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JUR 324
RELEX 602
CORLX 354
MAMA 110

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Subject:	Draft Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part - consistency with the Court
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Delegations will find attached the partially declassified version of the above-mentioned document.



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CONTRIBUTION OF THE LEGAL SERVICE¹

To:	Mashrak/Maghreb Working Party
Subject:	Draft Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part - consistency with the Court

I. INTRODUCTION

- On 11 June 2018, the Commission submitted to the Council proposals for Council Decisions on the signing and the conclusion of the Agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part¹, together with a draft Agreement² and a Report on the benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara³.

¹ 9966/18 and 9967/18.

² 9967/18 ADD 1 REV 1.

³ 9967/18 ADD 2 REV 1.

2. At the meeting of the Mashrek/Maghreb Working Party of 18 June 2018 the Council Legal Service advised orally on a number of aspects of the draft Agreement. The Council Legal Service was also asked to provide written advice on the consistency of the draft Agreement with the negotiating directives which were attached to the Council Decision authorising the Commission to open negotiations with Morocco and with judgment the Court of Justice handed down on 21 December 2016 in Case C-104/16 P⁴.

II. BACKGROUND

3. On 8 March 2012, the Council adopted Decision 2012/497/EU on the conclusion of an Agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part⁵ (hereinafter "the Liberalisation Agreement").
4. In accordance with Article 94 of the Association Agreement, the Liberalisation Agreement is applicable "*on the one hand, to the territories in which the Treaties establishing the European Community and the European Coal And Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of the Kingdom of Morocco.*"
5. Decision 2012/497/EU was challenged before the General Court by the Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (hereinafter "Polisario Front") (Case T-512/12)⁶. In its judgment the General Court annulled the Decision in so far as it approved the application of the Liberalisation Agreement to Western Sahara.

⁴ EU:C:2016:973.

⁵ OJ L 241, 7.9.2012, p. 2.

⁶ EU:T:2015:953

6. On appeal that judgment was set aside by the Court of Justice in its judgment of 21 December 2016 in Case C-104/16 P. The Court of Justice found that the General Court had erred in holding that the European Union and the Kingdom of Morocco should be regarded as having agreed to interpret the words ‘territory of the Kingdom of Morocco’ in Article 94 of the Association Agreement as including the territory of Western Sahara⁷.
7. The Court of Justice held that *"the General Court was bound not only to observe the rules of good faith interpretation laid down in Article 31(1) of the Vienna Convention but also that laid down in Article 31(3)(c) of that convention, pursuant to which the interpretation of a treaty must be carried out by taking account of any relevant rules of international law applicable in the relations between the parties"*⁸. It then referred to the general international principle of the relative effect of treaties under which treaties do not impose any obligations on, or confer any rights, to third parties without their consent.
8. The Court further stated that:

*"(...) the people of Western Sahara must be regarded as a ‘third party’ within the meaning of the principle of the relative effect of treaties, as stated in substance by the Advocate General in point 105 of his Opinion. As such, that third party may be affected by the implementation of the Association Agreement in the event that the territory of Western Sahara comes within the scope of that agreement, without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party. In the present case, however, the judgment under appeal does not show that the people of Western Sahara have expressed any such consent."*⁹

⁷ paragraph 108.

⁸ paragraph 86.

⁹ paragraph 106.

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