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Western Sahara, Morocco, and the EU: How good law makes good politics

The EU's highest court has again backed Western Sahara self-determination. It is now time for the EU's political institutions to bring their policy into line with the law – for the benefit of regional peace.



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[Commentary](#) 30 September 2021 5 minute read



Fishermen in El Marsa port, Laayoune, Western Sahara

The European Court of Justice (CJEU) has once again demonstrated that the European Union remains a community built on the rule of law. For the fifth time, it has rejected efforts by the Council of the EU and the European Commission – which are jointly responsible for the EU's trade relations – to extend the provisions of the EU-Morocco [agricultural](#) and [fishery](#) agreements to the territory of Western Sahara.

The two rulings in favour of Polisario, as the representative of the people of Western Sahara, will have far-ranging implications for the EU's relations with Morocco, and shape its involvement in the broader conflict between Morocco and Polisario.

As a result of the Court's ruling, EU fishermen will no longer be allowed to operate within Western Saharan waters under Moroccan permits, while Moroccan agricultural exports originating from the territory will be excluded from preferential EU tariffs. EU importers and fishing operators who disregard these rulings will find themselves in a dangerous legal position outside the EU's regulatory framework. And, indeed, Polisario's lawyer has already warned of his [determination](#) to enforce EU law against wayward businesses.

More generally, the rulings have reaffirmed the EU's nascent [differentiation policy](#) – whereby it is legally obligated to exclude the territory of Western Sahara from its agreements with Morocco. This is based on two core determinations. The first is Western Sahara's status as a territory that is “separate and distinct” from Morocco (and the EU's concomitant duty of non-recognition of Moroccan sovereignty over the territory). The second is the need to obtain the consent of the people of Western Sahara when entering into agreements relating to their territory. The effect of these twin legal requirements will reach beyond agricultural exports and fishery access, paralleling to some extent the development of [measures](#) by the EU to exclude Palestinian territory from its relations with Israel.

This is far from a flash in the pan. In 2018, the CJEU [ruled](#) that the EU's aviation agreement with Morocco did not cover Western Sahara, leaving EU carriers (which continue to operate flights to the territory) in a regulatory vacuum. Even the European Commission appears to be getting the hint. Last year it excluded the territory from a [proposed](#) Interbus agreement (regulating coach traffic) with Morocco. With time, this differentiation policy will inexorably affect other aspects of the EU's relations with Morocco – from funding programmes to research and development projects. In addition, the Court's decision may influence the outcome of a separate, but similar, civil society [challenge](#) against the United Kingdom's new post-Brexit partnership agreement with Morocco.

This legal ‘butterfly effect’ poses a significant challenge for Morocco. Its hardline stance on including Western Sahara in its bilateral agreements is partly motivated by financial interests: Moroccan businesses, many of which are reportedly [tied](#) to the king and his associates, have profited from Western Sahara and its inclusion in trade relations with the EU. But there is also a large dose of ideology since this provides a means of legitimising Moroccan [occupation](#) of the territory.

But Moroccan positions will increasingly conflict with EU legal constraints as enforced by the CJEU. With Brussels' hands tied by the Court, Rabat will either have to accept the EU's terms or risk losing access to new and existing agreements. When it came to the EU's Interbus agreement, the Moroccan government was able to put ideology first without losing too much. But those

costs could rapidly escalate when EU funding and cooperation agreements are put on the line.

The Council must now cut its losses, drawing confidence from the EU's proven ability to remain relatively united and withstand Morocco's efforts to "weaponise migration."

Morocco's loss is of course Polisario's gain. Sustained efforts by the Commission and Council to suppress Sahrawi self-determination have detrimentally [impacted](#) on the prospects for resolving the Western Sahara conflict, by amplifying the negative power dynamics that led to the failure of past peace-making attempts. This week's rulings may gradually start to reverse this.

The Court has also strengthened Polisario's international standing, by reaffirming its status as the international legal representative of the territory of Western Sahara and its people – something that Morocco, the Commission, and Council have strenuously argued against. As the Court emphasised, Polisario's authority is confined not just to its participation in the dead-ended UN-led peace process, but also to the exploitation of Western Saharan natural resources. This has provided Polisario with an important boost following last year's proclamation by US president Donald Trump of Moroccan sovereignty over Western Sahara. (A declaration that incidentally proved irrelevant to the Court's deliberations).

The EU has subordinated its Western Sahara policy (and Sahrawi self-determination) to its desire to develop and maintain close bilateral relations with Morocco. This was on display in the [joint declaration](#) issued by the European External Action Service in the name of the EU's high representative for foreign affairs Josep Borrell and Moroccan foreign minister Nasser Bourita, only minutes after the Court's ruling, pledging strengthened cooperation in "a climate of serenity". This effort to placate Rabat reflects how reliant on Morocco the EU feels vis-à-vis its core interests, namely counter-terrorism cooperation, migration control, and [gas transit](#) from Algeria. The Moroccan government has in turn willingly leveraged these interests to deter the EU and its member states from adopting positions seen to be overly sympathetic to Polisario or undermining Moroccan claims to the territory.

But by viewing the issue of Western Sahara exclusively through the lens of its relations with Morocco, the Council now finds itself caught between its political desires and legal obligations, with no realistic way forward. As the Court indicated, the only legal basis for EU relations with Western Sahara is to obtain the consent of the Western Sahara people as represented by Polisario. While legally straightforward, EU and member state officials have continuously ruled out such a possibility given the deep anger this would provoke in Rabat. Despite running out of legal arguments, the Council may still appeal the rulings – at the

behest of France and Spain which (together with a Moroccan agricultural organisation) joined the legal proceedings to defend the past agreements. At most this will earn them a year's reprieve before once again having to face the inescapable logic of EU laws, and ensuing Moroccan anger.

Rather than continuing to work hand in hand with Morocco to delay the inevitable, the Council would do well to confront reality, no matter how bruising. After having repeatedly backed Rabat in public, at the expense of the EU's commitment to international law, the Council must now cut its losses. This will no doubt risk a renewed crisis. But it should draw confidence from the EU's proven ability to remain relatively united and withstand Morocco's efforts to "[weaponise migration](#)" – as it did in May when it encouraged thousands of migrants to enter the Spanish city of Ceuta on the North African coast. While the EU has a clear interest in maintaining close relations, it must not accept continued Moroccan "[blackmail](#)".

Above all, the Council should appreciate the political good that can come from the correct implementation of EU laws. Beyond defending the integrity of the EU's legal order, the Court has provided a means of rebalancing relations with Morocco, and given the Council a perfect alibi: it has no choice but to respect the Court's decisions. As the stronger party, the EU stands to lose far less from any disruption of relations over the longer term – especially at a time in which the kingdom's socio-economic situation remains fragile.

As the latest episode again reveals, an unresolved conflict in Western Sahara will continue to impact on European interests, in particular bilateral cooperation with Morocco. Ignoring the elephant in the room is no longer an option. As the Court has made clear, there can be no separating the EU's relations with Western Sahara and Morocco from the broader conflict. Resolving it is therefore in the EU's interest.

Rather than trying yet again to suppress Sahrawi self-determination and challenge CJEU rulings, the Council should seize on the anticipated appointment of veteran EU diplomat Staffan de Mistura as the United Nations' new envoy to Western Sahara to relaunch a [credible UN-led peace process](#). Along the way, the EU may find that this week's ruling – combining the EU's normative and trade powers – gives it some valuable leverage to help push and prod the parties towards a future agreement based on the concept of [free association](#) (a solution [flagged](#) by the Court). This would fulfil Sahrawi self-determination through power sharing with Morocco in line with international law, finally providing a sound legal and political basis for trade with Western Sahara.

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