



Europaudvalget

Til: Udvalgets medlemmer

Dato: 19. januar 2012

Henvendelse fra Afrika Kontakt om en ny protokol til fiskeripartner- skabsaftalen mellem EU og Marokko

Europaudvalget har modtaget vedlagte henvendelse og bilag af 17. januar 2012 fra Afrika Kontakt til brug for mødet i udvalget den 20. januar 2012.

Med venlig hilsen

Maria Louise Bjørn Bøtker,
udvalgsassistent

17. januar 2012

Kære medlemmer af Europaudvalget

Jeg vedhæfter et brev fra Afrika Kontakt, samt et baggrundsnotat, som i dag er sendt til Ministeren for Fødevarer, Landbrug og Fiskeri, Mette Gjerskov. Brevet omhandler punkt 2 på udvalgets møde den 20.1. hvor EU-Kommissionen udbeder sig et nyt mandat for at kunne forhandle en ny fiskeripartnerskabsaftale med Marokko. Dette set i lyset af EU-Parlamentets afvisning af den sidste aftale.

Det er vores opfattelse, af EU-Kommissionens udkast til mandat ikke imødekommer den kritik som der fremkom fra bl.a. et bredt flertal i Folketinget i forbindelse med fornyelsen af den et-årige fiskeriaftale med Marokko.

En kommende fiskeripartnerskabsaftale med Marokko, og dermed også EU-Kommissionens mandat, skal ikke omfatte det af Marokko ulovligt besatte Vestsahara.

Hvis dette er tilfældet er det efter vores og mange andres mening, i strid med international lov. Eftersom at hverken EU eller Danmark, anerkender Marokkos besættelse af Vestsahara, bør der ikke være et problem i at udelade Vestsahara fra mandatet eller fra en kommende aftale. Løsningen er altså ikke at skrive Vestsahara ind i mandatet, selv om det er prisværdigt at EU-Kommissionen anerkender den kritik der er fremkommet.

Desuden er der vedhæftet et brev fra Western Sahara Resource Watch, der er et EU netværk med fokus på udnyttelsen af naturinteresser i det besatte Vestsahara.

Vedhæftet er også et notat af 8 fremtrædende svenske jurister, og omhandler illegaliteten af en fiskeriaftale med Marokko, der omfatter det besatte Vestsahara.

Skulle udvalget have spørgsmål i denne forbindelse står vi gerne til jeres rådighed.

Med venlig hilsen
Morten Nielsen
Afrika Kontakt



Brussels, 17 January 2012

To the attention of Ms Mette Gjerskov
Minister for Food, Agriculture and Fisheries of Denmark

Dear Ms Gjerskov,

Western Sahara Resource Watch is writing you regarding the European Commission's proposal for a mandate to negotiate a new protocol to the Fisheries Partnership Agreement (FPA) between the European Union and the Kingdom of Morocco.

It is our understanding that the fishing zones covered by the envisioned new protocol will include the waters off occupied Western Sahara. The text of the sought mandate stresses that with regard to the implementation of the FPA, Morocco must adhere to international law and must report to a much higher extent on the social and economic gains stemming from the use of EU-funding, including the geographic distribution thereof. This is, no doubt, an improvement on the previous mandate of 2011. Furthermore, we consider it a positive development that the Commission now explicitly distinguishes between Morocco and the occupied Western Saharan territories.

However, we still feel that the proposed mandate does not go far enough in terms of incorporating the critique given by the European Parliament's rejection of the one-year extension in December 2011.

As long as the people of Western Sahara have not been consulted on and have consented to the sale of their resources to Moroccan or other national or supra-national entities, the FPA will continue to conflict with international law. The illegality of such economic activities has been documented by numerous legal opinions (one of which we have attached for your ease of reference).

Amongst other things, this has led the former Danish government, supported by the current government, to vote against granting the Commission a mandate for negotiations in February 2011. Denmark also voted against the extension of the protocol in the Council, in July 2011. We strongly encourage you to remain firm on this stance. In our opinion, excluding the waters adjacent to Western Sahara from the geographical scope of a protocol to the FPA with Morocco, is the only way of ensuring that the EU and its individual member states bear no direct responsibility for the exploitation and plunder of Western Sahara's resources, which, according to the internationally recognized representatives of the Saharawi people, the Frente Polisario, is happening against their wishes.

Since neither Denmark nor the EU recognizes Morocco's occupation and administration of Western Sahara, we do not see any problems in excluding the Western Sahara's waters from the new protocol.

Denmark has been one of the few member states that have played an admirable role in questioning and ultimately stopping the EU's duplicitous stance on this issue. We therefore hope you will continue to do so. We are convinced that this will send a strong signal that the current holder of the EU-presidency *truthfully* values human rights, democracy and freedom above other lesser concerns.

On behalf of all the members of Western Sahara Resource Watch,

Sincerely,

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Western Sahara Resource Watch is an international organisation working in solidarity with the Saharawi people. We advance their right to self-determination, protect their natural resources and promote their human rights.



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København den 17. januar 2012

Kære Mette Gjerskov,

Jeg skriver til dig i forbindelse med Fødevarerministeriets notat til §5 udvalget (fiskeri), vedr. et nyt mandat til en ny protokol til en fiskeripartnerskabsaftale mellem Det Europæiske Fællesskab og Kongeriget Marokko.

Afrika Kontakt mener at flere elementer i notatet er uklare, og vi håber, at du som minister, kan afklare for os.

Det fremgår ikke særligt klart af notatet, om EU-Kommissionen forsat mener, at de kan indgå en fiskeripartnerskabsaftale, der omfatter det af Marokko besatte Vestsahara.

I notatet står, at Kommissionen bl.a. har følgende forhandlingsmål for en ny aftale:
"Der skal inkluderes en bestemmelse, som forudser yderligere forsikringer fra Marokko om, at Marokko opfylder sine forpligtelser under international lov som følge af Marokkos de facto administration af Vestsahara, i relation til implementeringen af fiskeripartnerskabsaftalen. Særligt skal Marokko jævnligt rapportere om de økonomiske og sociale virkninger af sektorstøtten i henhold til fiskeriprotokollen, herunder den geografiske fordeling heraf. Hvis dette ikke skønnes vellykket vil Kommissionen overveje andre muligheder, som har til hensigt at sikre fuld overensstemmelse med international lov."

Vi mener ikke, at ovenstående mål reelt imødekommer den kritik som EU Parlamentet fremførte i forbindelse med deres behandling af den et årlige aftale, og dermed også deres afvisning af denne, som i strid med folkeretten.

Utallige rapporter (bl.a. fra EU's jurister) viser, at EU's fiskeriaftale, som den har været frem til nu, bryder med folkeretten og international lov. Det var bl.a. også grunden til, at den tidligere regering, støttet af den nuværende regering, valgte at stemme nej i Rådet. Vi mener ikke at udkastet til mandat ændre på dette.

Vi skal derfor kraftigt opfordre dig til at stå fast på, at de af Marokko besatte områder af Vestsahara (og dertilhørende farvande) ikke kan være en del af et forhandlingsmål for EU, men fra starten skal udelades af mandatet. Efter vores opfattelse er det den eneste måde, at man kan sikre sig, at EU ikke bidrager til udnyttelsen af Vestsaharas naturressurser, herunder også de rige fiskebestande ud for Vestsahara.

Afrika Kontakt arbejder i solidaritet med folkelige bevægelser i Afrika og støtter disse bevægelser mobilisering og kamp for at sikre sig økonomiske, demokratiske og sociale rettigheder.

Afrika Kontakt arbejder for en ændring af politiske magtforhold og fordeling af samfundets ressourcer, for derved at bidrage til en ny og mere retfærdig global udvikling, der gavner Afrikas befolkninger.

Hvis ikke den danske regering, og det som formandsland, tager dette op overfor Kommissionen, risikere Danmark at blive medansvarlig for røveriet af det besatte områdets ressourcer.

Hverken EU eller Danmark anerkender Marokkos besættelse eller administration af det besatte Vestsahara. Der er derfor heller ikke problemer ved at udelade disse områder fra en kommende fiskeriaftale.

Der står i dit notat til Folketingets Europa udvalg at du vil arbejde for:

"Krav til overholdelse af menneskerettigheder og demokratisk udvikling, herunder fremme af opbygning af høringsprocesser"

Vi vil gerne høre nærmere om hvilke tanker du har i den forbindelse, og om du kan nævne konkrete krav EU bør stille.

Vi skal i den forbindelse gøre opmærksom på at Marokko er et kongerige, hvor respekten for demokratiske rettigheder og menneskerettigheder er begrænset. Som en marokkansk menneskerettighedsaktivist fortalte for en uge tid siden i DR' Deadline: *10% af magten er i parlamentet. 90% er hos kongen. Marokko er de facto et enevælde.*

At fiskeriaftalen tilsyneladende er en meget dårlig forretning for EU's medlemslande, skal vi ikke blande os i. Men at EU Kommissionen ønsker at forsætte med at betale overpris for at 116 af EU' indstifiskere kan rovfiske i det besatte Vestsaharas farvande, drejer sig ikke om penge, men om respekten for basale menneskerettigheder.

Afrika Kontakt mener at Kommissionens udkast til forhandlingsgrundlag ikke kun er svagt i forhold til en bæredygtig udnyttelse af fiskeresurserne i området, men at udkastet i forhold til Vestsahara spørgsmålet, er i direkte strid med international lov.

Du har både som politiker i opposition og som minister vist stor forståelse for Vestsahara spørgsmålet. Vi håber, at dette brev vil være med til at fastholde din position.

Vi vedlægger et notat fra en gruppe svenske jurister, der påpeger illegaliteten af EU's fiskeriaftale med Marokko.

Vi ser frem til dit svar på ovenstående.

Med venlig hilsen



Morten Nielsen
Afrika Kontakt

Western Sahara and the EU-Morocco Fisheries Partnership Agreement (FPA)

1 Conclusion

- A renewed FPA may make the EU and its member states liable for a violation of international law, namely as a recognition of and assistance to serious breaches of international law by Morocco.
- An FPA with Morocco that covers waters outside WS **must** conform with the following conditions:
 - The agreement should make clear that it does not cover WS as a part of the territory of Morocco
 - The agreement must be in accordance with the wishes and interests of the people of WS
- A negotiating mandate for the Commission – including a mandate for a short extension of the protocol to the FPA – should include the conditions related above and **must** – as an absolute minimum -- include a clause providing that the agreement shall be in conformity with international law.
- Before any new negotiations are undertaken, the Government of Morocco should provide an answer **in public** to the **two** question how the FPA has benefitted the people of WS **and** if it is according to the wishes of that people.

2 Legal analysis

2.1 *The legal status of Western Sahara*

In 1963 Western Sahara was listed as non-self-governing territory by the United Nations. In 1966 the United Nations General Assembly adopted its first resolution on the territory, urging Spain to organize, as soon as possible, a referendum under UN supervision on the territory's right to exercise its right to self-determination. In 1975, the ICJ rendered an advisory opinion on the Western Sahara question, concluding by 14 votes to two, that while there had been pre-colonial ties between the territory of Western Sahara and Morocco, these ties did not imply sovereignty. "Thus the Court has not found legal ties of such a nature as might affect the application of 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."² Shortly thereafter, on 6 November, Morocco occupied and later annexed Western Sahara, through the famous "Green march". The same day, the UN Security Council, in Resolution 380, called upon Morocco "immediately to withdraw ... all the participants in the march." Shortly thereafter, Morocco, Mauritania and the colonial power, Spain, entered into an agreement which in convoluted terms transferred the administration of the territory to Morocco and Mauritania. The agreement did not, however, transfer sovereignty explicitly. (Mauritania later rescinded and left the whole territory to Morocco.)

Western Sahara is not a part of Morocco and Morocco has no legal title or claim on the territory. The people of Western Sahara (the Saharawis) have a right to self-determination, which can be fulfilled by the creation of a fully sovereign state, if they so choose. The Moroccan occupation and annexation of the territory is a serious breach of International Law. Morocco has an obligation to respect the right of the people of Western Sahara to self-determination and to end its illegal annexation and occupation of Western Sahara.

2.2 *Use of natural resources*

Since Morocco has no legal right to govern the territory, she has no legal title to the natural resources of Western Sahara. Consequently, Morocco has no right as a sovereign to dispose of such natural resources for her own purposes. Furthermore, any agreement that Morocco enters into with other countries cannot cover

¹ UN General Assembly, 1966, Resolution 2229 (XXI).

² ICJ Reports, 1975, p. 68, para. 162.

Western Sahara as a part of Morocco.

Since the annexation is illegal it is null and void and Morocco is therefore an occupying power. The basic principles of belligerent occupation are: the occupying power may not change the legal and political framework; it should proceed from the premise that the occupation is temporary and that the occupying power may not introduce permanent changes into the occupied territory. Furthermore, Western Sahara is a non-self-governing territory, and its people has a right to permanent sovereignty over its natural resources and the right to “freely dispose of their natural wealth and resources”, as provided in Article 1(2) of the two UN Covenants on Human Rights.

Nevertheless, Morocco may under some circumstances use the natural resources of the territory. Under the law of occupation, as set out in the IV Hague Convention on Land Warfare, Morocco has a responsibility to uphold order as well as the “vie publique” -- public life and welfare. This means that Morocco must offer basic public goods to the population of Western Sahara, which entails that there must be income to pay for these goods. Consequently, Morocco may make arrangements with regard to the resources of Western Sahara, provided that they benefit the Western Sahara people. This would be particularly appropriate with regard to renewable resources, like reasonable fishing. The principle of self-determination further requires that the people of Western Sahara should be able to influence how this is done.

The rules governing the administration of non-self-governing territories point in the same direction, as provided for in Article 73 of the UN Charter and as developed in a legal opinion by the then UN Legal Counsel, Hans Corell, in 2002.³ The opinion concluded, with regard to oil exploration, that if “further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories.” Corell has later, in a presentation in Pretoria, confirmed that in his view this applies also to fishing.⁴

This entails the following consequences:

- Morocco may not dispose of the resources of Western Sahara for her own good.
- Any agreement entered into by Morocco in her own name does not cover Western Sahara, since Western Sahara is not a part of Morocco.
- Morocco may enter into agreements regarding the use of natural resources as an occupying or de facto administering power with regard to the territory of Western Sahara.
- Any such agreement must be for the benefit of the people of Western Sahara *and* according to the wishes of that people.

2.3 The Fisheries Partnership Agreement (FPA)

On 22 May 2006, the EU adopted the FPA with Morocco with one negative vote (Sweden) and one abstention (Finland). During the course of the negotiations, serious concerns with regard to Western Sahara had been voiced also by Denmark, Ireland and the Netherlands. The FPA entered into force on 28 February but the relevant protocol to the FPA will expire on 27 February 2011. While the FPA does not say so explicitly, it was meant to cover, and has indeed covered, also the waters outside of Western Sahara, which provide an important part of the total fisheries allocated to the EU (mostly Spanish ships).

The Commissioner responsible for Fisheries, Maria Damanaki, has allegedly stated that a new FPA should exclude Western Sahara. The Commission has asked Morocco for a statement of how the FPA has benefitted “the local population”, and a reply has been provided on 13 December, 2010, but has not been made public. Given the urgency of the matter before the expiry of the present agreement, the Commission has proposed a one-year renewal from 28 February to give room for further discussions between the EU and Morocco on a more permanent arrangement. In late 2009, the legal service of the European Parliament provided an opinion about the FPA and Western Sahara. The legal service found that “compliance with international law requires that economic activities related to the natural resources of a Non-Self-Governing Territory are carried out for the benefits of the people of such Territory, and in accordance with their wishes.” Further, “[i]n the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resources, principles which the Community is bound to respect, the Community should refrain from

³ UN Doc S/2002/161.

⁴ <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>

allowing vessels to fish in the waters off Western Sahara by requesting fisheries licences only for fishing zones that are situated in the waters off Morocco”.

The legal service of the European Parliament has analysed the situation correctly. By contrast, it should be noted that the Commission, while purporting to proceed from Hans Corell's opinion, have distorted his conclusions. Whereas Corell rightly pointed at "the interests and wishes of the people of Western Sahara", the Commission has restricted itself to ask whether the FPA has been to the benefit of the local population.⁵ Hence, the Commission has omitted the reference to the “wishes” of the people. Further, and equally serious, while the Commission should have asked about the relation between the FPA and the “people” of Western Sahara, they have instead asked about how the FPA affects “the local population”, which consists mainly of Moroccan settlers, who have been transferred into occupied territory in violation of Article 49 of the IV Geneva Convention of 1949.

2.4 Duties of the EU and its member states

In case of an illegal situation, third states have the following duties, as summed up by the ICJ regarding the wall (or barrier) in Occupied Palestinian Territory:

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁶

These principles apply to the current situation as well, meaning that the EU and its member states shall not recognise the annexation of Western Sahara and that they shall not assist in the continued occupation and annexation. Further, they should cooperate to bring an end to the illegal situation. Hence, it is illegal to enter into an agreement with Morocco, which explicitly or implicitly recognises the annexation of Western Sahara; any such agreement that covers Western Sahara would have to clarify that the territory is not under Moroccan sovereignty. Further, any such agreement should not strengthen the Moroccan occupation, and should hence not support measures that strengthen Moroccan control or that facilitate Morocco's transfer of settlers into the territory.

It should be pointed out in this context that this Moroccan responsibility is in addition to liability that individual Moroccan officials bear for acts in Western Sahara, which entail individual criminal responsibility, including aggression, war crimes and possibly also crimes against humanity. Such liability may attach also to individuals in third countries that assist or in other ways take part in those crimes.

16 February, 2011

Ove Bring, professor emeritus of international law (National Defence College, Stockholm University, Uppsala University)

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⁵ See Recommendation from the Commission to the Council 11.2.2011, SEC(2011) 170 final, and see further Hans Corell's dismay expressed in his Pretoria address, cited above.

⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, paragraph 163