Above the Law

How the EU, blatantly, imports fish products from occupied Western Sahara, ignoring its own Court of Justice.
The European Union’s highest Court ruled in 2016 that Western Sahara cannot be part of the EU’s trade deal with Morocco. Yet to date, even as war has resumed, the EU continues to import fisheries products from the territory, directly supporting Morocco’s illegal claims to Western Sahara. The only adjustment the EU made following the ruling, has been to admit that they are doing what they used to.

In November 2020, war broke out in Western Sahara again, a territory that has been mostly under Moroccan military occupation since 1975. Morocco has no sovereignty over Western Sahara, nor any mandate to lawfully administer it. Therefore, the EU Court of Justice (CJEU) ruled, EU-Moroccan relations could not be applied there unless with the express consent of the people of the territory. And yet, the trade continues as though nothing has happened, contributing to renewed tension - and even war – from November 2020.

This report documents the EU Commission’s willingness to accommodate Morocco’s untenable claim to Western Sahara, by applying its trade agreement with Morocco to the territory in almost the exact same way as before the CJEU’s ruling of 21 December 2016. The only difference is that what had been the de facto inclusion of Western Sahara has now been made explicit. The EU continues to engage exclusively with Morocco for the trade in products from Western Sahara:

- It accepts erroneous declarations of origin on customs documents and veterinary certificates issued by Morocco.
- It accepts the inclusion of establishments within the list of approved establishments of Morocco.
- It waives customs duties on such goods.
- It actively hinders the gathering of data on the trade flow.

In few other places in Europe is this more visible than a terminal in France in January 2017, containing fish oil from Western Sahara. The incident happened a few weeks after the EU Court of Justice found the EU-Morocco trade agreement inapplicable to Western Sahara. France disagreed with the CJEU. 

The CJEU stated in its landmark decision that the Saharawi people, whose right to self-determination is internationally recognised – matter – the actual people of the territory, the Saharawi people, have a right to self-determination, and therefore that their consent must be obtained for an agreement to affect the territory. So how did the EU approach this dilemma when negotiating the post-judgement agreement with Morocco?

The EU Commission stated it would be impossible to obtain consent from the Saharawis, instead arguing that a new agreement would benefit what they refer to as the local economy. That position runs counter to the Court’s specific rejection of the relevance of local benefits. Rather than seeking the consent of the actual people of the territory, the EU Commission held an exchange of information with 18 Moroccan operators and politicians who unsurprisingly agreed that a deal with Morocco would be beneficial. Despite manifestly failing to comply with both international and EU case law, a revised trade agreement covering Western Sahara was approved, and entered into force in July 2019. Not a single association advocating self-determination had taken part in this process.

This report reveals a document from the Commission showing how it manifestly misled EU institutions about who took part in the consultations on benefits. Literally all Saharawi pro-self-determination groups in Western Sahara and in the diaspora, including their UN recognised representation, objected to the EU-Moroccan agreement. However, all Saharawi objections to the EU-Moroccan process were used by the Commission as proof of a consultation process. Only 16% of the groups and individuals mentioned as consulted had actually taken part. All are against Saharawi self-determination.

The need to obtain consent has been completely ignored. The EU ignored its own court.

The EU claims its agreement is "without prejudice to the respective positions of the European Union and Morocco with regard to the status of Western Sahara." This is the root of the problem. All the way from the conceptualisation of a revised trade deal, to the negotiations and their conclusion, and in its current implementation – this has been about the EU and Morocco.

Through its trade agreement with Morocco for a land that international courts and the UN have rejected as part of Moroccan sovereign territory, the EU is a key supporter of the untenable Moroccan claims to Western Sahara, and as such severely undermines the UN peace efforts to find a solution to the conflict.

The only policy that legally ought to have a decisive say in this matter – the actual people of the territory, the Saharawi people, whose right to self-determination is internationally recognised have never had a say at all.

Executive Summary
Morocco’s continued and illegal plunder of Western Sahara’s resources has reignited war in the last colony on the continent.

For the first time in 29 years, war has re-erupted in Western Sahara. The resumption of the armed conflict in November 2020 comes as a direct result of Morocco’s use of a controversial border passage that it made between the occupied territory and neighbouring Mauritania. Western Sahara’s resources have always played a key role in the conflict. The territory’s phosphate reserves and its rumoured oil potential were certainly part of Morocco’s political calculus to invade in 1975, in blatant violation of UN resolutions and the International Court of Justice, which had rejected Morocco’s claim to Western Sahara. The ensuing war ended in 1991, when the UN brokered a peace agreement between the two parties – Morocco and the Western Sahara liberation movement Polisario Front. Both parties agreed to a ceasefire and committed to holding a referendum for the Saharawi people to decide their political and territorial status. A UN mission, MINURSO, was deployed to the territory to organise the referendum in the former Spanish colony. But all efforts to that end have been thwarted by Morocco, which now repeatedly rejects the possibility of a referendum with more than one option – that of integration into the Moroccan state.

Back to war

Western Sahara remains partitioned by a 2500-kilometre military fortified wall, surrounded by some of the world’s largest minefields, sown by Morocco. Half the people of Western Sahara fled their homeland, and survive in dismal circumstances in refugee camps in the Algerian desert. The Saharawis living in Western Sahara suffer under the yoke of a brutal occupation: the grave human rights violations committed by Moroccan authorities against Saharawis are well documented by reputable organisations such as the UN High Commissioner for Human Rights. Amnesty International and Human Rights Watch. Due to the severity of their situation, the call for resumed armed conflict has received ever more traction, particularly among younger Saharawis losing faith in the UN. The Moroccan army’s violent dispersal of a Saharawi protest against Morocco’s plunder in the Guerguerat border strip – a zone where any military presence is strictly prohibited under the UN-brokered ceasefire – was the spark that reignited the war.

Morocco’s claim to sovereignty over Western Sahara is not recognised by the UN, by any state or by the EU. But that has not prevented it from exploiting the territory’s resources: valuable phosphate reserves for global fertilizer production, fish stocks sold off to foreign governments and companies, a growing agri-industry, exports of sand to southern Europe, and vast areas of land for the use of the Moroccan king’s renewable energy company. Morocco also explores for hydrocarbons both onshore and offshore. The fisheries products exported from the overexploited stocks offshore the territory are of particular value to Morocco. This report shows how fish oil and fishmeal end up in Germany, the Netherlands and France. The exploitation of resources is managed by Moroccan state-owned ministries and agencies. None of the revenue from these resources is returned to the Saharawi people, and no accounting of them is publicly available. Saharawis don’t tend to profit from the development – unless they have sworn allegiance to the king of Morocco.

Morocco’s exploitation of Western Sahara’s economic potential is geared towards furtherance acceptance of its illegal occupation of the territory. It is not directed towards assisting the Saharawi people in the exercise of their right to self-determination – an occupier’s legal duty – but the opposite: maintaining and strengthening its untenable claim over the territory. Morocco’s development of Western Sahara’s resources not only enriches the kingdom, it also serves to legitimize or create an implicit yet tangible acceptance of its illegal presence in the territory, while decreasing the availability of these resources to the Saharawis. Morocco’s use of the Guerguerat passage, through which fisheries products are transported by truck, led to renewed tension and armed conflict in 2020.
Morocco’s fishing Eldorado

The rich fishing grounds off the coast of Western Sahara have become vitally important to Morocco. An increasing part of Morocco’s fishing industry takes place in the territory under occupation, making it a goldmine politically and financially.

The growing demand for fisheries products has endangered fish stocks off Morocco's Mediterranean and Atlantic shores. As a result, fishing activity in the waters of Western Sahara has increased in importance to the Moroccan fishing sector. For 2018, the Western Saharan coastal area accounted for approximately 71.64% of the quantity of Morocco’s annual coastal and artisanal catches. In terms of value, the catch from Western Sahara’s coastal waters accounted for 63.14% of Morocco’s national total for the year.

A considerable fishing industry has been established in occupied Western Sahara. Half of all Moroccan establishments for the production of frozen fish and FMFO are located in Western Sahara. According to the Moroccan government, 134 out of 450 units have been converted to exclusively freeze small pelagic species, as imposed by the Moroccan authorities in order to benefit maximally from the fishing quotas.

According to the Moroccan Department for Maritime Fishing, 29 out of a total of 457 deep sea fishing vessels (6.34%) were active in Western Sahara in 2018. In that same year, 91 out of a total of 2,536 coastal fishing vessels (3.6%) were active in Western Sahara's coastal waters. These two categories combined accounted for 192,535 tonnes in the Sakia El Hamra region and 587,225 tonnes in the Dakhla Oued Ed-Dahab region. Given the total volume of 1,296,757 tonnes caught in 2018, Western Sahara represented an astounding 77.65% of the total catches in these fishing categories combined.

Distribution of fish processing companies

<table>
<thead>
<tr>
<th>Distribution of fish processing companies</th>
<th>Moroccan Mediterranean coast</th>
<th>Moroccan Atlantic coast</th>
<th>Western Sahara</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canning/semi-canning</td>
<td>13</td>
<td>71</td>
<td>5</td>
<td>89</td>
</tr>
<tr>
<td>Frozen</td>
<td>19</td>
<td>76</td>
<td>121</td>
<td>194</td>
</tr>
<tr>
<td>Fresh</td>
<td>12</td>
<td>25</td>
<td>8</td>
<td>45</td>
</tr>
<tr>
<td>Fishmeal-oil (FMFO)</td>
<td>1</td>
<td>10</td>
<td>21</td>
<td>32</td>
</tr>
<tr>
<td>Shadfish</td>
<td>1</td>
<td>11</td>
<td>5</td>
<td>17</td>
</tr>
<tr>
<td>Deshelling</td>
<td>10</td>
<td>0</td>
<td>10</td>
<td>20</td>
</tr>
<tr>
<td>Storage</td>
<td>5</td>
<td>48</td>
<td>3</td>
<td>54</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>15</td>
<td>2</td>
<td>20</td>
</tr>
<tr>
<td>Total</td>
<td>63</td>
<td>254</td>
<td>174</td>
<td>450</td>
</tr>
</tbody>
</table>

A significant share of the factories specializing in the production of fishmeal and fish oil from small pelagics are located in Western Sahara. Statistics show that while production has remained stable over the last three years (2018-2020), it has in fact more than doubled over the course of the last decade – despite a stated objective of the Moroccan government’s Haileutis Strategy 2010-2020 to reduce the production of fish oil and fishmeal, and encourage the transformation of small pelagics into products with higher added value. This was corroborated by the 2012 publication of a list of the principal license holders in independent Moroccan media, demonstrating that most licenses were granted to army generals and a few defected Polisario officials willing to pledge allegiance to the Moroccan monarchy. The agreement was seemingly renewed in late November 2020.

The fishing industry is a means to reward domestic political allies. Cables by US diplomats leaked in 2010 revealed that the fishing industry in Western Sahara was controlled by generals of the Moroccan army. This was corroborated by the 2012 publication of a list of the principal license holders in independent Moroccan media, demonstrating that most licenses were granted to army generals and a few defected Polisario officials willing to pledge allegiance to the Moroccan monarchy. The agreement was seemingly renewed in late November 2020.
March 2000
The EU-Morocco Association Agreement enters into force. A free trade area liberalising two-way trade in goods is created.

October 2005
The EU and Morocco begin negotiations to further trade liberalisation for (processed) agricultural and fishery products.

October 2012
The Agreement on reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products enters into force. The agreement takes the form of an Exchange of Letters between the parties, and replaces Protocols 1, 2 and 3 and their Annexes and Amendments to the EU-Morocco Association Agreement.

19 November 2012
The Polisario Front brings court proceedings against the EU Council, asking for the annulment of the Council decision concluding the liberalisation agreement with Morocco.24

10 December 2015
The General Court of the CJEU annuls the EU-Morocco liberalisation agreement in so far as it applies to Western Sahara. The Court reasons that the EU Council failed to examine the situation of human rights in occupied Western Sahara and, in particular, the conditions of exploitation of the natural resources.25

19 February 2016
The EU Council appeals the General Court’s decision.26 The Council is backed by the EU Commission, and five Member States. A syndicate of Moroccan producers intervenes in the proceedings to defend Morocco’s position before the Court.

13 September 2016
The Advocate General of the EU Court presents his Opinion, concluding that “Neither the EU-Morocco Association Agreement nor the EU-Morocco Agreement on the liberalisation of trade in agricultural and fishery products apply to Western Sahara”.27

The CJEU draws the line: For years, the European Union’s bilateral agreements with Morocco have been applied to the part of Western Sahara that Morocco holds under military control. Since 2012, the representative organisation of the people of Western Sahara, the Polisario Front, has started to challenge that inclusion in the Court of Justice of the European Union, arguing that it is a violation of the Saharawi people’s right to self-determination.

21 December 2016
The CJEU’s Grand Chamber confirms in its appeal decision the argument of the Advocate General and annuls the initial judgment from December 2015.28 The reason for annulment is that Western Sahara is not part of Morocco, and so the 2000 and 2012 agreements could not extend to it. The Court concludes Western Sahara has a “separate and distinct status” from any country in the world – including Morocco – “by virtue of the principle of self-determination”. As such, it cannot be included in the territorial scope of an agreement with Morocco, according to the Court. Such a third party can only be affected by the implementation of the Association Agreement through its expressed consent, the Court concluded, “without its being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it”.29

31 January 2018
The EU Commission and Morocco initial an amendment to their existing trade liberalisation agreement, expressly extending it to Western Sahara.30

27 February 2018
The CJEU’s Grand Chamber rules in a separate case that including the territory of Western Sahara within the scope of the EU-Morocco Fisheries Agreement would be contrary to certain rules of international law, including the principle of self-determination.31 The ruling furthermore addresses matters of maritime jurisdiction.

19 July 2018
In the case brought by Polisario on the EU-Morocco Fisheries Agreement, the CJEU’s General Court confirms that “the territory of Western Sahara, and the waters adjacent to the territory, do not fall within the respective territorial scope of this Agreement and Protocol”.32 Polisario brings an action to annul the Council Decision (EU) 2019/202 of 28 January 2019, concluding the amended EU-Morocco Association Agreement.33 Polisario argues that neither Morocco nor the EU can lawfully conclude agreements that include Western Sahara, and that the extension of the EU-Morocco Association Agreement violates the 2016 ruling because the Saharawi people did not consent to it.

27 April 2019
Polisario Front brings a further proceeding seeking annul Council Decision (EU) 2020/462 of 20 February 2020, for the EU and Morocco to exchange data and statistical, economic, social and environmental information on the “advantages of the Agreement for the people concerned and the exploitation of the natural resources of the territories in question”. This will be done within the Association Committee, set up under the Agreement, which brings together representatives of the EU Commission and Morocco.34

10 December 2015
The amended trade liberalisation agreement between the EU and Morocco, now explicitly including the part of Western Sahara under Moroccan occupation in its territorial scope, enters into force.

23 June 2020
Polisario brings a further proceeding seeking annul Council Decision (EU) 2020/462 of 20 February 2020, for the EU and Morocco to exchange data and statistical, economic, social and environmental information on the “advantages of the Agreement for the people concerned and the exploitation of the natural resources of the territories in question”.

The CJEU has in four different legal processes concluded that including Western Sahara within the scope of agreements with Morocco is contrary to the principle of self-determination. Here, Saharawi refugees on 27 February 2018 thank the CJEU for clearly specifying that Western Sahara cannot be part of the EU’s fisheries agreement with Morocco.

The Canary Islands

Morocco

Western Sahara

The Sahrawi Arab Democratic Republic

Western Sahara

Mauritania

Algeria

El Aaiun

Guelta d’Archeb& Hrefn

Western Sahara

Morocco military wall

- Capital
- City
- Refugee camp

2021
It is expected that the CJEU’s General Court will rule on the revised EU-Morocco Agreement.
Western Sahara is not part of Morocco, according to the CJEU. Yet, the EU Commission’s lists of approved establishments in Morocco include companies in occupied Western Sahara.

The erroneous lists

The Moroccan government places fish processing companies in Western Sahara on the lists of approved establishments of fish products in Morocco. EU institutions don’t seem to object.

The European Union’s Directorate General for Health and Food Safety (DG SANTE) has a central role in determining which fishery products enter the EU. On a regular basis, DG SANTE publishes updated lists of establishments in non-EU countries that have been approved to export a specific category of food of animal origin. And these lists are the gatekeepers to the EU single market.

Procedurally, two cumulative conditions must be satisfied to import products of animal origin into the EU. First, the product must originate in an approved third country of origin, evaluated by the EU Commission as appropriate for providing the necessary guarantees for the specific food category. Second, the product must originate from an approved establishment, i.e. appear on a list of companies drawn up by the competent authority of that third country which avows the companies’ compliance with EU Regulations. An unrelated July 2020 decision, the EU Court of Justice again confirmed that these are the two requirements for importing into the Union. The first condition lies entirely in the hands of the EU Commission. For a country outside the EU to obtain the approval for exporting products to the EU, a prior evaluation of the country and its competent authority will be carried out by the EU’s Health and Food Audits and Analysis Office.

A wide variety and share of fishery products from Western Sahara – including fish oil and fishmeal – enter the Union market. However, Western Sahara does not appear in any list of approved non-EU countries. The territory is neither on the list for processing plants which produce fish oil and fishmeal, nor on the list for other fishery products.

The list of approved establishments for exporting fishery products, including fish meal and fish oil, to the EU currently contain 144 establishments located in Western Sahara. The Moroccan government places fish processing companies in Western Sahara on the lists of approved establishments of fish products in Morocco. EU institutions don’t seem to object.

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When checking imports, the Netherlands Food and Consumer Product Safety Authority (NVWA) uses a list established by the European Commission that contains companies that are authorised to export fishery products to the EU. This list is published on the website of DG SANCO [sic] and also contains companies in Western Sahara. The list is a guideline for the NVWA when checking imports. When the shipments of fish oil meet applicable EU-regulations and the fish oil is produced by companies on the EU-list, they are allowed into the EU.

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In response to inquiries by WSRW about the problematic lists, the Commission explained that the ‘current situation is not fully satisfactory but takes account of the de facto situation and is considered to be the best available compromise’. It furthermore stated that the EU has to ‘take account of the actual situation in the relevant territories’ and that ‘the Moroccan legislation is implemented there’.
El Aaiún

**Cold stores:**
- Dakhla Entreposage
- Halieutes Entreposage

**Processing plants:**
- Afro Pesca Maroc
- Al Alya Fisheries
- Aspam Sarl
- Cofrigob
- Congel O’Cheira
- Congelation El Mostakim
- Copelit
- Damsa
- Delta Ocean 2
- Deral
- Dipromer II
- Finnaoui Pesca Algarve
- Flora Pesca
- Gel Fish
- Hachimar
- Hallouates Process
- Iglo Fish
- Jamal Freres
- Jamil Freres Conserve
- KB Fish
- Komo Fish
- Laayoune Conserve Nagjir
- Laayoune Proteine
- O-2A-Fish
- Oceamic Laayoune
- Oceamic Laayoune II
- Pelapro
- Rijal Sakia El Hamra
- Sepomer Sahara 2
- Soccopo
- Sogsaco
- Sopimas
- Sotragel Congelation
- Tissir Port
- Val Fish
- Well Fishing

**EU approved establishments on occupied land**

The Moroccan government has ensured that a total of 144 establishments in occupied Western Sahara can export to the EU with the blessing of the EU Commission.

In total, the EU has agreed to the approval of 122 processing plants, 8 freezing vessels, 4 cold stores and 10 producers of FMFO for exports of fish from occupied Western Sahara to the EU. All have been rubber-stamped for approval by the sanitary authorities of the neighbouring country of Morocco.

The establishments appear in the lists of processing plants (dated 06.08.2019), and of fishery products (dated 18.07.2020) presented by the EU Commission’s Directorate-General for Health and Food Safety (DG SANTE).

The EU Court of Justice states that the territory of Western Sahara is separate and distinct from Morocco and that Morocco has no legal mandate to operate in the territory. Yet, not only does the EU allow Morocco to certify establishments outside of Morocco, it places these firms on the list of Moroccan exporters. The EU institutions act as if the Court had not ruled on the matter.

This picture at Guerguerat was taken in August 2019, when a young Saharawi, alone, blocked the controversial export point.
Olvéa, France

The French importer of fish oil from the occupied territory is most likely Olvéa Group, whose subsidiary Olvéa Fish Oils is the only producer of fish oils with a storage facility inside the port of Fécamp, and further infrastructure in the immediate vicinity. Olvéa produces omega-3 fish oils for both human and animal consumption, for which it uses pelagic fish and anchovy sourced – according to its website – in “Morocco” and Mauritania. Since 2003, the company has owned a factory in Agadir in Morocco, and, since 2012, a sourcing and storage unit in the north of Mauritania.14

WSRW has contacted Olvéa on several occasions, but the company refuses to respond—either inquiries by French and EU media on the occasion of the February 2017 shipment have been ignored. However, ever since that heavily scrutinized shipment, WSRW has not observed any of the tankers which have loaded fish oil in El Aaiún seen arriving at Fécamp on 22 January 2017, mere weeks after the CJEU statement. Since then, all imports of fishmeal in Bremen—thus including those from Western Sahara—have been carried out exclusively by KMP. The company purchases fishmeal from “Morocco”, with no mention of Western Sahara. In 2019, 76.9% of the fishmeal imported in Germany was landed and resold in Bremen. In 2020, 76.9% of the fishmeal imported in Germany was landed and resold in Bremen. In 2020, 76.9% of the fishmeal imported in Germany was landed and resold in Bremen.51

KMP mainly imports its fishmeal from Peru. Yet since 2015, coinciding with Peru’s increasing focus on China as its main client, KMP’s imports from Morocco—and therefore mainly from Western Sahara—increased, and even surpassed Peru’s share in 2017.15

In total, from what can be deduced from German trade statistics, KMP imports from Western Sahara have led to more forthcoming answers. Not only did the state’s Border Control Post clarify the volume of the imports, but they also included the approval numbers of the exporting companies. Each company that is included on DG SANTE’s list of approved establishments—and thus approved for exporting to the EU market—gets assigned an approval number. The numbers quickly reveal which “Moroccan” companies in occupied Western Sahara are providing KMP with fishmeal.

Unknown, Netherlands

Since 2019, WSRW has observed two shipments of fish oil from Western Sahara to the Netherlands; each time aboard the Dutch owned vessel Oramalia.16 The identity of the importer remains unclear. WSRW has asked Olvéa Groupe to clarify the potential involvement of its subsidiary Olvéa Néerlandais BV, which according to the Dutch company registry is involved in the wholesale of fish oil, but the company has not responded. WSRW has also written to Oi Petfood, an important partner of Olvéa in the Netherlands, but has not received a response. The German company KMP also has operations in Rotterdam, since taking over the Dutch company Marvesa Rotterdam N.V. in 2007.19

KMP’s suppliers in occupied Western Sahara, 2017-2019

<table>
<thead>
<tr>
<th>Supplier in Western Sahara</th>
<th>Approval number</th>
<th>Volume of imports (t)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delta Ocean</td>
<td>3618</td>
<td>3,440</td>
</tr>
<tr>
<td>Somat']): 51</td>
<td>2722</td>
<td>2,460</td>
</tr>
<tr>
<td>Bente Marine Proteins</td>
<td>254</td>
<td>1,161</td>
</tr>
<tr>
<td>Copelit SARL</td>
<td>2228</td>
<td>1,000</td>
</tr>
<tr>
<td>KB Fish</td>
<td>2258</td>
<td>1,000</td>
</tr>
<tr>
<td>Delta Ocean</td>
<td>2854</td>
<td>5,491</td>
</tr>
<tr>
<td>Capall SAL</td>
<td>2543</td>
<td>1,161</td>
</tr>
<tr>
<td>Oramalia</td>
<td>2854</td>
<td>5,491</td>
</tr>
</tbody>
</table>

While KMP remains silent in the face of scrutiny, Parliamentary Questions in the Bundestag and information requests to the federal state of Bremen have led to more forthcoming answers. Not only did the state’s Border Control Post clarify the volume of the imports, but they also included the approval numbers of the exporting companies. Each company that is included on DG SANTE’s list of approved establishments—and thus approved for exporting to the EU market—gets assigned an approval number. The numbers quickly reveal which “Moroccan” companies in occupied Western Sahara are providing KMP with fishmeal.

The Polisario Front, representing the Saharawi people, has called on KMP to stop trading fishmeal from Western Sahara.14 WSRW has repeatedly asked the company for clarifications on its continued imports, but has never received a reply.
EU Commission misrepresented the Saharawi opinion

The UN process to realise a just and lasting peace in Western Sahara is governed by a cornerstone principle fundamental to the process of decolonisation worldwide: the right to self-determination. The right to self-determination is established in Article 1 of both the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The right is understood as the free determination of a people’s political status, the free pursuit of their economic, social and cultural development and the free disposal of their natural wealth and resources. It is noted that this right in the context of colonized (i.e. non-self-governing) peoples is binding on all States, an obligation erga omnes.

Yet ever since the CJEU struck down the application of the EU-Morocco trade deal to Western Sahara - referring explicitly to the Saharawi people’s right to self-determination, and consequently, the need to obtain their consent - the EU has persistently ignored that basic tenet of international law. Instead, it has consistently and exclusively favoured one party to the conflict - the one without right to legal title to administer Western Sahara - Morocco.

Arguing that it was important that the Western Sahara economy could continue to benefit from preferential tariffs, the EU turned to Morocco in zero to negotiate an amendment to the EU-Morocco trade deal, one that foresaw the explicit inclusion of Western Sahara into the geographic scope of the agreement. It should be recalled that the CJEU stipulated that the issue of potential benefits to the territory were irrelevant. what mattered from the legal perspective was that the people of the territory had consented to having an EU agreement with another country apply to their land. And while the Court was clear that, according to the UN, it is the Polisario Front that is to be regarded as “the representative of the people of Western Sahara”57, not once did the EU Commission invite the Polisario Front to the negotiation table. They were simply ignored.

Then, as Morocco and the EU had agreed on extending the trade deal to Western Sahara, the deal was initialled in January 2018 by the EU and Morocco.58 Again, the people of Western Sahara were not asked for their consent - they were ignored.

After having sealed the trade deal with Morocco, and well aware of the CJEU’s conclusion that the consent of the people of Western Sahara was required for any deal to lawfully affect their land, the EU Commission tried to satisfy that condition by holding a round of consultations with Moroccan economic operators based in the territory and Moroccan officials elected in the territory. There were highly problematic aspects to this “consultation process” which took place from mid-February to mid-March 2018. First, instead of applying the notion of “consent”, as the Court had stressed, the Commission undertook a “consultation”. These are fundamentally different concepts: whereas consent requires an expressed explicit approval, a consultation does not. Moreover, the entire concept of “the people” of the territory was replaced with the concept of “les populations concernées”, “la population” or “the people concerned”. The Court never suggested any of these new concepts could apply.

Second, there seems to be little purpose in consulting stakeholders after an agreement has already been inked. Third, recalling that consulting falls short of the requirement of obtaining consent, most Saharawi groups were not even invited to take part. The EU External Action Service (EEAS) - the EU’s foreign affairs branch tasked with the consultation exercise - had stated that only groups registered by the Moroccan government were invited, immediately ruling out practically all Saharawi groups in the occupied territory - bar two who had obtained some form of registration in 2013 after the UN Human Rights Council had criticised Morocco for not registering Saharawi groups.59 Both groups, ASWQ and Al Ghard, had already issued statements that they would not participate in a consultation process that they perceive as undermining their people’s right to self-determination. Critically, the Saharawis living in the refugee camps - having fled the very areas where most fishery products are produced - were not even heard at all.

Fourth, the EU Commission has blatantly misrepresented which “stakeholders” it consulted. No less than 85 Saharawi civil society groups 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, the Polisario Front.60 The EEAS would then use the letter as a premise to include all 85 groups as having been consulted. A meeting with the Polisario Front on 5 February 2018 - at the initiative of the latter and not part of any consultation exercise - was referred to by the EU Commission as a “consultative meeting”. This was something approaching a lie, as was clear when Polisario released the email exchange that had led up to the meeting, proving they could not have known about the EEAS’ true intentions.61 Not only was the false information about Polisario circulating as having been consulted. A meeting with the Polisario Front on 5 February 2018 - at the initiative of the latter and not part of any consultation exercise - was referred to by the EU Commission as a “consultative meeting”. This was something approaching a lie, as was clear when Polisario released the email exchange that had led up to the meeting, proving they could not have known about the EEAS’ true intentions.61 Not only was the false information about Polisario circulating.

Whatever we do, in the framework of this negotiation and the framework of this agreement, shall not prejudice that UN process. It shall not favour one party or the other party in the framework of the negotiations, and it shall not prejudice the outcome of the UN process.”

Vincent Piket, the EU’s chief negotiator on amending the EU-Morocco trade deal to expressly apply to Western Sahara, in June 2018.62

The EU Court of Justice ruled that the consent from the people of Western Sahara is required for trade with the territory. In negotiating a revised deal with Morocco, the Commission chose to ignore that requirement and subsequently misled the EU Parliament and Council about its communication with Saharawi groups.

“Whatever we do, in the framework of this negotiation and the framework of this agreement, shall not prejudice that UN process. It shall not favour one party or the other party in the framework of the negotiations, and it shall not prejudice the outcome of the UN process.”

Vincent Piket, the EU’s chief negotiator on amending the EU-Morocco trade deal to expressly apply to Western Sahara, in June 2018.62

The UN process to realise a just and lasting peace in Western Sahara is governed by a cornerstone principle fundamental to the process of decolonisation worldwide: the right to self-determination. The right to self-determination is established in Article 1 of both the Interna-
The Commission’s fake “consultation” list

<table>
<thead>
<tr>
<th>List of stakeholders consulted on the amendment to Protocols 1 and 4 of the Association Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Political actors</strong></td>
</tr>
<tr>
<td>President of two Regional Councils:</td>
</tr>
<tr>
<td>• President of the Regional Council of Daïcha-Draa ed Dabah: Mr Yanga El Khatib</td>
</tr>
<tr>
<td>• President of the Regional Council of Lahcène-el-Henna: Mr Sidi Hamd Oulid El przez</td>
</tr>
<tr>
<td>Representatives of the Polisario Front:</td>
</tr>
<tr>
<td>• Mr Mohamed Sidati</td>
</tr>
<tr>
<td><strong>2. Economic operators</strong></td>
</tr>
<tr>
<td>• Agriculture</td>
</tr>
<tr>
<td>• Sahrawi Development and Investment Association</td>
</tr>
<tr>
<td>• Chamber of Agriculture of the region of Daïcha-Draa ed Dabah</td>
</tr>
<tr>
<td>• OCP Group (and Phosboucraa Foundation)</td>
</tr>
<tr>
<td><strong>3. Human rights associations</strong></td>
</tr>
<tr>
<td>• Sahrawi Human Rights Association</td>
</tr>
<tr>
<td>• American Human Rights Watch</td>
</tr>
<tr>
<td>• National Human Rights Council</td>
</tr>
<tr>
<td><strong>4. Industry</strong></td>
</tr>
<tr>
<td>• OCP Group (and Phosboucraa Foundation)</td>
</tr>
<tr>
<td>• Agency for the Development of the Southern Provinces (Agence du Sud)</td>
</tr>
<tr>
<td><strong>5. Policy and stakeholders</strong></td>
</tr>
<tr>
<td>• Sahara Observatory for Peace, Democracy and Human Rights</td>
</tr>
<tr>
<td>• Western Sahara Resource Watch</td>
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<tr>
<td>• Western Sahara Campaign</td>
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<tr>
<td>• National Fishers Research Institute</td>
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<tr>
<td>• Chamber of Maritime Fisheries</td>
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<tr>
<td>• Halib Sakia El Hamra Cooperative</td>
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<tr>
<td>• EIG Agida Dakhla</td>
</tr>
<tr>
<td><strong>6. Moroccan entities</strong></td>
</tr>
<tr>
<td>• Sahrawi Development and Investment Association</td>
</tr>
<tr>
<td>• OCP Group (and Phosboucraa Foundation)</td>
</tr>
<tr>
<td>• Agency for the Development of the Southern Provinces (Agence du Sud)</td>
</tr>
</tbody>
</table>

A list of consulted alleged “stakeholders” was part of the so-called Staff Working Document sent to all EU governments and Members of the European Parliament. The document outlined the EU Commission’s arguments as to why EU institutions should support the agreement reached with Morocco. The main assertion was that certain areas of economic and production activity in Western Sahara would benefit greatly from enjoying the same tariff preferences as granted to Morocco – while at the same time admitting there was no accurate data to actually back up that claim.

In the end, only 18 out of the 112 groups described by the EU Commission were actually consulted. All 18 supported Morocco’s approach to the EU-Morocco trade agreement. The EU Commission did not address issues relating to self-determination.

“...the people of Western Sahara”... 94 of the 112 organisations, not 85...
EEAS drew data from its desired conclusion

A document shared with the European Parliament’s international trade committee three months before the formal presentation of the Staff Working Document shows how key data was invented by the EEAS.

This document authored by the EEAS has never before been published. It shows the status of its work as presented to the EU Parliament’s Committee on International Trade (INTA) in March 2018. The document correctly mentions that all Saharawi and European civil society groups had refused to participate. Now, compare this file with the one that the EEAS sent to the EU institutions three months later, in June 2018. There, all these non-participating groups suddenly appear as having taken part in the alleged ‘consultation’ process.

The initial overview document was sent as response to a request issued by the INTA Committee on 9 March 2018. The Committee had asked the EEAS “to provide us as soon as possible, and prior to the final completion of the report, an overview of the involvement of people in Western Sahara, with the list of organisations and stakeholders that have been consulted”. The Committee had underlined that the CJEU had established “that the consent of the people of Western Sahara should be received prior to the implementation of the agreement”. There are notable differences between the list first presented to the INTA Committee in March, and the one that was formally published as an annex in the Staff Working Document in June.

1 The Commission first used Moroccan terminology to describe the occupied territory. This way of referring to Western Sahara as Morocco’s “regions du Sud”, which is contrary to the EU’s own position, was also used by the European Commission in a hearing in the Parliament on 17 May 2018.66 This political language was redacted before final publication.

2 This is factually incorrect in both lists. Polisario would have had nothing to gain from taking part in a consultation on an agreement that they spent years fighting in court. Would Palestinian authorities take part in a consultation on how settlements can benefit from EU trade with Israel? The allegation makes no sense. Its non-participation is well documented.

3 Initially, the EEAS was transparent about the fact that not a single civil society organisation advocating for self-determination had taken part in the talks, either from Western Sahara or abroad. The list of non-participants includes, correctly, Western Sahara Resource Watch. Three months later, these were all incorrectly moved to the list of those who were “consulted”.

4 The Commission first explained that the 85 Saharawi associations (or 89, to be correct) had refused to take part. Three months later, the important information that they had rejected taking part in the process was deleted. EEAS also chose to delete the word “Saharawi”.

5 The committee three months before the formal presentation of the Staff Working Document shows how key data was invented by the EEAS.

The said judgment states that an agreement with Morocco covering the territory of Western Sahara must receive the consent of the people of Western Sahara. Consequently, Sweden made clear in the national statement that we understood ‘the people concerned’ to be ‘the people of Western Sahara’, in line with the judgment.[...] In view of the rejections to the consultation process and/or the draft agreement, and particularly the objections of Polisario, the official representative of the people of Western Sahara in the UN process, Sweden is not satisfied that the outcome of the consultation process can be said to constitute the free and informed consent of the people of Western Sahara.”

[“It seems difficult to confirm with a high degree of certainty whether these steps meet the Court’s requirement of a consent by the people of Western Sahara. also taking into consideration that the conclusion of a positive consent is reached in spite of the negative opinion expressed by the Polisario Front.”]

All known Saharawi groups that work for self-determination signed a letter to the EU stating they condemned the EU-Morocco plan to include their territory in a revised trade agreement in a first briefing to the EU Parliament’s International Trade committee, the Commission stated that the groups “did not accept” to take part. A few weeks later the Commission stated that all participating organisations had in fact joined the consultation process. In its final report to the Parliament and Council, the Commission grossly misrepresented all self-determination oriented groups on the consultation list.

Can you spot the difference? This document from the EU’s External Action Service from March 2018 is fundamentally different from the one that was sent to the Parliament and Council three months later. The final and erroneous version of June 2018 is shown on page 18.
post: This is the EU Court of Justice ruling. It concluded that "the people of Western Sahara" must express its "consent" to a trade agreement affecting the territory and that the aspect of benefits is unnecessary to determine.

2016: This is the EU Court of Justice ruling. It concluded that "the people of Western Sahara" must express its "consent" to a trade agreement affecting the territory and that the aspect of benefits is unnecessary to determine.

In 2010, the CJEU ruled in the so-called Brita case that the 2000 EU-Israel Association Agreement does not apply to occupied Palestine. Since then, the EU Commission has developed and enforced a policy of differentiation between Israel and the Syrian/Palestinian territories under Israeli occupation. In particular, it has adopted specific legislation to exclude occupied Palestine and the Golan Heights from the notion of the "territory of Israel" under EU law. An example is the certification requirements for imports of meat of farmed ratites (ostrich-type birds) into the EU, where the EU Commission adopted a regulation that declares that "for the sake of market transparency and in accordance with public international law, it should be clarified that the territorial coverage of the certificates is limited to the territory of the State of Israel excluding the territories under Israeli administration since June 1967." It even added the following clarification that the notion "Israel" is "hereafter understood as the State of Israel, excluding the territories under Israeli administration since June 1967, namely the Golan Heights, the Gaza Strip, East Jerusalem and the rest of the West Bank."

The CJEU is clearly aware of the similarities of the occupation of Palestine and that of Western Sahara. In the cases brought before the EU Court of Justice regarding the application of EU-Morocco agreements to Western Sahara, the Court relied on the Brita case to rule that the Saharawi people is a third party to EU-Morocco relations that must consent to agreements applicable to Western Sahara, regardless of whether such agreements are deemed to be beneficial.

Similarly, in the case regarding the labelling of products originating in Palestine, the Court referred to its case-law on the separate and distinct status of Western Sahara, to rule that, in the light of the right to self-determination of the Palestinian people, occupied West Bank has an international status distinct from Israel.

While the EU Commission follows the CJEU's rulings pertaining to Palestine, it does the opposite when it comes to Western Sahara, turning a blind eye to its duty of non-recognition by including the territory in that of Morocco.

Saharawis have time and again spoken out against the plundering of their land's riches. Ten years ago, the autumn of 2010, thousands of Saharawis living under Moroccan occupation erected a four-week protest camp in denunciation of socio-economic exclusion in their own land. That November, the camp was burnt to the ground by the Moroccan army and fights erupted between Moroccan police and frustrated Saharawis, with casualties on both sides. Leading human rights defenders who took part in the camp were given sentences ranging from 20 years to life, including the secretary-general of a Saharawi group that monitors foreign involvement in Morocco's illegal plunder of the territory. In November 2020, a Moroccan court confirmed the sentences.
Bremen: the EU hub for conflict fishmeal

On 19 July 2018, the cargo vessel *Bente* unloaded a consignment of fishmeal from occupied Western Sahara in the port of Bremen in Germany. It was neither the first nor the last of such shipments to Bremen.

Fishmeal exports, in tonnes, from “Morocco” to Germany, 2017-2019

<table>
<thead>
<tr>
<th>Year</th>
<th>Import from “Morocco” into Germany</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017</td>
<td>24,446</td>
</tr>
<tr>
<td>2018</td>
<td>22,544</td>
</tr>
<tr>
<td>2019</td>
<td>18,446</td>
</tr>
</tbody>
</table>

It would take 16 months and several appeals to get the German federal customs services to finally admit that they did not verify the origin of fishmeal imports from “Morocco”, as no customs duties are levied on the import of fishmeal. And because imports of fishmeal from occupied Western Sahara are imported as Moroccan goods, there is no specific information on their exact origin in foreign trade statistics. However, probing the Bremen Border Control Post (BCP) led to clarifications about the volume and value of the imports: a total of 40,220 tonnes of fishmeal were imported from plants in Western Sahara into the federal state of Bremen between the years 2017 and 2019. WSRW estimates the value of these imports at around €44 million.

The Bremen BCP not only failed to question the origin of the fishmeal - something it had little reason to do because the exporter appeared in the DG SANTE list - but neither did it question the validity of the veterinary certificates accompanying the shipments. The Bremen BCP has stated that it accepts the veterinary export documents issued by the office of ONSSA - Morocco’s national food safety authority - in El Aaiún, Western Sahara. But a Moroccan authority cannot deliver such certificates because, as the CJEU has ruled, Morocco has no sovereignty over Western Sahara and thus cannot perform acts in a sovereign capacity in the territory. The EU’s kowtowing to Morocco in this matter is putting BCPs in a position where they have to accept erroneous documents and certificates on foodstuffs and feeding stuff, when EU and international law dictate the exact opposite.

Knowing the real origin of fishmeal imports that had been categorised “Moroccan” in origin sheds light on just how large Western Sahara’s share of the trade is. In 2017, fishmeal from Western Sahara accounted for 96% of imports whose origin was officially declared as ‘Morocco’. In 2018 a major drop was observed: the fishmeal imported from Western Sahara accounted for only 28.2% of the imports from ‘Morocco’ to Bremen (and likewise to all of Germany). In 2019, the share of fishmeal from Western Sahara again increased to more than half (56.2%).

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Bremen’s imports from Western Sahara also turn out to be a substantial share of the EU’s fishmeal imports from “Morocco”. In 2017, they accounted for 65% of these imports. In 2018 it was 24% and in 2019, 26%. In addition, there may be imports from Western Sahara to other EU countries: Greece, Spain, Denmark, Italy, the Netherlands and Lithuania also imported fishmeal from “Morocco” in 2019.

The Bremen solidarity paradox

Bremen has a strong historic record in the fight against colonisation. As the only federal state to have opposed the German government’s South Africa policy and support independence movements in both Namibia and South Africa, it is perhaps unsurprising that Bremen’s political institutions have an expressed commitment to the Saharawi people’s struggle for self-determination.


The Bremen government explained that it does not have any authority to ban imports. It has not taken initiatives to clarify the imports. It has not asked KMP to stop importing the fishmeal from the territory, nor to request the German government to act at EU-level.
Morocco to decide
The EU has left it to Morocco to define which country Western Sahara products are from. This affects both EU import tariffs and trade statistics.

When a cargo of products originating in Western Sahara enters the EU single market, customs officers need to determine the applicable import measures. An important factor for assessment is the origin of the product.

Trade agreements, such as the one between Morocco and the EU, offer preferential treatment for products that would otherwise be subject to higher duties. To benefit from preferential treatment, the import has to be accompanied by a so-called EUR1 or EUR-MED origin certificate. The condition of "origin" is that the product has been completely obtained, manufactured, processed or transformed in the exporting country. The certificate serves as proof that this condition has been met. But the burdensome administrative procedure that exporting country. The certificate is also a fact that Western Sahara is part of the same customs territory as Morocco; it is a single customs territory.

The trade statistics for Western Sahara show that barely any goods were declared as such. The fish oil imports to France and the fishmeal imports into Germany were not recorded as imports from Western Sahara by the Member States involved. Such a problematic absence of information is not new. The former EU High Representative, observed in 2017 that it is "difficult for the EU to accurately quantify from EU international trade databases the share of total trade actually coming from Western Sahara."14

The EU Commission has a major responsibility in the matter. By 2013, Member States were asking which country code should be used if preference was claimed for products coming from Western Sahara. The EU Commission then replied that "the code MA should be used in that case and that the code EU was only to be used to designate non-preferential origin. Eurostat is reconsidering the need to keep the code EC."15 To date, despite questions on the matter in both the EU Parliament and from Member States, the EU Commission appears determined to avoid any clarity on the trade flow from Western Sahara. In February 2019 in response to a question by a Member State as to how the origin of products from Western Sahara should be indicated in customs declarations, the EU Commission responded that "Morocco will not want to indicate Western Sahara in the certificates of origin" and that it is "also a fact that Western Sahara is part of the same customs territory as Morocco, it is a single customs territory with the same customs authorities applying the same origin rules."16 WSRW has not seen any explanation from the Commission clarifying the legal basis for such a claim.

In October 2019, as Member States persisted with questions on the originating status of goods from Western Sahara, the EU Commission essentially responded that they would need to sort things out for themselves. If sure that the origin of the goods is in fact Western Sahara, then it is up to the competent authorities of the EU Member States to consider that the indication of Morocco is not in itself a reason to initiate a verification request to Morocco.17

The political aspect is just as important. Said Morocco’s fisheries minister in 2006:18

"Morocco was emboldened in reacting to EU institutions’ inclusion of Western Sahara in the trade deal in 2019. By no means is the Sahara issue a point of controversy between Morocco and the EU. Some parties would like that to be the case. But to their despair, the EU clarified its positions once and for all during the last Association Council. It was a historical moment, because for the very first time, we had a common language on the Moroccan Sahara”, remarked Morocco’s Minister of Foreign Affairs. He was referring to the joint-declaration issued by the EU and Morocco in the framework of their 14th Association Council in June 2019. It included a short reference to "the issue of Western Sahara", in which both parties affirm their support to the UN process and the EU “welcomes the serious and credible efforts led by Morocco to this end”.

Morocco content with EU deal
The political importance of including Western Sahara in international agreements has been referred to often and explicitly by Morocco. “International agreements which do not exclude the Moroccan Sahara” from their application, prove that the area is Moroccan”. Morocco’s Minister of Communication said in 2013.19 The financial aspect [of the EU-Morocco Fisheries Agreement] is not necessarily the most important aspect of this agreement. The political aspect is just as important, said Morocco’s fisheries minister in 2006.

Morocco content with EU deal

By 1993, the EU Commission had recognised the Dakhla area as a "production zone authorised for the export of products from Western Sahara to the European Economic Community."15 In 1995, the EU Commission recognised the first ‘approved establishments’ in Western Sahara – a status that is granted for export.20 As stated by the Commission in the Staff Working Document referred to above, imports from Western Sahara have taken place since the entry into force of the Association Agreement.

When the CJEU concluded that the trade relations with Morocco could not apply to Western Sahara due its “separate and distinct status”, a range of consequences resulted, including financial ones – as it can be argued EU importers of products from “approved establishments” in Western Sahara may have been avoiding taxation since 1995.

The EU Commission was aware of the tax consequences implied by the 2006 CJEU decision. In March 2017, the Commission notified the EU’s national customs authorities that henceforth ‘goods imported into the EU, whose origin is WS shall be declared so’ and that “tariff preferences cannot be claimed in the customs declaration and shall not be granted.”21 But still the fox was left to guard the hen house. As Morocco had the final say: “in case of reasonable doubt about the authenticity of the proofs or origin and the correctness of the information given in these documents, the customs authority of the Member State of import sends a request of verification to

26 27
In September 2016, French customs was confronted with the arrival of a tanker containing fish oil from Western Sahara in Fécamp, Normandy. Customs stated that it had “decided that the shipment is not liable for tariffs, in line with the EU-Morocco trade treaties, because, the EU says, those accords remain in force despite the December 2015 ECJ ruling.” The EU Court of Justice had ruled on 10 December 2015 that goods from Western Sahara could not be included in the EU-Morocco trade agreement.

In other words, according to the French authorities, the CJEU decision from 10 December 2015 was not applicable when Key Bay anchored in Normandy. This is in itself peculiar, as the EU institutions had appealed the CJEU’s decision, but they had not requested a suspension of the decision.

But not only that, the agreement must also have been relevant for this particular import. If not, it would not have been referred to by the French customs when confronted by the media. Had the fish oil been intended only for animal food, the trade agreement and the rulings would not have been relevant, as such oil is free of tariff. However, oil for human consumption is covered by the agreement. The implication is that tariff should most probably have been paid upon import. But most likely, it was not.

Four months later, 22 January 2017, the same tanker again arrived in France with a cargo of fish oil from Western Sahara – this time about a month after the highest Court of the European Union had come to the same conclusion in December 2016. Again, this happened at a time when there was no trade agreement in place to regulate the trade. So, was a tariff paid?

When assessing how to deal with imports of fish oil for human consumption from Western Sahara, the EU could have looked to the EFTA countries.

Together with its sister vessels, the tanker Key Bay had for some years been transporting fish oil from Western Sahara to Norway, an EFTA country. In 2010, the transports of fish oil on these vessels to Norway were the subject of a detailed, award-winning documentary on Swedish broadcaster SVT. It not only revealed that the traders violated the Norwegian government’s advice on occupied Western Sahara. The vessels also picked up Moroccan certificates of origin in the Moroccan town of Tan Tan, and the actual cargo in Western Sahara. The backlash for the importer – Norwegian company GC Rieber – was intense. Losing major clients such as German company Corgis and the partially state-owned Ewos, GC Rieber halted the imports. Subsequently, Norwegian customs forced the company to pay €1.2 million in customs duties for not having paid the correct tariff fees for years. In the political debate that followed, the Norwegian government stated that such products cannot enter Norway under the EFTA-Morocco free trade pact, as Western Sahara is not Morocco. The policy of all the EFTA states was noted by the CJEU General Advocate in his 2016 opinion.

Were the EU institutions ready to implement the landmark ruling in the same way as EFTA? No.

Spanish police and harbour authorities who boarded the Key Bay in January 2017 during its short stop-over in Las Palmas confirmed the cargo aboard was indeed from Western Sahara. The Spanish government would later explain that “the CJEU judgement of 21st December 2016 only establishes that the commercial benefits granted to Morocco by the Euro-Mediterranean Agreements are not applicable to Western Sahara” and that “in order to assure that the Agreement was correctly implemented, and taking into account the CJEU judgement, we informed the custom authorities in France and Denmark, countries of destination of the shipment, of the proven facts, in the framework of mutual assistance in customs of the EU Member States.”

On 16 January 2017, European Parliamentarians wrote to the EU High Representative, the EU Trade Commissioner and the EU Commissioner for Economic and Financial Affairs, asking the French authorities to intervene before the Key Bay arrived in the port of Fécamp to ensure enforcement of EU legislation. A day later, Polisario Front announced it would file a complaint with the French customs authorities and the EU Commission for the law to be complied with.”

If the EU Commission had made an effort to enact the CJEU decisions, it would have adapted the necessary materials – such as the SANTE lists - for the French customs and veterinary BCP to do their job. The misleading origin in the documents accompanying the shipments would in that case have resulted in a denial of entry.

Taxes avoided?

Based on a statement from the French authorities in September 2016, there is reason to believe that imports of fish oil from Western Sahara into Europe should have been subjected to a tariff, but weren’t.

Key Bay observed just outside the harbour of El Aaiún on 6 January 2017 on its way to pick up fish oil for France, two weeks after the CJEU ruling.
Catching small fish to produce bigger ones

To produce expensive fish in cages along the coast of Northern Europe, the producers depend on cheaper African or Latin American stocks that are transformed into oil or meal.

The aquaculture industry is a peculiar one. In order to farm fish such as salmon, the industry needs to purchase massive amounts of fish feed, which generally consists of soy and FMFO. According to the most recent annual overview of the global fish sector by the UN Food and Agriculture Organisation (FAO), production reached an estimated 179 million tonnes in 2018 – 96.4 million tonnes in capture and 82 million tonnes from aquaculture production – of which 22 million tonnes were destined for non-food uses, mainly to produce fishmeal and fish oil. More specifically, the FAO states that about 88% of the 2018 world fish production was used for direct human consumption. The remaining 12% was used for non-food purposes, of which 82% (18 million tonnes) was used to produce fishmeal and fish oil.

The average annual fishmeal and fish oil production in the last 10 years is approximately 5 million tonnes of fishmeal and 1 million tonnes of fish oil. Each year, around 20 million tonnes of raw material are used to produce fishmeal and fish oil. About 75% come from whole fish of which nearly half is landed in South America. The rest comes from by-products from the processing of wild and farmed fish.

Many species from direct fisheries are delivered as whole fish to the so-called “reduction industry”, in addition to by-products from the fish processing industry. The species dominating the raw material supply are small pelagics, such as sprat, sardinella and anchovy. In fact, when prepared from whole fish, fishmeal is made almost exclusively using small pelagic species. Pelagic fish can generally be found from the surface to a depth of 1,000 meters. In general, the larger species such as mackerel, herring and sardine are used for human consumption, while smaller pelagics are more commonly converted to fishmeal or fish oil for use as feed – mainly aquaculture, but also for livestock. Increasingly, however, these smaller species are being marketed for human consumption including nutritional supplements.

Although a growing share of global fishmeal and fish oil production, estimated at 25-35%, originates from by-products of fish processing that were formerly discarded or used as direct feed, nutrient-rich fish are still diverted from human consumption to farmed fish (and other animal) feeds. The growing production of fishmeal in some countries in West Africa, mainly destined for exports, is leading to concerns about food security as fewer pelagics are available for human consumption. For example, one single FMFO factory in Gambia receives approximately 40% of the country’s total reported fish catches in a single year. Gambia is a country where the population relies on fish as a staple food.

As noted, the aquaculture sector is the main consumer of fishmeal and fish oil, taking about 70% of global consumption in 2017. Fishmeal is mainly used in aquaculture feed, and also in poultry and pig diets. Similarly, the bulk of the global fish oil production is for aquaculture feed, while the highly valued benefits of its omega-3 fatty acids ensure that a significant share is for human consumption.

Prices of fish oil have been increasing since mid-2018 and are expected to increase further. An increase in fishmeal prices can also be expected, according to UNFAO.

Infographic inspired by Mats (2019). Fishmeal is a proteinaceous flour-type material obtained after milling and drying of fish or fish parts, while fish oil is obtained through the pressing of cooked fish and subsequent centrifugation of the liquid obtained.
North-West African stocks under pressure

The bulk of Morocco’s pelagic catch is not taken in Morocco proper, but from the waters of Western Sahara. An independent evaluation ordered by the EU Commission revealed that in 2015, 85% of the EU’s catches under its fisheries agreement with Morocco were landed in Dakhla, a town located on the central coast of Western Sahara. Only 12% was landed in the port of Agadir, in Morocco proper. Yet the relative value of landings in Agadir is slightly higher, given “the specialisation of the port of Dakhla in small pelagics.” This is something the EU is well aware of. Access to the pelagic stocks of Western Sahara is in fact a driving factor behind the EU’s successive fish deals with Morocco. In terms of sheer volume, most of the catches made by EU vessels under the 2014-2018 EU-Morocco Fisheries Protocol were made in Western Sahara. Industrial pelagic trawling on stocks “in the south” accounted for 92% of the total weight of all catches made under that Protocol.

However, these stocks are under severe pressure. The EU’s evaluation report revealed that except for sardines, all pelagic species “in the south” were either fully or overexploited, as a result of years of intense fishing by local, EU and other foreign fleets. This dramatic conclusion was repeated by the UNFAO Fishery Committee for the Eastern Central Atlantic late 2018. That is particularly worrying in light of the fact that these waters represent the core range of most of the species concerned. In this regard, the UNFAO highlighted the continued expansion of the fishmeal industry in North-West Africa as a contributing factor. Fishmeal factories can absorb much larger quantities than the consumption market, meaning that local fishers are incentivised to step-up their fishing effort in order to sell more to the factories, the UNFAO noted.

Several recent reports have questioned the sustainability of the North-West African FMFO industry, and traced the supply chains from the endangered stocks via the European aquaculture industry to the supermarket shelves. Over the years, WSRW has observed increasing activity of Morocco’s national fleet in the occupied waters, including through the adoption of retired European pelagic fishing vessels, as documented by Greenpeace. At the same time, small-scale Moroccan fishers have been incentivized to relocate from Morocco to the occupied territory by the development of fishermen villages along the coastline - an activity that is partly sponsored by the EU as part of the sectoral support under the fisheries agreement with Morocco. In fact, Morocco has spent most of the EU’s fisheries sectoral support on further developing the fishing industry in occupied Western Sahara - with explicit approval of the Union.
Growing sector

Trade statistics show that most of the fishmeal produced by Morocco in Western Sahara ends up in Turkey. According to the trade database ITC Trade Map120, Turkey imported 90,412 tonnes in 2019. Runner-up is the EU, with an import total of 40,534 tonnes that year, of which 45.5% went to Germany. Coming in third is China, with 8,154 tonnes. If these figures are correct, it means that most of Turkey’s “Moroccan” fishmeal in fact came from Western Sahara. WSRW can deduce this from its daily monitoring of bulk vessels departing El Aaiún harbour.121 On 6 November 2019, WSRW witnessed the arrival of the cargo vessel Derya Aytekin at the port of Güllük, Turkey. When confronted with the true origin of its purchase, importing company Gümüsdoga responded that “We only buy from EU-approved facilities”.122 The power of DG SANTE’s lists reaches beyond the EU’s borders.

Since the turn of the century, fishmeal production has more than doubled in Morocco, from 71,000 tonnes to 170,000 tonnes in 2019.123 Morocco’s production total for 2019 placed it in the 10th position on the ranking of global fishmeal producers.

Morocco’s relative importance grows when looking at global export figures. Until 2017, the country was the largest producer and exporter of fishmeal in the West Africa region. In 2018, it was second behind Mauritania. Morocco has crept up to fifth position globally, as it exports most of its fishmeal production. In 2019, it exported around 156,000 tonnes of meal, constituting an increase of 57% over the last two decades. In 2001, Morocco exported 23,000 tonnes.

The EU was the main importer of fish oil from Morocco in 2019, having taken in 14,669 tonnes, of which 4,916 tonnes went to France and 6,049 tonnes to the Netherlands. However, not all those exporters of FMFO are operating from Morocco proper.

WSRW has tracked the vessels that exported fishmeal from Western Sahara in 2019 and estimates that a volume of around 84,500 tonnes was exported from the territory. That means that over 54% of the fishmeal exported from Morocco that year (see table above) came from Western Sahara. Accordingly, Morocco is not actually the world’s fifth biggest exporter, but falls to 11th position - two places behind the territory it holds under military occupation.

German federal trade statistics indicate that fishmeal imported from ‘Morocco’ into Bremen has a value of 1,106 Euros/tonne.125 If applying this value to the overall exports of fishmeal from Western Sahara to Germany and Turkey combined, the companies on occupied territory earned in 2019 alone an income of astonishing 102,921,000 euros.

But are the fishmeal and fish oil producers of Morocco and occupied Western Sahara as important to the EU as to Morocco? That appears not to be the case. For the period 2015–2019, the EU took in on average 6.4% of its total fishmeal imports from Morocco. The lion’s share of the EU’s fishmeal needs is purchased from Denmark, Norway and Peru. Between 2017 to 2019, only 4.18% of the Union’s fish oil imports were imported through Morocco.

The above data does not distinguish between exports from Morocco and Western Sahara. The data originates from the Moroccan government.124 WSRW has tracked the vessels that exported fishmeal from Western Sahara in 2019 and estimates that a volume of around 84,500 tonnes was exported from the territory. That means that over 54% of the fishmeal exported from Morocco that year (see table above) came from Western Sahara. Accordingly, Morocco is not actually the world’s fifth biggest exporter, but falls to 11th position - two places behind the territory it holds under military occupation.

The data in the table to the right, of the Moroccan government itself, is more credible.
From an economic perspective, Morocco depends more on the EU than the reverse. The EU is Morocco’s largest source of bilateral aid and main trading partner. This is evident in the fish oil and fishmeal trade: the EU imports relatively little of its overall needs from Morocco and could easily import that amount from elsewhere. But for Morocco, the exports to Europe are considerable. In 2012, a quarter of the country’s fishmeal exports and no less than 40% of its fish oil exports went to the Union. Yet as shown in this report, a sizeable part of those exports were never Morocco’s to begin with.

The Moroccan government particularly values its relationship with France, which it perceives as its strongest ally – notably in defending the Moroccan position on Western Sahara in the UN Security Council and in EU institutions. But even those strong diplomatic ties with one of the EU’s founding States did not prevent the CJEU in first instance from nullifying the EU-Morocco trade agreement in Western Sahara in December 2015. Rabat reacted furiously and EU-Moroccan relations soured. On 25 February 2016, the Moroccan government officially announced that it would stop all communications with the EU.127 And it did not end there. Morocco refused any further cooperation in bilateral programmes funded by EU and Member States, including on security exercises. As if its intransigence on anti-terror programs wasn’t enough to unnerve EU decision makers, playing hard-ball on the EU’s envisioned readmission agreement seemingly resulted in paralysis:128

Morocco’s frenzy induced several EU States to go solo and broker their own bilateral readmission agreement with Morocco. Not coincidentally, these countries would officially back the EU Council’s appeal against the CJEU’s first ruling of December 2015. Germany, for instance, would convince Morocco in February 2016 to speed up procedures for identifying Moroccan citizens in return for supporting the EU Council’s appeal in relation to the trade liberalization Agreement.129 It is to be noted that the two EU Member States that had always interpreted the EU-Morocco trade deal as not applicable to Western Sahara, received a very different treatment. Sweden had to backtrack on its commitment to recognise Western Sahara as a State in order to agree a readmission deal.130 The Netherlands experienced the opposite: although already having a readmission accord in place, Morocco refused to accept any of the Dutch government’s readmission requests.131

When the CJEU Grand Chamber essentially upheld the first instance judgment of the General Court in December 2016 – with stronger language on self-determination to boot – Morocco threatened the EU that if it failed to fully implement the deal, it would have severe consequences and could spur “a new flow of migration” towards Europe and place the continent “at risk.”132 Members of the EU Parliament who questioned the legal basis for the proposed explicit inclusion of Western Sahara in the EU-Morocco trade arrangement, received letters from Morocco’s embassy to the EU, calling their actions “hostile” and of potential influence to the EU-Moroccan relation in the “fight against terrorism, migratory flows and security issues.”133 How [does the EU] want us to do the job of blocking African and even Moroccan emigration if Europe does not want to work with us?”, the Moroccan Minister of Agriculture told Spanish media in 2017.134

Coinciding with the CJEU’s rulings crossing Morocco’s red line of Western Sahara, the North African kingdom intensified its diversification of partnerships. This was spelled out clearly by King Mohammed VI in April 2016, in his speech at the first ever meeting between Morocco and the Gulf Cooperation Council. Mohammed VI made clear that the regime would not accept any interference in what it calls its “domestic politics,” and that while his country still valued its partnership with the EU, it was now strengthening ties with others, including Russia and China.135 Morocco even applied for membership of the African Union in January 2017, ending its boycott dating back to 1984 after the Saharawi Arab Democratic Republic (SADR) had been admitted as a full member.

Combined, Morocco’s more diversified partnerships, its image of a reliable ally in countering radicalisation in North Africa and its role in limiting irregular migration to Europe, have provided Morocco with leverage vis-à-vis the EU, in part offsetting the country’s dependence on financial aid and market access.

The European Court of Auditors has commented on the suspension of political dialogue with Morocco in its 2019 Evaluation Report on EU Support to Morocco, blaming the EU Commission for not having used this standstill period to develop a clear strategy for its relations with Morocco.136 The EU’s relation with Morocco is important and preserving it is in the interest of both parties. But that preservation is being done at the expense of another people, with a legitimate right to self-determination that is severely hampered by the EU’s willingness to de facto bolster Morocco’s position in the conflict – even at the expense of the EU’s own legal order. The EU’s failure to abide by rulings of its own Court-system while it still has the upperhand in its relations with Morocco, could weaken the EU’s position in the long-run. Morocco will surely keep playing this card to its advantage.

At the same time, Saharawis are growing increasingly alienated due to the lack of a positive response to their peaceful resistance. For each truck that has left Western Sahara – many via the controversial Guerguerat crossing – Saharawis saw themselves deprived not only of their right to their own resources, but more fundamentally, of their right to self-determination. Over the years, the calls to resume armed conflict have increased within Saharawi society.137

In November 2020, increased tension led to the end of the ceasefire. As civilian Saharawis blocked the passage of goods in Guerguerat, interrupting the flow of trucks crossing from the occupied territory into Mauritania, Morocco launched a military intervention, severely violating the truce. The military operation was carried out “in the interest of Africa, Morocco” and Europe. Morocco’s Prime Minister stated.138

How did the EU respond to the intervention? “I salute Morocco’s attachment to the ceasefire. It is fundamental to guarantee free circulation of people and goods. Preserving political stability and the economic neighbourhood is primordial,” the EU Commissioner for Neighbourhood and Enlargement, Oliver Varhelyi, tweeted.139

The EEAS proceeded to relate to the crisis without making a single reference to the Saharawi people, their self-determination, international law, or approaching their UN recognised representa-tive.140 As if they do not even exist.

The question is whether the EU, while still having leverage over Morocco, is ever willing to help facilitate conditions that will increase the chances of a just and peaceful solution to the conflict in Western Sahara, rather than continuing to pay lip-service to the UN peace process and self-determination while in practice undermining both.
Recommendations

To the European Union:
- To immediately suspend the application of all EU agreements with Morocco in relation to Western Sahara (notably in the areas of fisheries and agriculture) and to engage in exploratory talks with the Polisario Front for the development of legally compliant trade ties with the territory;
- To adopt a strict EU policy of differentiation between the territories of Morocco and Western Sahara across the spectrum of EU dealings that ensures EU compliance with its legislation and jurisprudence regarding the separate and distinct status of Western Sahara and the required consent of the Saharawi people;
- To publicly acknowledge and to apply the law of occupation in accordance with the EU Guidelines on International Humanitarian Law in its dealings with the territory of Western Sahara;
- To include a territorial clause in all EU agreements with Morocco, explicitly excluding Western Sahara; to adopt a legal definition of the “territory of Morocco” in all EU legal acts in accordance with the case-law of the CJEU territorial scope in all EU legal acts;
- To suspend all current and planned funding from the EU and Member States that directly or indirectly contributes to strengthening Morocco’s policy of annexation and demographic engineering in the territory; to request from Morocco the reimbursement of all past and current funding unlawfully granted by the EU in relation to Western Sahara;
- To seize the EU Anti-Fraud Office (OLAF) in relation to unpaid customs duties by EU-based importers accrued from the unlawful application of the EU-Morocco Association agreement since 2000;
- To appoint an EU Special Representative for Western Sahara; to actively support the resumption of the UN-led conflict resolution efforts and to insist that the UN Mission (MINURSO) is granted a human rights mandate;
- To support Saharawi civil society organizations and human rights defenders in the occupied territories and in the refugee camps;
- To develop public diplomacy towards the Moroccan public to explain its policy towards Western Sahara.

To the European Commission and European External Action Service:
- To carry out a comprehensive mapping of EU relations with Morocco (including diplomatic ties, trade, technical assistance and cooperation development) in order to identify areas in which EU practices conflict with EU legislation and jurisprudence with regard to Western Sahara;
- To monitor Moroccan compliance with EU differentiation requirements in accordance with the European Commission’s duty, as the Guardian of EU treaties, to monitor the proper implementation of EU law;
- To exclude the certification of origin by the Moroccan body ONSSA within its authorized lists of any establishment that is located outside of Morocco’s internationally recognised borders;
- To review and ensure compliance of the lists of approved establishments in Morocco and to exclude any establishment located in Western-Sahara from such lists;
- To exclude sanitary and food safety certificates issued by Moroccan authorities for products produced in Western Sahara;
- To allow establishments to export from the territory of Western Sahara only if the Polisario Front has agreed to it on behalf of the Saharawi people;
- To apply third country duties to imports from Western Sahara into the EU and adjust the TARIC system accordingly;
- To instruct the national authorities in EU Member States to verify the origin of products imported from Morocco, and - if in reality originating in Western Sahara - deny entrance in these cases of false origin declarations.

To the Moroccan authorities:
- To immediately suspend the application of all agreements concluded with the EU in relation to Western Sahara;
- To repatriate all national institutions and agencies, including certification bodies such as the ONSSA office, established in Western Sahara;
- To comply with international human rights and international humanitarian law in relation to Western Sahara;
- To seek the authorization of the Polisario Front in order to ensure the respect of the consent of the Saharawi people in relation to any dealings with the territory and its natural resources.

To the Governments of EU states allowing imports from occupied Western Sahara, particularly the Netherlands, Germany, France and Spain:
- To advise its nationally registered and operating companies to stop importing products from Western Sahara and to seek alternative suppliers;
- To request the Commission to ensure that all its policy dealings with Western Sahara are compliant with EU legislation and jurisprudence, notably with regard to the DG SANTE lists in order to exclude Western Sahara establishments from Morocco’s list.

To the Government of Bremen:
- To adhere to its stated commitment to the people of Western Sahara and within its sphere of influence push the German federal government to initiate the needed measures in the EU in order to ban imports of goods from Western Sahara, without the consent of the Saharawi people, until the realisation of self-determination has been achieved.

To importing companies:
- To immediately end all purchasing of products exported from occupied Western Sahara without the consent of the Saharawi people.

To customers of importers of Western Sahara products:
- To immediately stop purchases of products exported from occupied Western Sahara without the consent of the Saharawi people.

To the African Commission on Human and Peoples’ Rights and the Protocol establishing the African Court on Human and Peoples’ rights:
- To facilitate the fact-finding mission by the African Commission on Human and Peoples’ Rights on the human rights situation in Western Sahara, in line with decisions of the Assembly of Heads of State and government of the African Union.
- To engage in UN-led peace talks with the Polisario Front, with a view to realizing the exercise of self-determination in Western Sahara through which the people of the territory can freely choose the status of the land from all available options, including independence.

40. Royaume du Maroc, ONSSA, Produits de la pêche et de l’aquaculture, website https://www.onssasportsaliments.ma. The office in El Aaiún also has an antenna in Dakhla, the southernmost city in Western Sahara. #WSRW.org, 21.12.2016, EU Court protects Western Sahara from EU-Morocco trade deal, https://www.wsrw.org/a243x3436


42. WSRW.org, 01.02.2018, EU has sealed Western Sahara trade deal in violation of Court Judgment, https://www.wsrw.org/a249x4060

43. European Commission, Non-EU Countries Authorized Establishments, https://ec.europa.eu/food/stayalert/international/authorisedestablishments/non_eu_countries_en


46. DG SANTE, 03.10.2020, Morocco - Fishery Products. List in force.


50. Royaume du Maroc, ONSSA, Produits de la pêche et de l’aquaculture, website https://www.onssasportsaliments.ma. The office in El Aaiún also has an antenna in Dakhla, the southernmost city in Western Sahara. #WSRW.org, 21.12.2016, EU Court protects Western Sahara from EU-Morocco trade deal, https://www.wsrw.org/a243x3436


“The Court’s conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.”

International Court of Justice, 16 Oct 1975