

## THE ALTERNATIVE FACTS OF THE EUROPEAN COMMISSION WITH REGARD TO THE PROPOSED TRADE ARRANGEMENT FOR WESTERN SAHARA

1. The Court of Justice of the European Union (CJEU) has ruled that the consent of the people of Western Sahara is required for any EU trade or association agreement with Morocco to lawfully apply to the territory of Western Sahara.<sup>1</sup> The European Commission has made no effort to comply with that requirement.
2. The Commission's Staff Working Document (SWD) does not address the issue of consent, and instead purely "focuses on the benefits for the population of Western Sahara" (page 7). The aspect of benefits is found irrelevant by the Court.<sup>2</sup> The necessary prerequisite according to the CJEU lies in the aspect of consent, which the Commission has not sought.
3. A discussion of the trade scheme's potential benefits, which the Commission has put at the heart of its efforts to justify its proposal, cannot predate a decision by the people of Western Sahara as to whether they want a trade agreement in the first place.
4. The SWD does not explain what legal right the EU and Morocco have to engage in a consultation on benefits with regard to a territory that does not fall under the sovereignty of either Morocco or the EU, without first having sought the consent of the people of Western Sahara to being affected by the trade agreement.
5. The consultation exercise (which is pointless in view of Article 106 of the CJEU judgment) began *after* the agreement was initialed with Morocco on 31 January 2018. No contact whatsoever had been made with the people of Western Sahara at the time the agreement was initialed.
6. The Commission stated in front of the CJEU that it does not challenge the capacity as representative of the people of Western Sahara of the Front Polisario, as recognized by the UN General Assembly.<sup>3</sup> However, the Commission claims in the SWD that it has no way of directly consulting the people of Western Sahara.<sup>4</sup> The Commission had simply to contact the Front Polisario with a view to fulfilling the requirement set out by the Court. When the Government of Sweden refused to support the Commission's proposal on 11 July 2018, it was due to the fact that Polisario had objected to the agreement, referring to Polisario as the UN recognized representative of Western Sahara.<sup>5</sup>

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<sup>1</sup> Judgment of the Court (Grand Chamber), 21 December 2016, case C-104/16 P, Council of the European Union v. Front Polisario, §106. "...**the people of Western Sahara must be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties, as stated in substance by the Advocate General in point 105 of his Opinion. As such, that third party may be affected by the implementation of the Association Agreement in the event that the territory of Western Sahara comes within the scope of that agreement, without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party. In the present case, however, the judgment under appeal does not show that the people of Western Sahara have expressed any such consent.**"

<sup>2</sup> Ibid.

<sup>3</sup> Judgment of the General Court, 10 December 2015, case T-512/12, Front Polisario v. Council of the European Union, §44.

<sup>4</sup> Commission Staff Working Document, SWD(2018) 346 final, Report on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara, p. 10

<sup>5</sup> <http://data.consilium.europa.eu/doc/document/ST-11441-2018-INIT/en/pdf>

7. Not only has the Commission diverted attention away from the notion of *consent to the trade agreement* in favour of *consultation with regard to benefits*, it has also replaced the concept of the *people* of the territory with the concept of *population*. The Court never suggested that the 'population' of Western Sahara (which is of an entirely different composition than the 'people') is relevant to the matter. The CJEU makes no reference, at any point, in any of the judgments, to the population of the territory. Terminology such as “the people concerned” or “the people affected”, in which are in the particular case of Western Sahara synonymous with the population, should not obfuscate the fact that is the people of Western Sahara that needs to consent.
8. Of the 112 ‘stakeholders’ mentioned in the Annex to the SWD, only 18 took part in the consultations. 94 of the mentioned groups were never invited or refused to take part. All 18 that did take part are either officials of the Moroccan government, or supporters of the Moroccan position. Not a single group that is critical to the Moroccan/EU presence in the occupied territory has taken part in the consultation. Statements in the SWD that a broad range of stakeholders from different sides to the conflict was included, is factually incorrect, and can be documented (see more about the fraudulent approach in the attached document).
9. By the Commission’s own admission, it cannot provide any figures to back up the claim that the agreement is beneficial to Western Sahara as “available data is often fragmentary” or “patchy and disparate”. The Commission acknowledges that it is “generally impossible to distinguish Moroccan imports from Western Saharan imports”. “There is no independent UN-commissioned analysis of the benefits of international trade agreements for Western Sahara. Moreover, the EU has no competence for or direct means of investigating the territory of Western Sahara”, the Commission admits.<sup>6</sup> The only figures cited in the benefit report, are provided by Moroccan ministries or government bodies. There are no figures on the trade flows to and from Western Sahara. The Commission also admits that it cannot distinguish between the Saharawi and Moroccan populations in terms of employment benefits, yet recognizes that the share of Saharawi employees in the affected sectors is minimal. Not a word is mentioned on the overwhelming Moroccan ownership structure of the sectors that stand to benefit from the agreement.
10. Lastly, the Commission demonstrates its blatant disregard for the sustainability impact of its agreement, by admitting that it does not possess independent, reliable data with regards to the available water reserves. Instead, it concedes that there may be serious risks of depletion, yet it fails to justify why it proposes an agreement that will lead to further resource-intensive, export-oriented production in an extremely dry area.

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<sup>6</sup> Commission Staff Working Document, *ibid*, pp. 1, 8 and 9.

## The fraudulent Annex A: who were really “consulted”?

Bearing in mind that the CJEU has stated that it is irrelevant whether the trade arrangement is beneficial to Western Sahara, and that a consultation process would not qualify for fulfilling the necessary requirement of consent - *who has been consulted in the process that took place after the agreement was initiated with the Moroccan government on 31 January 2018?*

There are 112 “stakeholders” enlisted in the SWD. Of those, 94 have rejected taking part in the consultation, have never been invited, or have taken the EU to court for such practice.

*“Following the involvement of the territory's elected representatives, the consultation of public opinion carried out by the European Commission and the EEAS shows that a large majority is in favour of amending the EU-Morocco Association Agreement to extend tariff preferences to products from Western Sahara. Most of those interviewed said this would help everyone, stressing the key role such preferences would play in spurring private investment...”*

*European Commission, Staff Working Document, p.33*

**So which are the remaining 18 stakeholders that the Commission claims have given a “large majority” in favour?**

\* 2 of the 18 are Members of the Moroccan Parliament. WSRW has asked the Commission in this regard whether the EU recognizes Morocco’s parliamentary elections organized in Western Sahara, but has not received an answer.

\* 1 of the 18 is the Moroccan state owned phosphate company OCP, which has been excluded from government pension funds in the EU for violation of international law in Western Sahara.<sup>7</sup> The Council on Ethics of the Norwegian Government Pension Fund has labelled OCP's activities as "grossly unethical", as their activities "do not respect the wishes and interests of the local population".<sup>8</sup>

\* 2 of the 18 are regional councils that the Kingdom of Morocco has set up in Western Sahara – yet the Commission stated in court that it does not recognize Morocco’s sovereignty in Western Sahara. There is no explanation in the Commission’s SWD as to whether it recognizes Morocco’s administrative partitioning of Western Sahara into Moroccan administrative units.

\* 6 of the 18 are agricultural cooperatives. It should be noted that there are 12 plantations in Western Sahara. All are owned by French or Moroccan interests, none are owned by Saharawis.

\* 2 of the 18 is the “Chamber of Maritime Fisheries” and the “National Fisheries Research Institute”. It could be specified that these are both “Moroccan”, and operate in Western Sahara without permission.

### Annex

#### List of stakeholders consulted on the amendment to Protocols 1 and 4 of the Association Agreement

##### 1. Political actors

Presidents of two Regional Councils:

- President of the Regional Council of Dakhla-Oued ed Dahab: Mr Yanja El Khattat
- President of the Regional Council of Laäyoune-Sakia el Hamra: Mr Sidi Hamdi Ould Errachid

MPs from Western Sahara:

- Justice and Development Party (PJD): Mr Brahim Daaf
- Authenticity and Modernity Party (PAM): Mr Moulay Zoubair Habbadi

Representative of the Polisario Front:

- Mr Mohamed Sidati

##### 2. Economic operators

###### 2.1. Agriculture

- Sahrawi Development and Investment Association
- Chamber of Agriculture of the region of Dakhla-Oued ed Dahab
- EIG Agida Dakhla
- Alban Dakhla Cooperative
- Halib Sakia El Hamra Cooperative
- Al Joud Cooperative

###### 2.2. Fisheries

- National Fisheries Research Institute
- Chamber of Maritime Fisheries

###### 2.3. Miscellaneous economic actors

- OCP Group (and Phosboucraa Foundation)
- Agency for the Development of the Southern Provinces (Agence du Sud)

##### 3. Human rights associations

- National Human Rights Council
- Sahara Observatory for Peace, Democracy and Human Rights
- Independent Human Rights Commission
- Moroccan Human Rights Association
- Sahrawi Association of Victims of Serious Human Rights Violations
- Al Ghad Human Rights Association
- Western Sahara Campaign
- Western Sahara Resource Watch
- Independent Diplomat
- Delegation of 85 associations jointly signing a letter to the European Commission and the EEAS on 3 February 2018 on amending the Protocols

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***The “Annex”: The Commission lies about who were consulted. Only 18 stakeholders on this list – not 112 as mentioned – were consulted. All were Moroccan or pro-Moroccan.***

***No groups critical to the EU-Moroccan trade in Western Sahara, or defenders of self-determination, have been consulted. Among the dishonestly included organizations is our own, Western Sahara Resource Watch.***

<sup>7</sup> In addition to private investment firms in Denmark, Netherlands, France and Sweden, public pension funds in Luxembourg, Denmark, Netherlands and Sweden have blacklisted firms importing phosphate from Western Sahara, and/or the company responsible for the export of the conflict mineral: OCP. More info on [www.wsrw.org](http://www.wsrw.org).

<sup>8</sup> Norwegian Government Pension Fund Global, Council on Ethics, 2014, [http://nettsteder.regjeringen.no/etikkradet3/files/2017/02/Recommendation\\_Innophos\\_Sept-2014\\_ENGLISH.pdf](http://nettsteder.regjeringen.no/etikkradet3/files/2017/02/Recommendation_Innophos_Sept-2014_ENGLISH.pdf)

\* 1 of the 18 is the “Agence du Sud” of the Moroccan government, a public body set up by royal decree with the strategic purpose of promoting the economic development of Western Sahara under Moroccan patronage, i.e. cementing the occupation.

\* 1 of the 18 is the “National Human Rights Council”. It should be underlined that it is a body established through a decree of the Moroccan government. It is widely seen by Saharawis as not addressing the situation in Western Sahara, nor the right of self-determination. No effort has been made to meet Western Sahara’s own human rights council, the Saharawi Human Rights Commission, exiled in the Saharawi refugee camps.

\* 2 of the 18 are small, Moroccan puppet organisations often appearing in media agitating for the Moroccan approach to the conflict: *L’Observatoire du Sahara pour la paix, la démocratie et les droits de l’Homme* and *La Commission Indépendante pour les droits de l’homme*.

\* 1 of the 18 is the credible and well-respected Moroccan human rights NGO *Association Marocaine de Droits de l’Homme*, which speaks out against violations both in Morocco and in Western Sahara, but naturally does not speak on behalf of the people of Western Sahara.

*“With no other way of directly consulting people in Western Sahara, the Commission and the EEAS consulted a broad range of Sahrawi civil society organisations, MPs, economic operators and other organisations, including the Polisario Front. Most of those organisations and associations, including the Polisario Front, shared their views with us; a few declined to do so. The main aim of the consultation was to exchange views and comments on the potential benefits for the people and the economy of Western Sahara of extending the preferential treatment granted to Moroccan products to products imported from Western Sahara to the EU.”*

*European Commission, Staff Working Document, p.11*

**The following 94 “stakeholders”, however, are also enlisted as “consulted” – but they have never taken part in any consultation, and most never even received any invitation:**

\* 1 of the 94 is Polisario Front. The email correspondence between Polisario Front and the EEAS demonstrates that the meeting took place at the request of Polisario Front to commence trade negotiations with the EU. Nothing in the EEAS’ responses indicates that they were in the process of conducting consultations.<sup>9</sup>

\* 2 of the 94 are EU based advocacy groups that rejected taking part in the consultation process, as it does not respond to the requirement of consent as set by the CJEU. These two are Western Sahara Resource Watch and Western Sahara Campaign UK. We have never taken part in any meeting with the EEAS. This can be documented.

\* 1 of the 94 is Independent Diplomat, a group that advises Polisario Front. It rejected to meet the EEAS.

\* 2 of the 94 organizations are Saharawi groups that advocate for self-determination: ASVDH and Al Ghad. The EEAS stated to Parliament that only human rights groups registered by the Moroccan authorities were invited to take part<sup>10</sup>, which immediately rules out practically all Saharawi groups in Western Sahara - bar the two who received some form of registration in 2015 after Morocco had received severe criticism for not registering Saharawi groups in the UN Human Rights Council. Note that both ASVDH and Al Ghad have issued statements that they would not participate in a consultation process that undermines their right to self-determination. Note also that the members of Al Ghad that had been invited by the EEAS, are currently applying for asylum in Belgium out of fear for their safety, while credible reports keep emerging about their families being harassed by Moroccan police.<sup>11</sup> Critically, the Saharawis living in the refugee camps - having

<sup>9</sup> The entire email correspondence between the EEAS and Polisario has been published here: [wsrw.org](https://www.wsrw.org), “Commission misleads EU states on Polisario talks, documentation shows”, 14 June 2018, <https://www.wsrw.org/a105x4179>

<sup>10</sup> Mr Vincent Piket, Head of the Maghreb Division in the EU External Action Service, before the INTA Committee, 20 February 2018. Transcript available here: <https://wsrw.org/a105x4113>

<sup>11</sup> FIDH, “Maroc/Sahara Occidental: menaces et harcèlement à l’encontre des Messieurs Ettalbi Hafdalla et Babit El Kori”, 25 July 2018, <https://www.fidh.org/fr/themes/defenseurs-des-droits-humains/maroc-menaces-et-harcelement-contre-mm-ettalbi-hafdalla-et-babit-el>

fled the very areas where the produce for export to the EU is cultivated on the farmlands owned by the king of Morocco himself - are not even heard at all.

\* Finally, 89 Saharawi civil society groups have sent a letter to the EU Commission, rejecting the approach of negotiating a deal with Morocco for their homeland without the consent of their political representation, Polisario. These groups were never invited for the consultation process, but have been represented by the EEAS as consulted stakeholders. (The Commission refers to them as 85, the correct number is 89. Note that ASVDH had also signed this letter – and are thus included twice in the list of “consulted stakeholders”)

### **To conclude:**

The list presented by the EEAS of consulted stakeholders is a fraud. Most of the groups listed have either refused to take part in the consultation process, or were never invited in the first place. This holds true for 94 of the enlisted 112 “stakeholders”.

The Commission claims that the Western Sahara trade arrangement it has negotiated with Morocco will be beneficial for “the people concerned”. Note that the Court considers the aspect of benefits irrelevant for assessing the proposal’s legality: what matters is the consent of the people of the territory.<sup>12</sup> All arguments relating to the benefits are irrelevant in view of the Court judgment.

The list of organisations of the SWD’s Annex was first circulated to parliamentarians in a different form a month before its official publication. WSRW wrote about that first circulated note on its website 24 May.<sup>13</sup> Two changes were made to the final version. On one hand, all references to the Moroccan “Southern Provinces” were deleted. On the other, all groups that had first been listed under the heading “*Organisations qui n’ont pas accepté la proposition d’une rencontre dans le cadre de l’exercice*” were suddenly re-labelled as “consulted”.

WSRW can facilitate contact with any of the 94 organisations that are erroneously referred to as “consulted” in the Annex to the SWD.

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<sup>12</sup> See footnote 1.

<sup>13</sup> <https://www.wsrw.org/a106x4165>