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Editors: Sławomir Dębski • Bartosz Wiśniewski • Rafał Tarnogórski

Karolina Borońska-Hryniewiecka • Anna Maria Dyner • Aleksandra Gawlikowska-Fyk
Sebastian Płóciennik • Patrycja Sasnal • Justyna Szczudlik • Marcin Terlikowski • Tomasz Żornaczuk

Court of Justice Ruling on Western Sahara Reveals EU's Mixed Signals

Szymon Zaręba

A Court of Justice judgment appears to have not resolved a dispute over the application of EU trade agreements with Morocco to occupied territory in Western Sahara. It confirmed, however, that the EU has not developed trade policy in relation to occupied and separatist areas that would be in line with international law. The absence of such policy negatively affects EU diplomacy and the coherence of its foreign policy, particularly in the field of sanctions. Poland could propose a review of the application of EU trade agreements to contested areas.

Western Sahara. The dispute over the status of Western Sahara has been ongoing since the mid-1970s. After Spain left the territory in 1975, neighbouring Morocco and Mauritania took over. This was met with opposition from the local population. In 1976, the People's Liberation Front of Sakija al-Hamra and Río de Oro (Polisario), declared Western Sahara independent and launched an armed struggle. In 1979, Mauritania withdrew from the conflict, but Morocco held strong, leaving Polisario to control about 15% of the disputed area. The UN's attempts to resolve the dispute peacefully, including a plan to hold a referendum in 1992, have ended in failure.

A 1975 advisory opinion of the International Court of Justice and UN General Assembly resolutions treat Western Sahara as an illegally occupied territory whose inhabitants have the right to self-determination. At the same time, according to Resolution 34/37 (1979), the Polisario is recognised by the United Nations as "a representative of the people of Western Sahara," authorised to represent the interests of its inhabitants at the international level. This status is recognised by 46 countries, mainly from Africa, as well as the African Union.

Judgment. In a case between the Council of the EU and the Polisario, the Court of Justice of the EU (CJEU) issued its decision in December 2016. In its arguments, Polisario demanded annulment of a 2012 Council decision approving an EU-Morocco agreement on the liberalisation of trade in agricultural and fishery products. It further argued that the Union's acquiescence to the import of these goods under the terms of the agreement with Morocco and at duty rates provided under it meant that the EU was treating Western Sahara as part of the territory of Morocco. It also submitted that this practice violated the right of the Sahrawi people who live there to control the natural resources located in the area and that belong to them.

CJEU ruled there were no grounds for annulment of the Council's decision. It stated that from a legal standpoint, the EU-Morocco agreement did not cover Western Sahara, since the territory is not part of Morocco under international law. The *de facto* application of this agreement by the EU to products originating in Western Sahara was not tantamount to recognition of Moroccan rights over the area. The court also found it did not violate the right to self-determination of its people.

The latter conclusion, however, may not suffice. The EU applied the agreement with Morocco to Sahrawi goods despite repeated protests by Polisario, and therefore against the will of the official representative of

the people of Western Sahara. Because of that, the Union's practice disregards the right to self-determination of this people as exercised through its representatives.

Reactions and Similar Cases. Interpretation of the court judgment by EU members is varied. Some, like the Scandinavian countries and Spain, attach greater importance to the first conclusion and have ceased to apply the duty rates set out in the agreement with Morocco to goods exported from Western Sahara and have started to discourage their companies and citizens from trading with entities located in the region. Others, like France, focus on the two other conclusions and have not changed their conduct. This second position is shared by the European Commission (the EC). Some five months after the judgment, the list of Moroccan exporters authorised to trade goods with the EU under the agreement still includes nearly 150 companies located in the area in question. Despite several interpellations from Members of the European Parliament, the EC has refused to suspend sanitary inspections—required for exporting goods to the EU—scheduled to be carried out in the territory. The Commission's actions in this area appear to partially legitimise the occupation of Western Sahara.

The view that treaties with Morocco do not apply to Western Sahara has been expressed for at least the last several years by the United States and countries of the European Free Trade Association (EFTA), including Switzerland and Norway. Unlike the EU, however, they have taken steps to ensure respect for the right to self-determination of the people of the region. Consequently, they refuse to allow the import of Sahrawi goods or have established separate, higher duties on them than those contained in trade agreements with Morocco. This has allowed them to express their opposition to control of the region's economy by incoming Moroccan settlers. According to media reports, there even have been cases in which products originating in Western Sahara have been treated as if from Morocco. However, these cases are not widespread and the parties to the agreement generally receive public criticism.

The Western Sahara case was at least the third in the last dozen years in which the CJEU examined the behaviour of EU bodies regarding trade in goods from illegally occupied territories. In 2003, in the *Anastasiou* case regarding Turkish-controlled Northern Cyprus, and in 2010, in the *Brita* case, pertaining to Palestinian territories occupied by Israel.[1] In both cases, the court ruled against the export of products from occupied territories when accompanied by sanitary or export certificates provided by the occupiers, as well as the *de facto* application to such goods in agreements. However, these cases were decided in response to requests for preliminary rulings from national courts and not an entity originating outside of the EU, such as the Polisario, so the court had a wider basis to assess their legality. Nevertheless, the EU has yet to draw up conclusions from the decisions and has not developed a coherent policy for similar cases.

Conclusions and Recommendations. The EU's disregard of violations of international law by its trading partners as well as its own actions, which are inconsistent with the body of law in this area, undermine the credibility of EU diplomacy and diminish its effectiveness. On one hand, the EU is the largest donor of humanitarian aid to Sahrawi refugees; on the other hand, by accepting trade in goods from Western Sahara despite the Polisario protests, it contributes to the consolidation of the occupation of this area, which results in refugees. In fact, then, it reduces the effectiveness of its own efforts to mitigate the effects of territorial disputes in its, broadly understood, neighbourhood.

These examples of seeming EU tolerance of abuse and its inconsistency suggest the need for a comprehensive review of the application of Union trade agreements to goods that should not be covered. Apart from the treaties with Turkey, Israel or Morocco, it also should take into account ones that have not yet been subject to CJEU scrutiny, specifically the agreements with Armenia, which assists the illegal authorities of Nagorno-Karabakh, and with Russia, which illegally occupies Crimea and supports the so-called separatist authorities in Transnistria, Abkhazia, South Ossetia and Donbas. Publicly available information reveals indications that goods from Donbas can be imported and sold in the EU as Armenian or Russian. Importing products originating in Crimea in that manner would violate sanctions imposed by the EU relating to Russia's annexation of the territory. It would also harm Poland's interest in ensuring that aggressor countries do not benefit from changes made by force. It would be worthwhile for Poland to consider raising this issue at the EU level to increase the effectiveness of sanctions related to the conflict between Ukraine and Russia.

For Poland, a candidate for a non-permanent seat on the UN Security Council, it is also important to note the growing interest of the UN in Western Sahara, such as the nomination of former German President Horst Köhler as special envoy to Western Sahara in mid-April by Secretary-General António Guterres. It is also evidenced by the resolution adopted by the UNSC on 28 April, which called upon the parties to the dispute to resume negotiations with a view to ending the conflict and requested regular reports on their progress.

[1] See: R. Kownacki, "Court of Justice Ruling in Brita Case: Implications for EU-Israeli Relations," *PISM Bulletin*, no. 41 (117), 11 March 2010.