. Stein](#) if you have any questions on how the EJC's ruling might affect your company.