Comments on the Opinion of Advocate General Wathelet on Case C 104/16 P, *Council v. Front Polisario.*

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On September 13, 2016, Advocate General Melchior Wathelet delivered an Advisory Opinion to the Court of Justice in Brussels supporting, in part, the European Council's appeal of the judgment of the General Court in Case **T 512/12** ***Front Polisario v Council.***

In the lower court's judgment, issued on December 10, 2015, the General Court annulled an agreement between the EU and Morocco calling for the reciprocal liberalization of measures concerning agricultural products ("contested Agreement") insofar as it approved the application of the agreement to Western Sahara.

In partially annulling the contested Agreement the Court held, *inter alia,* that the Council had failed to fulfill its obligation, prior to the conclusion of that Agreement, to examine whether there was any evidence of the exploitation of the resources of that part of the territory controlled by Morocco which was liable to adversely affect its inhabitants and their fundamental rights.

The Advocate General disagreed with both the reasoning and the conclusion of the General Court on several key points and argued that the Agreement should not be annulled. (114)

His major disagreement with the General Court concerned its findings with respect to the scope of the contested Agreement. In his view the fact that Article 94 of the Agreement restricted its scope to the 'territory' of Morocco meant that did not apply to Western Sahara since the latter had not been recognized by the EU, the UN or any government as being under the sovereignty of Morocco, and hence it could not legally be considered part of the 'territory' of Morocco (68, 82). He rejected the Council's argument that the EU could apply the Agreement to Western Sahara without recognizing that it was part of the territory of Morocco or subject to its sovereignty (83), and then declared that since the

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EU did not recognize Morocco's sovereignty over the territory, in negotiating the Agreement the EU could not have intended that it be deemed applicable to it (86). To the contrary, he noted that Western Sahara is a non-self-governing territory subject to the United Nations' rules on de-colonization, and under international law it has a status distinct from Morocco even if Morocco could be considered its "Administering Power" (71-75) – a statement to which the Council agreed. He then declared that under 'state practice' the extension of the terms of a treaty by an Administering Power of a non-self-governing territory to that territory must be stated in the terms of the treaty (79), and concluded that since the parties did not expressly include such an extension in the contested Agreement, the scope of the Agreement did not extend to Western Sahara. (80)

Next, he rejected the argument that the Agreement should nevertheless be considered applicable to Western Sahara because a long-standing practice of applying the Agreement, and its predecessors, to the territory *de facto* demonstrated the parties' acceptance of a modification of its express terms. He distinguished the rules of *estoppel* (95) (which might permit a *modification* of the express terms of a treaty on the basis of party conduct) from the rules of treaty *interpretation* set forth in Article 31(3)(b) of the Vienna Convention (which provides that subsequent practice may be taken into consideration when interpreting the terms of a treaty), and considered the evidence produced in the case "insufficient" to prove such a long-standing practice within the meaning of the Convention. Moreover, he stated that for 'subsequent practice' to exist within the meaning of Article 31(3)(b) of the Convention there must be an 'indisputable concordance' between the positions of the parties such as to establish the meaning of a treaty provision, and since it had been established that the EU and Morocco had different views on the interpretation of the relevant terms of the contested Agreement , there was no such concurrence (100).

Finally, he argued that international law does not permit the extension of the scope of a bilateral agreement to a territory which constitutes a third party (in this case Western Sahara) without the approval of the people of that third party, which was absent in this case (108). Accordingly the parties did not have the right to extend the scope of the Agreement to Western Sahara.

If those arguments are deemed insufficient to warrant a reversal of the General Courts decision to annul the contested Agreement he added another: that the Polisario does not have standing to challenge the Agreement since it does not represent the Sahrawi people on economic issues but only on political issues in proceedings before the United Nations (108).

In my opinion the Advocate General makes several valid points. It is clear, for instance, that Western Sahara is NOT a part of Morocco -- something that was clearly recognized by the United States when it declared that products from Western Sahara were not included in the US-Morocco Free Trade Agreement, and which should be obvious to anyone with a knowledge of international law, but that Morocco consistently fails to acknowledge in its laws and activities. Therefore, to the extent that the contested Agreement is deemed applicable only to products emanating from territory over which Morocco's sovereignty is recognized under international law, it should be considered valid.

But that is the problem: *the contested Agreement is not and never has been applied only to products emanating from Moroccan territory*. It has always been applied equally (in fact, some would say primarily) to products emanating from Western Sahara. The Advocate General's suggestion that the evidence of this situation produced before the Court was 'insufficient' to establish a long-standing practice, even if true (and I suggest that it is *not*) is *irrelevant* for the simple fact that the existence of such a long-standing practice has been *admitted* by both the European Council (67, 87), the European Commission (65, 87), and the Polisario (87), and confirmed by the General Court.

The argument that there was no concordance between the parties such as would permit a long-standing practice to constitute an interpretation of the terms of the Agreement, is not borne out by the evidence – there is a disagreement between the parties over whether Morocco exercises sovereignty over the territory, *not* over whether products emanating from the territory have been traded pursuant to its terms over a long period of time. The Council's argument that this was merely 'tolerance' is self-serving and facetious, and should not be allowed to circumvent the legal implications of its long standing actions. Accordingly, the General Court's conclusion that the contested Agreement should be annulled is not manifestly in error.

However, regardless of whether or not the Court accepts the argument that the contested Agreement does not apply to products from Western Sahara, the fact that the EU allowed trade in such products to exist under its rubric has legal consequences that cannot be ignored. If the Advocate General's position is correct that the parties did not have the legal right to trade in products emanating from Western Sahara, it supports the Polisario contention that for a long time an unacceptable and illegal trade in such products has been conducted by the parties with the full acquiescence of the EU – a practice which to the extent it harms the interests of the people of Western Sahara is rightfully one which can and should be challenged by the people who represent them. Likewise, if the Advocate General's position is correct, it necessarily means that in the future the EU should be estopped from importing products from Western Sahara without the prior

approval of the people of the territory, and that the General Court's judgment should be amended accordingly.

There are many observations of the Advocate General with which I concur. For instance, the fact that if the EU applies the contested Agreement to products from a territory over which Morocco claims sovereignty it "necessarily and inevitably implies recognition" of such sovereignty (85), the fact that the assent of the people of Western Sahara to a trade agreement between the EU and Morocco which extends to its products may not be 'presumed' but must be given through 'prior consultation' and has not been given in this case (108), the fact that the Polisario has the legal capacity to bring an action before the Court under the Fourth paragraph of Article 263 TFEU (143), and the fact that before concluding a trade agreement that applies to products emanating from Western Sahara the Council would be under an affirmative duty to examine the extent to which the agreement would negatively affect the 'human rights' of the people of the territory, and the exploitation of the territory's natural resources. (232)

However, although I agree with the Opinion of the Advocate General in these and many of his other comments, I believe that his first alternative basis for rejecting the General Court's ruling is unfounded.

He claims that the Polisario does not have standing to represent the people of Western Sahara, the Sahrawis, on *commercial issues,* such as the use of the natural resources of the territory, but only on *political issues* within the context of the United Nations negotiating process. But the legal or policy basis for such a distinction is unclear. The Advocate General admits that the Polisario has been considered by the United Nations the representative of the Sahrawi people in a process designed to achieve the self-determination of the people of Western Sahara and its future.(138) He admits that by its action to annul the contested Agreement the Polisario 'is seeking, as the representative of the people of Western Sahara recognized by the UN, to protect the rights which that people enjoy under international law, namely its right to self-determination and to its permanent sovereignty over the natural resources of Western Sahara.' (139) However, he maintains that the fact that the UN has designated the Polisario the representative of the people of Western Sahara for purposes of political proceedings instituted by it does not necessarily mean that the Polisario should be deemed the representative of the people of the territory with respect to *all* issues and in *all* fora, and he suggests that there may be other actors – such as the government of Spain – who may be entitled to represent the people of the territory in such matters.

It is difficult to understand why the Advocate General suggests that the government which has benefitted the most from the exploitation of the fisheries and other natural

resources of Western Sahara, which abandoned its responsibilities as Administering Power over the territory over 40 years ago, and which has joined the Council in demanding that the judgment of the General Court be vacated, should be deemed qualified to represent the interests of the people of the territory on commercial issues, rather than a liberation movement that according to his own analysis has been considered the legitimate representative of the people of the territory before the African Union, at the United Nations, and in negotiations with Morocco, Mauritania and other countries and organizations in a variety of contexts for over 30 years! (146)

The Advocate General's argument presupposes that Spain has remained the Administering Power of Western Sahara, a fact that would support the Polisario's claim that Morocco must be deemed an occupying power with no right to utilize the resources of the territory. However, even assuming that is the case, representing the people of Western Sahara on commercial matters – particularly with respect to fisheries and agricultural products -- would constitute a clear conflict of interest, if Spain ever showed an interest in assuming such a responsibility – which it has not.

And the above argument begs the question: if the PLO is deemed qualified to represent the Palestinians on economic issues before EU institutions, why should the Polisario be denied the opportunity to represent the Sahrawis? There is no reason in logic or in law.

Indeed, the Advocate General supplies no authority or valid policy reason for excluding the Polisario from such representation. There is no mention in any United Nations document that the recognition of the Polisario as the legitimate representative of the Sahrawi population of Western Sahara is for a limited purpose. Moreover, it has been acknowledged by the United Nations that to the extent the Polisario are competent to represent the Sahrawis in their fight for self-determination, a component of this right is control over the territory's natural resources.

Indeed, subsumed in the principle of self-determination is the right of the peoples of non-self governing territories to dispose of its resources in their best interest. It has been noted as a matter of international law, that must be recognized by the European Union, that the "peoples" of non-self governing territories and occupied lands enjoy permanent sovereignty over their natural resources.[2]The resource dimension of the right to self-

[2] 'Declaration of Permanent Sovereignty over Natural Resources,' GA Res.1803 (XVI), 14 December 1962; Article 1(2) of the International Covenant on Civil and Political Rights (1976) and Article 1(2) of the International Covenant on Economic, Social and Cultural Rights (1976), United Nations Council for Namibia, 'Decree No. 1 for the Protection of Natural Resources of Namibia,' adopted in GA Res. 3295, 13 December 1974, and GA Res. 57/132, 25 February 2003. For a discussion of this right, see Catriona Drew, *The East Timor Story: International Law on Trial,* 12 European Journal of International Law, 2001, at 651-684, and Stephanie Koury, *The European Community and Member States' Duty of Non-Recognition under*

determination was recently confirmed by the International Law Commission.[3] It was further affirmed by the General Assembly in its resolution A/RES/61/123, of December 14, 2006 in which *inter alia*, it stated that it:

> "1. *Reaffirms* the right of peoples of Non-Self-Governing Territories to self determination . . . as well as their right to the enjoyment of their natural resources and their right to dispose of those resources in their best interest;"

Yes, it may be true that the fact that the UN has designated the Polisario the representative of the people of Western Sahara for purposes of the political proceedings instituted by it does not *ipso facto* mean that they must be deemed the representative of the people of the territory with respect to proceedings before EU institutions dealing with economic issues. But there are valid reasons for considering them so qualified.

First, there is no other group that is capable of representing the people of Western Sahara on such issues. There is evidence that Morocco has stifled dissent within the territory to such an extent that no other Sahrawi group or organization exists to represent the people. Accepting the Advocate General's argument would be tantamount to leaving the Sahrawis with *no* adequate representation on commercial issues before EU institutions, essentially permitting the EU and Morocco a free rein to do whatever they please.

Second, the Sahrawis themselves have indicated their willingness to have the Polisario represent them. In a report of a mission sent by the United Nations in 1975 to assess the wishes of the Sahrawi people in the territory – the last time the wishes of the people have been able to be ascertained -- its authors concluded that: "there was an overwhelming consensus among Saharans within the Territory in favour of independence and opposing integration with any neighboring country,"[4] and that the "overwhelming majority" of the population supported the Polisario.[5] On November 28, 1975, after fighting began between Morocco and the Polisario in the territory, the vast majority of the native representatives from the advisory council of sheikhs instituted by Spain in the territory (the Jemma) as well as a majority of the other Sahrawi tribal leaders, signed a declaration at Guelta Zemmour, in Western Sahara naming the Polisario "the sole legitimate authority of the Saharan people." Since the Sahrawi refugee camp was established in Tindouf, Algeria, in 1975 the Polisario, through the government in exile they established, has governed the thousands of Sahrawi refugees who fled the territory – some say the

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the EC-Morocco Association Agreement: State Responsibility and Customary International Law, INTERNATIONAL LAW AND THE QUESTION OF WESTERN SAHARA, (IPJET, (2007) at 170-172.

[3] *See* General Assembly Official Record, Fifty Sixth Session, Supplement No. 10, UN Doc A/56/10 at 336 (2001).

[4] Report of the Special Committee, October 15, 1975, at 48.

[5] *Id*, at 67.

majority of the territory's initial inhabitants – and through democratically elected officials represents their voices on the international stage for all purposes.

There is currently no organization or political group other than the Polisario that has been chosen to represent the Sahrawis by the Sahrawis themselves in a legitimate election, or which has been recognized as representing the Sahrawis by the international community. As was noted by one legal scholar, "In matters relating to natural resources, it is . . . the only all encompassing body for the Saharawis, namely Polisario, which must be consulted."[6]

In 1999 the United Nations published a preliminary list of Sahrawis eligible to vote in a referendum on self determination – which would have resolved the question of the use of the natural resources of the territory – but such a referendum has been blocked by Morocco, which prefers to use the natural resources of the territory without restraint. Accordingly, giving the people of the territory a voice on these issues through the UN process is currently impossible. If the EU prohibits the Polisario from contesting Morocco's use of these resources in its courts it will only encourage Morocco's intransigence and thus, pose a significant obstacle to the achievement of self-determination of the people of the territory through the UN process.

For the above reasons I urge the Court to reject the argument of the Advocate General that the Polisario should be denied the standing to represent the people of Western Sahara on economic issues before EU institutions.

Moreover, I urge the Court to either (1) reject the appeal of the European Council in its entirety and uphold the judgment of the General Court annulling the contested Agreement, or (2) uphold the appeal on the basis of the Advocate General's argument that the contested Agreement does not extend to products emanating from Western Sahara, and (3) issue an order (or direct the General Court to issue an order) estopping the EU from accepting agricultural and fishery imports from Western Sahara in the future without fulfilling the requirements under international law for such importation.

In either case it appears clear from both the Opinion of the Advocate General and the findings of the General Court that the EU has been engaged for a number of years in the importation of products from Western Sahara contrary to principles of international law,

[6] Hans Morten Haugen, "The Right to Self-Determination and Natural Resources: the Case of Western Sahara" LEAD (2007) accessed at www.lead-journal.org/content/07070pdf on February 26, 2014, at 76.

and the people of the territory should be entitled to claim damages in the form of restitution for the value of such imports.

No matter what the Court decides it should reiterate clearly and in unequivocal terms what the Advocate General has proclaimed in his Opinion: that Western Sahara is NOT part of the territory of Morocco and that Morocco does NOT exercise sovereignty over the territory.

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