



## Is the EU-Morocco fishing agreement an attempt by Spain to legalise Moroccan occupation of the Western Sahara?

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Is Morocco the Western Sahara 'administering power' according to United Nations or is it instead an occupying power? The answer, far from being purely theoretical, has serious practical, political and economic consequences. The most immediate would affect nothing less than the possibility of brokering a fishing agreement on Sahrawi waters. The ratification of the fishing agreement signed on July 2005 by European Commission and Morocco is still on process and might result seriously affected by this answer.

### **I. The government of Spain misleads the EU regarding the Moroccan status in the Western Sahara**

Rodríguez Zapatero's government has *radically* changed Spanish position on the matter of the Western Sahara. After Franco's death no

Spanish government had qualified Morocco as Western Sahara 'administering power'. However, high representative officials of the Spanish government have repeatedly insisted that Morocco is the colony's 'administering power'. Spanish foreign affairs minister Miguel Ángel Moratinos uttered as many as *four* times on June 2005 that the Madrid Agreement (the very last act of the Francoist government) "gave Morocco its quality as administering power recognised by United Nations". These were on 22 June in the Senate, on 27 June in the Tele 5 channel program 'La Mirada Crítica', on 29 June in the Spanish Congress and on 7 August in the city of Asilah (Morocco). In turn, Agustín Santos, Executive Assessor for Parliamentary Matters at the Ministry of Foreign Affairs alluded to the "Moroccan authorities, as the

Western Sahara *administering power*". He addressed a letter to the spokespersons of the Asturias pro-Western Sahara parliamentary group as regards their visit to Laayoun.

These statements have been made by a government that confessed to have propelled a new fishing agreement between EU and Morocco. This fishing agreement, in which the European Commission admits the inclusion of Western Sahara waters, was signed a few weeks after Minister Moratinos' statements. Obviously, the European Commission has signed this agreement after having been induced to believe that Morocco definitively is the territory's administering power.

¿Is this really so? In my opinion it clearly is not and I would personally be glad to invite Spanish foreign affairs Minister or any one of his assessor to a public debate on the issue. Hence, after clarifying the notion of 'administering power' I would like to put forward the following issues: firstly, that the quality of 'administering power' for the Western Sahara has only been recognised to Spain; secondly, that the 1975 Madrid Agreement did not transfer this quality to Morocco; thirdly, that the UN has not recognised this quality to Morocco but, in contrast, it has been qualified as occupying power; and fourthly, that precisely because of this, the EU cannot sign any fishing agreements with Morocco that includes the Western Sahara waters.

## II. The notion of 'administering Power' in International Law

The United Nations Charter refers, in several articles, to the colonial powers that hold colonies. In the English version, colonial powers under the especial regime of the Trusteeship Council are called '*administering authority*', in the French version '*autorité chargé de l'administration*' (articles 84, 87 and 88 of the United Nations Chart). There is no any other *specific denomination* for colonial powers apart from the previous ones[M1].

Nonetheless, in the UN resolutions a concept has been introduced to refer to that type of colonial power, that of 'administering Power' or '*puissance administrante*' in its French version. Thus, in the case of the Western Sahara, the resolutions that alluded to Spain as 'administering power' (from resolution 2072 onwards allude to the 'administering Power' or '*puissance administrante*').

The status of 'administering power' entails important juridical consequences. On the one hand, an administering Power is enabled to rule over the colonial territory (i.e. on economic matters). On the other hand, however, this 'administering power' status also entails 'responsibilities' and 'obligations'. The article 73 of the United Nations Charter gives details on these obligations. In any case, the most important obligation is that of decolonising the territory.

### III. Spain, Western Sahara administering Power

Spain began its last continuous presence in the Western Sahara in 1884. A few years after its admission in the UN Spain began to consider officially the Western Sahara as a 'Non-Self-Governing Territory', that is, as a colony. Therefore, it was accountable for a decolonisation process in accordance with the United Nations Charter. UN specifically recognised Spain as the Western Sahara 'administering Power'. The first UN general Assembly resolution that qualified Spain as Western Sahara 'administering Power' (*puissance administrante*) was resolution 2072, on 17 December 1965. This resolution, in its dispositive section, paragraph 2, literally states that

"[The General Assembly] *Urgently requests* the Government of Spain, as the administering Power, to take immediately all necessary measures for the liberation of the Territories of Ifni and Spanish Sahara from colonial domination"

This quality of Spain as Western Sahara 'administering Power' was reiterated by several General Assembly subsequent resolutions: resolutions 2229 (20 December 1966), 2354 (19 December 1967), 2428 (27 December 1968), 2591 (16 December 1969), 2711 (14 December 1970), 2983 (14 December 1972) and 3162 (14 December 1973).

**First conclusion:** Spain was the administering Power when Western Sahara decolonisation process was initiated.

### IV. The Madrid accord did not transfer the quality of 'administering Power' to Morocco

On 14 November 1975, six days after Franco's death, Spain signed an agreement with Morocco and Mauritania. This agreement consisted of a 'political declaration' transmitted to the UN and some secret annexes. The 'Declaration of principles between Spain, Morocco and Mauritania on the Western Sahara' (official name of what was to be commonly known as the 'Madrid Agreement') says in its two first paragraphs:

"1. Spain confirms its resolve, repeatedly stated in the United Nations, to decolonize the Territory of Western Sahara by terminating the responsibilities and powers which it possesses over that Territory as administering Power.

2. In conformity with the aforementioned determination and in accordance with the negotiations advocated by the United Nations with the affected parties, Spain will proceed forthwith to institute a temporary administration in the Territory, in which Morocco and Mauritania will participate in collaboration with the Djemaa and to which will be transferred all the responsibilities and powers referred to in the preceding paragraph. It is accordingly agreed that two Deputy Governors nominated by Morocco and Mauritania shall be appointed to assist the Governor-General of the Territory in the performance of his functions. The termination of the Spanish presence in the Territory will be completed by February 28, 1976 at the latest.

It could be inferred from the previous paragraphs that Spain wanted to abandon its quality of 'administering Power'. Nevertheless, as we shall see, in Law, not everything that one wants is legally possible.

The '[Madrid Agreement](#)' is usually invoked by Morocco as the 'entitlement' of its presence in the Western Sahara. It was last mentioned in a letter (1) addressed to the UN General Secretary by the Moroccan Foreign Affairs Minister (Benaissa). However, a careful analysis of the 'Madrid Agreement' would reveal that it is highly questionable for different reasons.

Firstly, Spain 'responsibilities and powers' as 'administering Power' were not transferred to Morocco in that agreement, but to a tripartite entity "in which Morocco and Mauritania will participate" alongside Spain. Consequently, it is totally untrue to state that the Madrid Agreement gave Morocco any quality as 'administering power'. That quality was not given to Morocco but to a tripartite entity composed by Spain, Morocco and Mauritania.

Secondly, the tripartite administration assumed 'responsibilities' that corresponded to Spain. The most important of these responsibilities was to *decolonise* the territory through a self-determination referendum as demanded by UN General Assembly resolutions. Resolution 3458 B, 10 December 1975 reminded it. Since the 'tripartite administration' did not hold the self-determination referendum the Madrid Agreement failed its main tar-

get. Once the main target stated by its text is not fulfilled, the agreement can be regarded as invalid.

Thirdly, it would be appropriate to recollect that this 'tripartite administration' was *temporary*. Hence, by definition it was to finish at the very moment in which Spain would abandon the territory, that is, before 28 February 1976. Spain abandoned the territory two days before, on 26 February 1976. This only means that after 26 February 1976 the tripartite administration came to an end since one of the parties was absent. Moreover, the agreement did not preview to subrogate the two remaining parts the rights of the tripartite administration. The delegation of powers that Spain conceded to the tripartite Administration did not contemplate sub-delegations. Consequently, after 26 February 1976 the tripartite Administration ceased to exist and since administration was not sub-delegable, Morocco and Mauritania ceased as co-administrators of the territory. Morocco, after 26 February 1976 is neither "administering Power", nor could even be considered "co-administrator".

The juridical validity of the Madrid accord has been unanimously questioned by the juridical doctrine. Not only academics advocate its nullity, the UN under-Secretary General and Legal Counsel Hans Corell has also declared it. In its transcendental opinion of 29 January 2002 the UN legal advisor stated:

"The Madrid Agreement did not transfer sovereignty over the terri-

tory, nor did it confer upon any of the signatories the status of an administering Power - a status which Spain alone could not have unilaterally transferred" (section 6).

Furthermore, this opinion reminds that

"Morocco however, is not listed as the administering Power of the territory in the United Nations list of Non-Self-Governing Territories, and has, therefore, not transmitted information on the territory in accordance with Articles 73 (e) of the United Nations Charter" (section 7).

The article 73 compels the administering Power of a colony to transmit technical and statistical information to the UN.

**Second conclusion:** the 1975 Madrid Agreement has not transferred the quality of administering Power 'to Morocco'.

**Third conclusion:** the transference of the quality of 'administering power' to the tripartite entity was made for it to assume its 'powers' as well as its 'responsibilities'. The main responsibility of the tripartite entity composed by Morocco, Mauritania and Spain was to hold a self-determination referendum. It is a fact that the tripartite temporary administration did not carried out this responsibility.

## **V. United Nations have not considered Morocco as an 'administering Power' but as an 'occupying Power'**

UN General Assembly resolutions confirmed all former conclusions.

Once the Agreement was signed the resolutions continued considering Spain as the 'administering Power' and Morocco as the 'occupying Power' after checking that the temporary tripartite administration had not fulfilled its 'responsibilities' on the decolonisation of the territory.

UN General Assembly resolution 3458 B of 10 December 1975 'takes note' of the Madrid Agreement, but reminds the three parties (*interim administration/administration intérimaire*) that they should hold a referendum, as the unique way to justify that act.

Resolution 3458B admitted the Madrid Agreement only if it led to the self-determination of the territory. UN General Assembly also adopted resolution 3458A on the same date, previewing that this might not be the case. This resolution refers to "Spain, as the administering Power" (*puissance administrante*) on two occasions, in section 7 and 8 of its dispositive section.

Nonetheless, in case this is not enough, after the Madrid Agreement, UN General Assembly *has never used the expression 'administering Power'* referring to Morocco. In addition, it has identified its presence as an 'occupation', as a presence that lacks any juridical entitlement. The dispositive part of resolution 34/37 of 21 November 1979 gives Moroccan presence in the territory on three occasions the quality of 'occupation'. Resolution 35/19 of 11 December 1980 (paragraph 3 and 9 of its dispositive part) expresses in the same sense.

**Fourth conclusion:** the unique denomination of the Moroccan presence in the territory contained in the UN resolutions is that of 'occupying Power'.

## **VI. UN General Secretary reports do not consider either morocco as the territory 'administering Power'**

This juridical denomination apparently so clear appears questioned as a result of General Secretary report S/2000/1029 of 25 October 2000. For first time the GS referring to Morocco introduces the expression of 'administrative Power' (paragraph 30). Nevertheless, a careful analysis reveals that nothing has changed. This report does not alter the status that the General Assembly has given to Morocco. Furthermore, GS reports are neither a source of International Law nor a juridical instrument able to modify a resolution disposed by the General Assembly.

The only original version of the report is the English one and the expression used to refer to Morocco is that of 'administrative Power' (paragraph 30). That is to say, by mentioning 'administrative' instead of 'administering' care is being taken so as not to alter the denomination made by the General Assembly. Morocco is therefore not identified as 'administering Power' which is the term used in English to designate the legally considered entity on charge of administration, but as 'administrative Power'.

This denomination of 'administrative Power' is repeated in report S/2001/148 of 20 February 2001 (paragraph 2 and 22). The only

original version of this report is also the English one. The same happens in the report S/2001/398 of 24 April 2001 (paragraph 19).

From report S/2001/613 of 20 June 2001 onwards, the report on which Plan Baker I is presented, (paragraph 2 and 42) a small variation appears. On this occasion the two versions, English *and French*, are considered original. While in the English version nothing changes and morocco is still identified as 'administrative Power' in the French version it is identified as '*puissance administrante*'. This means that while in the English version a *different* expression is being used to designate 'administering Powers' ('administrative Power' instead of 'administering Power'), in the French version the same expression is used to refer to 'administrative powers' ('*puissance administrante*').

This discordance means something. Although in French the same expression is used, that is not the case in English. This means that, at least, it is not clear that morocco is the 'administering Power' of territory. Also, the fact that there is discordance between the English and French versions suggests that the identification of Morocco as 'administering Power' cannot be concluded since there is no concordance between the two original versions (French and English).

In case this is not enough, the Security Council resolution (S/RES/1359, of 29 June 2001) that studies this report does neither adopt nor welcome it and simply

says "having considered the report" ("*ayant examiné le rapport*"). As a result, the Security Council has not endorsed the assertions contained in the report (i.e. identification of Morocco as the 'administering Power'/'puissance administrative').

But if there were any doubts, soon they were cleared and there was a return to the starting point established by the report of 25 October 2000. The next report in which the Moroccan "administration" is alluded to is *report S/2002/178*, of 19 February 2002. But an essential change is produced here: the only original version of the report is the English one... and the expression used to refer to Morocco is again that of "*administrative Power*" (paragraphs 37 and 38). That is to say, Morocco is not described as "*administering Power*" which is the term used in English to designate the legally considered "administrator" of a Non-Self-Governing Territory.

The use of the expression ("administrative Power") to designate Morocco instead of "administering power" has necessarily a meaning. Which one? On the one hand, it alludes to the fact that Morocco has established a *de facto* power in the Western Sahara territory by means of an administration.... but, on the other hand, to suggest that that *de facto* power of administration has not been internationally endorsed. Thus, Morocco cannot technically be considered the Western Sahara 'administering Power'.

**Fifth conclusion:** morocco cannot be designated Western Sahara 'ad-

ministering power' by virtue of the UN General Secretary reports.

## VII. Morocco cannot negotiate over Western Sahara waters

The fishing agreement signed with Morocco on behalf of the EU by the European Commission on 28th July 2005 includes the waters of the Western Sahara. This is confirmed by the own words of the European chief negotiator:

"For his part, the European chief negotiator, César Deben, confirmed that the agreement includes the Western Sahara waters, not because the Commission considers them to be Moroccan, but because 'they are under Moroccan administration', according to the 1975 agreement between Spain and Morocco." (2)

As we can infer from the chief negotiator words, the Commission has proceeded with the signing of the agreement under a premise which, according to previous conclusions, is completely false. This premise states that the waters of the Western Sahara "are under Moroccan administration", according to the 1975 agreement between Spain and Morocco. As it has already been said, neither the agreement of 1975 is "between Spain and Morocco" since it was also signed with Mauritania, nor did that agreement transferred the "administration" to Morocco.

If this is true, Morocco cannot, under any circumstances, negotiate over the waters of the Western Sahara since its presence in this territory lacks any juridical entitlement. But if Morocco cannot negotiate on

the Western Sahara because it is not the territory administering Power, neither can the EU do it by virtue of its constituent Treaty. In fact, on the one hand, one of the principles of the EU is the "Rule of Law" (Preamble and article 6 of the Treaty on European Union) that forces the EU to not disregard the juridical status that the UN attributes to Morocco in the Western Sahara. But, also, on the other hand, the EU in its foreign policy takes on the duty "to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principle of the United Nations Charter (art. 11.1 of the Treaty). One of these principles, as everyone knows, is that of self-determination.

Taking this premise into account, it does not make sense to speak about the contingency of including a clause that forces Morocco to foresee "a compensation to the Sahrawi people" for the use of their territorial waters. Indeed, the possibility of compensating the Sahrawi people for the use of their territorial waters is only possible in so far as this compensation presupposes an agreement signed by the "administering Power" of the territory.

This kind of compensation seems to be based in article 73 of the United Nations Charter which states that:

"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle

that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories."

However, article 73 talks about the 'administering Powers' of the non-self-governing territories. But, Morocco happens to not to be the administering Power of the Western Sahara, and in fact, it never fulfilled the obligation that article 73.e. assigns to the administering Power:

"To transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply".

In case all this is not enough, it would be important to recollect that the fishing agreement is signed and pretended to be ratified in a moment (years 2005-2006) in which Morocco refuses to hold the self-determination referendum that all UN resolutions (Commission of Human rights, General Assembly and Security Council) demand for the colony. It stuns as contradictory that while the supposed Moroccan "administering Power" status of the Western Sahara is being put for-

ward to obtain profits from the territory natural wealth; Morocco refuses to fulfil its international obligations, especially, the holding of a self-determination referendum.

In this context, the celebration of the fishing agreement with Morocco is not only a violation of International Law by attributing Morocco a legal status (that of 'administering Power') that it does not have, but it could also be understood as an endorsement of Morocco's refusal to fulfil its international obligations.

*Sixth conclusion:* since Morocco is not the 'administering Power' it cannot agree international treaties that affect the Western Sahara.

*Seventh conclusion:* the European Union, obliged to honour the United Nations Charter, cannot act contrarily to the principle of free determination of peoples.

*Eighth conclusion:* in the current political moment, marked by Morocco's refusal to fulfil its obligation to hold a self-determination referendum, the ratification of a fishing agreement with Morocco that includes Western Sahara waters can only be interpreted as a support to the Moroccan disobedience policy towards its international obligations.

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## Notes

(1) An passage of this letter has been distributed by the Moroccan Press Agency (MAP): <http://www.lematin.ma/journal/article.asp?id=natio&ida=57241>

(2) Dispatch by the Agency Europa Press on 28 July 2005: <http://www.europapress.es/europa2003/noticia.aspx?cod=20050728190110&tabID=1&ch=69>

## VIII. Conclusion

The overall conclusion is evident: Morocco is an 'occupying' power and not an 'administering' power. Its presence in the Western Sahara is not endorsed by any juridical entitlement and the 1975 'Madrid Agreement' did not transfer the status of 'administering Power' to Morocco. In addition, Morocco displays pretentiously its refusal to fulfil its obligation to hold a self-determination referendum in the Western Sahara.

The signing of any fishing agreement with Morocco that includes the Western Sahara propelled by Zapatero's government is an attempt to indirectly bestow Morocco with something that the UN has not yet granted to it: the Western Sahara 'administering Power' status. If this is so, the European Union would have the dubious honour of trying to complete late Francoist government policy on the Western Sahara. The handing over of the Western Sahara by the Madrid Agreement was its very last act. That a democratic government wants to conclude what last Franco's government has left unfinished is something that should worry everyone.