



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-266/16
Western Sahara Campaign v Secretary of State for Environment, Food and
Rural Affairs and Commissioners for Her Majesty's Revenue and Customs

According to Advocate General Wathelet, the Fisheries Agreement concluded between the EU and Morocco is invalid because it applies to the Western Sahara and its adjacent waters

By concluding that agreement, the EU was in breach of its obligation to respect the right of the people of Western Sahara to self-determination and not to recognise an illegal situation resulting from breach of that right and has not put in place the safeguards necessary to ensure that the exploitation of the natural resources of Western Sahara is for the benefit of the people of that territory

Western Sahara is a territory in North-West Africa, bordered by Morocco to the north, Algeria to the north-east, Mauritania to the east and south and the Atlantic to the west. Currently, the greater part of Western Sahara is occupied by Morocco, which considers it to be an integral part of its territory. A smaller part of that territory, in the east, is controlled by the Front Polisario, a movement which seeks to achieve the independence of Western Sahara.

The EU and Morocco concluded in 1996 an association agreement, in 2006 a partnership agreement in the fisheries sector ('the Fisheries Agreement')¹ and in 2012 a liberalisation agreement with respect to agricultural products, processed agricultural products and fish and fishery products. By judgment of 21 December 2016,² the Court of Justice, before which an appeal had been brought against the judgment on an action brought by the Front Polisario against the Council of the European Union, held that the association agreement and the partnership agreement concluded between the EU and Morocco were not applicable to the Western Sahara. That case did not, however concern the Fisheries Agreement, and consequently the Court gave no ruling on the validity of that agreement in its judgment.³

In the UK, the Western Sahara Campaign (WSC) is an independent voluntary organisation whose aim is to support the recognition of the right of the people of Western Sahara to self-determination. WSC claims, before the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) that the Fisheries Agreement concluded by the EU and Morocco and the acts approving and implementing that agreement⁴ are invalid in so far as that agreement and those acts apply to the territory and waters of Western Sahara.

WSC consequently considers that the UK authorities are acting unlawfully in implementing that agreement and, in particular, granting preferential tariff treatment to products originating in Western Sahara that are certified as products originating in the Kingdom of Morocco. Further, WSC

¹ OJ 2006 L 141, p. 4. The conclusion of that agreement was approved by Council Regulation (EC) No 764/2006 of 22 May 2006 (JO 2006, L 141, p. 1). The Fisheries Agreement was supplemented by a 'protocol setting out the fishing opportunities and the financial contribution provided for in the Fisheries Partnership Agreement' (OJ 2013 L 328, p. 2). The conclusion of that protocol was approved by Council Decision 2013/785/EU of 16 December 2013 (OJ 2013 L 349, p. 1).

² Case: [C-104/16 P](#) Council v Front Polisario, see Press Release No. [146/16](#).

³ The Front Polisario is however challenging the Fisheries Agreement protocol before the General Court Case [T-180/14](#). The General Court has stayed proceedings in that case until the Court has given judgment in the WSC case on which the Opinion is delivered today.

⁴ In addition to the acts referred to in footnote 1, the action brought by WSC also concerns the validity of Council Regulation (EU) No 1270/2013 of 15 November 2013 on the allocation of fishing opportunities under the 2013 Protocol (OJ 2013 L 328, p. 40).

disputes the fact that the UK authorities have the ability to issue licences to fish in the waters adjacent to Western Sahara (since the agreement provides that EU fishing boats may, under certain conditions, fish within the fishing grounds of Morocco).

The High Court of Justice seeks to ascertain from the Court of Justice, first, whether an association such as the Western Sahara Campaign is entitled to challenge the validity of EU acts for a failure to comply with international law and, second, whether the Fisheries Agreement is valid under EU law. This is the first time that a request has been made under the preliminary ruling procedure for a review of validity with respect to international agreements concluded by the Union and their implementing acts.

In his Opinion today, Advocate General Melchior Wathelet proposes that the Court should answer **that it has jurisdiction to assess the legality of international agreements concluded by the EU, that an association such as WSC is entitled to challenge the legality of the Fisheries Agreement and that the Fisheries Agreement is invalid because it applies to the territory and waters of Western Sahara.**

As regards whether it is open to natural and legal persons to rely on the rules of international law within the framework of judicial review of an international agreement concluded by the EU, the Advocate General considers that it must be possible to rely in legal proceedings on the rules of international law which are binding on the EU, where their content is unconditional and sufficiently precise and where their nature and broad logic do not preclude judicial review of the contested act.

The Advocate General considers that those conditions are satisfied with respect to the three norms of international law relied on by WSC: (1) **the right to self-determination**, (2) **the principle of permanent sovereignty over natural resources in so far as it requires the exploitation of those resources to be for the benefit of the people of Western Sahara** and (3) **the rules of international humanitarian law applicable to the conclusion of international agreements concerning the exploitation of the natural resources of occupied territory**. The Advocate General concludes that **those norms can be relied on within the framework of judicial review of an international agreement concluded by the EU.**

The Advocate General then examines whether the Fisheries Agreement and the acts approving and implementing it are compatible with those three norms.

First, the Advocate General states that the people of Western Sahara have thus far been deprived of the opportunity even to exercise the right to self-determination on the conditions set out by the United Nations General Assembly. Western Sahara was integrated into the Kingdom of Morocco by annexation without the people of that territory having freely expressed its will on the matter. Since the Fisheries Agreement was concluded by Morocco on the basis of the unilateral integration of Western Sahara into its territory and Morocco's assertion of sovereignty over that territory, the people of Western Sahara have not freely disposed of its natural resources, as is however required by the right to self-determination. Accordingly, **the fisheries exploitation by the EU of the waters adjacent to Western Sahara established and implemented by the contested acts does not respect the right of the people of Western Sahara to self-determination.**

Since the assertion of Moroccan sovereignty over Western Sahara is the result of a breach of the right of the people of Western Sahara to self-determination, the Advocate General concludes that **the EU has failed to fulfil its obligation not to recognise the illegal situation resulting from the breach, by Morocco, of the right of the people of Western Sahara to self-determination and also not to render aid or assistance in maintaining that situation.** For that reason, in so far as they apply to the territory of Western Sahara and to the waters adjacent thereto, the Fisheries Agreement and the acts approving and implementing that agreement are incompatible with the provisions of the Treaties that require of the European Union that its external action should protect human rights and strictly respect international law.

The Advocate General considers also that Morocco's status as de facto administering power or occupying power in Western Sahara cannot justify the conclusion of the Fisheries Agreement.

First, the concept of 'de facto administering power' does not exist in international law. Second, Morocco is the occupying power in Western Sahara, but the manner in which the Fisheries Agreement was concluded does not comply with the rules of international humanitarian law applicable to the conclusion, by an occupying power, of international agreements applicable on the occupied territory.

Second, the Advocate General finds that most of the exploitation provided for by the Fisheries Agreement relates almost exclusively to the waters adjacent to Western Sahara (catches made in those waters representing around 91.5% of the total catches made in the context of the fisheries exploitation established by the Fisheries Agreement). It follows that the financial contribution paid to the Kingdom of Morocco pursuant to the Fisheries Agreement should almost exclusively benefit the people of Western Sahara. In the view of the Advocate General, the Fisheries Agreement does not contain the legal safeguards necessary for the fisheries exploitation to be for the benefit of the people of Western Sahara. In that sense, **the Fisheries Agreement and the other contested acts do not comply with the principle of permanent sovereignty over natural resources, or the rules of international humanitarian law applicable to the conclusion of international agreements concerning the exploitation of the natural resources of occupied territory, or, last, the EU's obligation not to recognise an illegal situation resulting from a breach of that principle and those rules, and not to render aid or assistance in maintaining that situation.**

For all those reasons, the **Advocate General concludes that the Fisheries Agreement is invalid.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of an EU act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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