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Fishing in Troubled Waters

The Queen, on the application of: Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, Case C-266/16, ECJ, 27 February 2018

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1 Introduction

According to the United Nations list of non-self-governing territories, there are currently 17 areas that are deemed to be non-self-governing and subject to the process of decolonization. Western Sahara, with a population of 584,000, and a land mass of 266,000 km² is by far the largest of these territories. While the others are still administered by Western powers (United Kingdom, United States, France and New Zealand), Spain no longer considers itself to be responsible for the administration of Western Sahara, a position it has held since 1976. Most of the territory of Western Sahara has been under Moroccan occupation since 1975. Morocco considers Western Sahara to be a part of its territory, although no other states have recognised this claim. The conflict remains subject to international negotiations. In April 2018, the United Nations Security Council renewed the mandate of the United Nations Mission for the Referendum in Western Sahara (MINURSO), and reaffirmed its commitment to the self-determination of the people of Western Sahara.

The situation in Western Sahara presents a challenge for the European Union as it seeks close economic ties with Morocco. The European Union has entered into multiple international agreements with Morocco, particularly on trade liberalisation in the field of agriculture and fishing rights. This, in turn, has given rise to questions as to whether the EU and its Member States' economic relations with Morocco can respect international law and the right of the people of Western Sahara to self-determination. Although neither the EU nor any of the Member States have recognised Morocco's claims over the territory, the Union has applied *de facto* the EU-Morocco Liberalisation Agreement and the Fisheries Agreement to the territory of Western Sahara and its adjacent waters. The EU's policy in this regard has been harshly criticised.¹ The inclusion of the territory of Western Sahara in such agreements appears to violate international law and the obligation under international law not to recognise an illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination. For example, in a legal opinion regarding third party obligations with respect to the Israeli Settlements in the Occupied Palestinian Territories, Professor James Crawford referred to another situation of occupation, that of Western Sahara:

“... as a matter of realpolitik, the European Union has demonstrated political disinterest in upholding the right to self-determination in relation to the analogous situation in Western Sahara. The recently-extended Fisheries Partnership Agreement (“FPA”) entered into between Morocco and the European Communities provides for fishing rights over the offshore territory of Morocco, including the unlawfully annexed territory of Western Sahara. There is no doubt that the FPA, like its predecessor agreements, contravenes the right to self-

¹ See S. Hummelbrunner and A. Prickartz, ‘It’s not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union’ 32(83) *Utrecht Journal of International and European Law* (2016) 19.

determination of the people of Western Sahara as well as the principle of non-recognition; yet there have to date been no legal repercussions for any State party.”²

It is in this context that litigation arose in the EU Courts regarding the EU’s economic relations with Morocco. In a 2016 judgment, *Council v Front Polisario*,³ the Grand Chamber dismissed an action brought by Front Polisario, the national liberation movement representing the people of Western Sahara, which challenged the Council decision approving the conclusion of a trade liberalisation agreement between the European Union and Morocco. Although Front Polisario was unsuccessful in that case due to lack of standing, the Court importantly recognised that the agreement in question did *not* extend to the territory of Western Sahara. The Court also confirmed the status of Western Sahara as a non-self-governing territory, which is not a part of Moroccan territory, and therefore not covered by the EU-Morocco agreement.

On 27 February 2018, the Grand Chamber delivered its judgment in *Western Sahara Campaign UK*, a case this time challenging the fisheries agreements between the European Community and Morocco. This Note will focus on the legal issues in that judgment and the reasoning employed by the Court. It does not explore the broader question of the EU’s policy towards Western Sahara and other areas of contested sovereignty. However, in order to understand the Court’s approach, it is important to consider the case as part of this long running and contentious international dispute, which remains highly politically sensitive. On the one hand, the Court seeks to ensure that the EU respects its internal Treaty commitment to uphold international law, including in the EU’s future economic relations with Morocco. On the other hand, the case is an example of the way in which the Court engages with international law in a rather narrow fashion. Ultimately, the Court seeks to uphold international law in the EU legal order while allowing the EU to maintain its economic ties with Morocco, and without going so far as to invalidate a Union act. This approach may make it more difficult for the EU’s political institutions to conclude a future agreement with Morocco, as they look to these judgments for guidance on how to ensure any new agreement respects the EU’s international obligations. The *Western Sahara Campaign UK* judgment is also important insofar as it further develops the Court’s relationship with public international law issues, particularly challenges to EU acts based on alleged violations of international law, and the interpretation of treaties. The Court draws a distinction between an assessment of the *de jure* validity of the agreement under EU law, and the *de facto* application of the agreement by the parties in practice. Such a distinction allows the Court to focus on the interpretation of the text of the agreement, without recourse to the broader context in which the agreement is applied. Such an approach has the effect of excluding broader questions under international law, such as whether the EU’s policy in effect recognises an illegal situation resulting from the breach of international law.

2 The Western Sahara Campaign UK Case

Western Sahara Campaign UK is a non-governmental organization based in the United Kingdom. The organization was established to support the right of the people of Western Sahara to self-determination and to promote the human rights of Saharawi people. Western Sahara Campaign UK brought two proceedings before the High Court of Justice (England & Wales). The first action concerned whether the Commissioners for Her Majesty’s Revenue and Customs, United Kingdom, (HMRC) were entitled to accept the importation,

² Opinion, ‘Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’, James Crawford SC, para 131. Available at <<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>>.

³ ECJ 21 December 2016, C-104/16 *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*. For commentary on the judgment, see J. Odermatt, ‘Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)’ 111 *American Journal of International Law* (2017) p. 731-738; Volume 55 (2018); E. Cannizzaro, ‘In Defence of Front Polisario: The ECJ as a global jus cogens maker’ 55 *Common Market Law Review* (2018) Issue 2, pp. 569–587.

into the United Kingdom, of goods certified as originating in Western Sahara, as if they were goods certified as originating in the Kingdom of Morocco for the purposes of the Association Agreement between Morocco and the EU and its Member States.⁴ The second action challenged the fisheries policy of the UK Secretary of State for Environment, Food and Rural Affairs. This challenge was on the grounds that the policy included the waters adjacent to the territory of Western Sahara within the scope of the domestic legislation intended to implement the Fisheries Partnership Agreement,⁵ its 2013 Protocol⁶ and acts of secondary legislation whereby the EU allocated fishing opportunities to the Member States.

Western Sahara Campaign UK essentially argued that these instruments – the Association Agreement, the Fisheries Partnership Agreement, and the 2013 Protocol, as well as secondary legislation implementing fishing opportunities – were contrary to Article 3(5) of the Treaty on European Union, according to which the EU shall contribute to the “strict observance and the development of international law, including respect for the principles of the United Nations Charter” in its relations with the wider world.⁷ Western Sahara Campaign UK asserted that the inclusion of the territory of Western Sahara and its waters within the territorial scope of the agreements violated a number of rules of international law. These included: (i) the right to self-determination, (ii) Article 73 of the Charter of the United Nations, which deals with the rights of the people of non-self-governing territories, (iii) provisions of the UN Convention on the Law of the Sea⁸ (iv) the obligation to bring to an end serious breaches of a peremptory norm of international law, (iv) the obligation not to recognise an illegal situation resulting from such a breach, and (v) the obligation not to provide assistance for the commission of an internationally wrongful act. Western Sahara Campaign UK also argued that the international agreements in question were not concluded on behalf of the people of Western Sahara nor in consultation with its representatives, and that there was no evidence that the people of Western Sahara had derived any benefit from those three international agreements.⁹

The referring court decided to stay the proceedings and referred to the Court of Justice of the European Union four questions for a preliminary ruling. The first two concerned the interpretation and validity of the Association Agreement. The latter two questions concerned the validity of the Fisheries Partnership Agreement and the various acts of secondary legislation associated with it.

In an earlier ruling, on 21 December 2016, the Court of Justice delivered its judgment *Council v Front Polisario* (mentioned above). Front Polisario had also challenged the Association Agreement, based on very similar arguments, alleging *inter alia* that it violated the principle of self-determination. One of the Court’s key findings in *Front Polisario* was that the Association Agreement did not apply to the territory of Western Sahara. Following this judgment, the referring court was asked whether it wished to retain its first two questions relating to the interpretation and the validity of the Association Agreement, and it decided to withdraw them. These two judgments are closely related and should be understood together, since in *Western Sahara Campaign UK*, the Court applies similar logic and legal reasoning.

⁴ 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, was signed in Brussels on 26 February 1996 (OJ 2000 L 70, p. 2 ('Association Agreement')).

⁵ Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, OJ 2006 L 141, p. 4 ('Fisheries Partnership Agreement').

⁶ Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (OJ 2013 L 328, p. 2; ('2013 Protocol')).

⁷ Article 3(5) TEU.

⁸ United Nations Convention on the Law of the Sea ('UNCLOS'), signed at Montego Bay, 10 December 1982, entry into force 16 November 1994, UNTS 1833.

⁹ ECJ 27 February 2018, Case C-266/16, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* ('Western Sahara Campaign UK'), para 32.

From a procedural perspective, *Western Sahara Campaign UK* raised the question of whether a private party is entitled to challenge the validity of EU acts on the basis of alleged violations of international law. Whereas *Front Polisario* involved an action for annulment of a Council Decision on the conclusion of the Association Agreement, *Western Sahara Campaign UK* involved a challenge of the agreements via the preliminary ruling procedure. The Council argued that the Court only had jurisdiction with respect to the validity of the EU acts approving the conclusion of the agreements, and not the agreements themselves. The Court found that its jurisdiction to deliver preliminary rulings on the interpretation of EU law and the validity of EU acts includes the jurisdiction to assess whether an international agreement concluded by the EU is compatible with international law binding upon the EU.¹⁰ When the Court receives a request for a preliminary ruling concerning the compatibility of such an agreement, the Court found, the request must be understood as relating to the EU act approving its conclusion,¹¹ and the review of its validity “in the light of the actual content of the international agreement at issue”.¹² The EU Treaties set out that the Court shall give preliminary rulings on the interpretation of Union law or on the validity of EU acts.¹³ It would appear, then, that the Court does not have the jurisdiction to assess the validity of acts on the plane of international law, such as a treaty concluded between the Union and a third state. Article 218 (11) TFEU sets out a procedure under which the Court may render an opinion on whether an ‘envisioned’ agreement is compatible with the Treaties. This procedure was designed to ensure that the Union would not conclude agreements that could later be found to be incompatible with the EU Treaties, which could then give rise to responsibility for the Union at the international level. Academic commentators have discussed whether the Court may assess the validity of an international agreement via the preliminary reference procedure.¹⁴ One may question whether, under the preliminary reference procedure, there is any practical distinction between a review of an international agreement and the internal act approving the agreement. Under both circumstances, if the Court found the agreement or the act approving it violated EU law, the agreement would no longer be applicable in the EU legal order and could give rise to international responsibility. Yet the distinction is still an important one to make. The Court does not have jurisdiction to determine the validity of a treaty concluded with a third party on the international law plane, especially when that third state has not given its consent to that procedure, and does not have a right to take part in the proceedings. In the event that the Court were to find the internal act invalid on the grounds it violated international law, this would only have effect within the EU legal order, and the EU institutions would have to take steps to rectify the situation to avoid incurring international responsibility.

As in *Front Polisario*, much of the case turned on the crucial question of the territorial scope of the agreements at issue. For the Court of Justice, the referring court’s questions were all based on the premise that the agreements applied to the territory of Western Sahara, and included the waters adjacent to Western Sahara. It reasoned that the questions of validity only arise if this premise is correct, and so then proceeded to assess the issue of territorial scope of the agreements. As it did in *Front Polisario*, the Court found that this called for it to resort to the rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties (‘1969 VCLT’).¹⁵ The Court has found that such principles are applicable to the EU’s international agreements to the extent that they reflect principles of customary international law.¹⁶ In particular, the Court relied on the general rule of interpretation reflected in Article 31 of the 1969 VCLT, according to which a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

¹⁰ *Western Sahara Campaign UK*, *supra* n. 9, para 48.

¹¹ *Western Sahara Campaign UK*, *supra* n. 9, para. 50

¹² *Western Sahara Campaign UK*, *supra* n. 9, para 51.

¹³ Art 19 (3) (b) TEU.

¹⁴ See K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law* (OUP, 2014) 459-460.

¹⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

¹⁶ ECJ 25 February 2010, Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*.

In order to determine whether the Fisheries Partnership Agreement and its Protocol apply to the territory of Western Sahara, the Court first looked at the provisions in the agreements related to territorial scope.¹⁷ The Fisheries Partnership Agreement uses the term ‘the territory of Morocco and to the waters under Moroccan jurisdiction’.¹⁸ Vessels flying the flag of an EU Member State are permitted to ‘engage in fishing activities in [the] fishing zones [of the Kingdom of Morocco]’.¹⁹ The term ‘Moroccan fishing zone’ is defined as ‘the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco.’ The question then was whether these terms also relate to the waters adjacent to Western Sahara.

The Court considered the instruments in question – the Association Agreement, the Fisheries Partnership Agreement, and 2013 Protocol – as a ‘body of agreements’, since they all relate to the common aim of intensifying a close relationship between the parties and are closely related to one another.²⁰ Thus, the Court found that the concept of ‘territory of Morocco’ in Article 11 of the Fisheries Partnership Agreement should be construed in the same way as the concept of ‘territory of the Kingdom of Morocco’, in Article 94 of the Association Agreement. The Court had previously held in *Front Polisario* that the concept ‘territory of the Kingdom of Morocco’ in the Association Agreement referred to the geographical area over which Morocco “exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as that of Western Sahara.”²¹ Thus, the Court found that the Fisheries Partnership Agreement does not apply to the waters adjacent to the territory of Western Sahara.

To confirm this conclusion, the Court uses similar logic as it did in *Front Polisario* to find that the agreements do not apply to the territory of Western Sahara. At paragraph 63-4, the Court states:

“63. If the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression [...]”

64. That being the case, the territory of Western Sahara is not covered by the concept of ‘territory of Morocco’ within the meaning of Article 11 of the Fisheries Partnership Agreement.”

In order to understand these paragraphs, it is important to look at the parts of the *Front Polisario* judgment to which the Court refers, in particular paragraph 123. Here the Court was looking at whether the Union’s *de facto* application of the association agreement to the territory of Western Sahara represented an ‘agreement between the parties’ to amend its territorial application. The Court reasoned that the Union could not have had such an intention, since to do so the Union would have been applying the agreement in a way that violated the principle of self-determination and the relative effect of treaties. The Court uses the EU’s fidelity to international law as a way to interpret an international agreement. Yet this is the entire argument of Western Sahara Campaign UK, that is, by concluding agreements that apply to the territory of Western Sahara, the EU has violated its own constitutional commitment to uphold international law. The Court makes a distinction between the validity of the agreements at issue, and the factual application of the agreements in practice. Although the proceedings in the UK dealt with the question of the implementation of the agreements, the referring court’s questions only relate to the issue of their validity in the light of international

¹⁷ *Western Sahara Campaign UK*, *supra* n. 9, para 56.

¹⁸ Art 11, Fisheries Partnership Agreement.

¹⁹ Article 5, Fisheries Partnership Agreement, quoted by the Grand Chamber at para 57.

²⁰ *Western Sahara Campaign UK*, *supra* n. 9, para 59.

²¹ *Front Polisario*, para 95.

law and Article 3(5) TEU.²² Such a distinction allows the Court to focus narrowly on the text of the agreements, without examining the broader context in which those agreements were actually applied by the parties.

Since the Court found that the territory of Western Sahara did not form part of the territory of the Kingdom of Morocco, it went on to find that the waters adjacent to the territory of Western Sahara are not part of the Moroccan fishing zone referred to in Article 2(a) of the Fisheries Partnership Agreement.²³ It found that the term ‘Moroccan fishing zone’, used in the Fisheries Partnership Agreement and the 2013 Protocol to determine territorial scope, must be understood as referring to waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco. Thus, ‘Moroccan fishing zone’, for the purposes of that protocol, did not include the waters adjacent to the territory of Western Sahara.²⁴ In addition to using the 1969 VCLT to interpret the agreements, the Court also made use of the UN Convention on the Law of the Sea (UNCLOS), an international treaty to which the EU is a party, and which is also specifically referred to in the Fisheries Partnership Agreement. Under UNCLOS, a coastal State is entitled to exercise sovereignty or jurisdiction with respect to waters adjacent to its territory and forming part of its territorial sea or of its exclusive economic zone. As the territory of Western Sahara does not form part of the territory of Morocco, the Court reasons, the waters adjacent to the territory of Western Sahara do not form part of the Moroccan fishing zone referred to in the Fisheries Partnership Agreement.

The Court also considered whether the parties to the agreement could have agreed to establish a ‘special meaning’ to the term. In this respect the Court referred to Article 31(4) VCLT, under which ‘[a] special meaning shall be given to a term if it is established that the parties so intended.’ Whereas the general rule of treaty interpretation in Article 31 VCLT gives precedence to the text of the treaty, particularly its ordinary meaning in the light of its object and purpose, Article 31(4) VCLT allows an exception by which the subjective intention of the parties can also be considered. The International Court of Justice (ICJ) has established that a very high standard of proof should be met in order to deviate from a treaty term’s ordinary meaning. The Court thus dismisses this argument that the parties intended to give special meaning to term ‘waters falling within the sovereignty of the Kingdom of Morocco’ since it found there to be no evidence to support this. To further support this conclusion, the Court uses argumentation based on the judgment in *Front Polisario* discussed above. It reasons that the EU could not have intended to support an interpretation that would violate its obligations under international law, since the EU is committed to observing international law. The Court’s reasoning is unconvincing. It appears to use circular logic: the agreements cannot be considered as applying to the territory of Western Sahara, as this would go against the principles the Union is obligated to respect. Using this reasoning, there would be very limited circumstances when the EU could ever violate international law by concluding an international agreement, perhaps only if it were manifestly unlawful, and the Court could not ‘interpret away’ the incompatibility. The Court’s approach also minimises the importance of the actual implementation of the agreement in practice. The fact that the Council and the Commission were both of the position that the Fisheries Partnership Agreement and Protocol do apply to Western Sahara seems to play no role in its reasoning.²⁵

To further support its conclusion that the agreements do not apply to the waters adjacent to the territory of Western Sahara, the Court refers to the geographical coordinates and baselines of its fishing zone supplied by

²² In particular, the referring court asked “Is the [Fisheries Partnership Agreement] (as approved and implemented by Regulation No 764/2006, Decision 2013/785 and Regulation No 1270/2013) valid, having regard to the requirement under Article 3(5) TEU to contribute to the observance of any relevant principle of international law and respect for the principles of the Charter of the United Nations and the extent to which the [Fisheries Agreement] was concluded for the benefit of the Saharawi people, on their behalf, in accordance with their wishes, and/or in consultation with their recognised representatives?” *Western Sahara Campaign UK*, para 41.

²³ *Western Sahara Campaign UK*, *supra* n. 9, para 73.

²⁴ *Western Sahara Campaign UK*, *supra* n. 9, para 79.

²⁵ ECJ 10 January 2018, Case C-266/16 *Western Sahara Campaign UK, The Queen v Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Opinion of Advocate General Wathelet, para 144.

Morocco, as required by the 2013 Protocol. The Court found that these coordinates did not form part of the text of that protocol, as they were notified on 16 July 2014, one day after the Protocol entered into force, on 15 July 2014.²⁶ Although not forming part of the text of the protocol, the Court may have still been open to look at other documents and practice of the parties in order to understand the broader context in which the agreements are interpreted. This would fit with the Court's previous practice regarding Article 31 VCLT, in which the Court has been quite open to referring to other documents and principles to aid interpretation.²⁷

Once the Court found that the Fisheries Partnership Agreement and the 2013 Protocol do not apply to the waters adjacent to the territory of Western Sahara, it decided that there was no reason to proceed further, since the referring Court's questions are based on this premise. The Court thus structured its reasoning in such a way so that everything turned on the question of territorial application. The Court departs in this respect from the Opinion of Advocate General Wathelet, who had concluded that the Fisheries Partnership Agreement and Protocol did apply to Western Sahara. Whereas the Court confined itself mostly to the text of the instruments, Advocate General Wathelet looked at the broader context of the agreements. This included *inter alia* the minutes of the third Joint Committee of the Fisheries Agreement; fishing catch statistics provided by the European Commission; and declarations of EU Member States within the Council which suggested certain Member States had reservations about the policy. Considering this broader context, Advocate General Wathelet concluded that it was the intention of the parties to apply the Fisheries Partnership Agreement and Protocol to Western Sahara.²⁸

3 Analysis and Discussion

Western Sahara Campaign UK appears to be a rather straightforward decision, one that closely follows the Court's reasoning in *Front Polisario*. Yet the case presents interesting and important issues under EU law and international law, and in the way these sources interact.

The case must also be understood in the broader political context of relations between the EU and Morocco. Had the Court found that agreements at issue violated international law, this would also have had legal and political repercussions. This is not the first time the Court dealt with sensitive legal issues pertaining to occupation, sovereignty and self-determination. In *Anastasiou*,²⁹ the Court of Justice was faced with similar questions relating to products originating from the Turkish Republic of Northern Cyprus. In this case, the Court decided that Member States could not accept phytosanitary certificates accompanying products originating from northern Cyprus which had not been issued by the authorities of the Republic of Cyprus, but by the *de facto* administration in northern Cyprus.³⁰ In *Brita*,³¹ the Court dealt with the question of products originating from the West Bank, and whether they could be given preferential treatment under the EC-Israel Association Agreement. These cases represent much more than customs disputes, but relate to more complex questions of contested sovereignty, often in situations where international negotiations are ongoing. The Court seeks to uphold the integrity of EU law and its Common Commercial Policy while also maintaining the respect for international law, all the while maintaining good relations with its treaty partners. This has often led to the Court using principles of public international law, including treaty law, in a rather flexible and inventive manner. The Court's approach in the Western Sahara cases has been to find that the agreements do not apply to the territory of Western Sahara. This approach keeps these economic agreements intact while appearing to maintain the EU's commitment to international law. Such an approach is

²⁶ *Western Sahara Campaign*, *supra* n. 9, para 81.

²⁷ See J. Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union' *Cambridge Yearbook of European Legal Studies* (2015) pp. 136-7.

²⁸ Opinion of Advocate General Wathelet, *supra* n. 25, para 75.

²⁹ ECJ 30 September 2003, Case C-140/02 *Anastasiou and Others v Minister of Agriculture, Fisheries and Food*.

³⁰ See S Talmon, 'The Cyprus Question Before the European Court of Justice', 12 *European Journal of International Law* (2001) pp. 727-750.

³¹ *Brita*, *supra* n. 16.

understandable, and prevents the more critical approach taken by Advocate General Wathelet. Yet as the EU seeks to negotiate new agreements with Morocco, these judgments can have the effect of tying the hands of the negotiators, who may find it difficult to satisfy the requirements set out by the Court in these cases. While I am critical of the way in which the Court approaches international law issues in these cases, the Court's approach may have the effect of strengthening the international rule of law, by ensuring that future agreements that are to cover the territory of Western Sahara, are negotiated in a way that includes the representatives of the people of Western Sahara and respects their right to self-determination.

Western Sahara Campaign UK also further develops the rather limited case-law relating to Article 3(5) TEU. This provision provides a list of values and interests that the EU is committed to pursuing in its relations with the wider world, including ‘the strict observance and the development of international law’. But is this a justiciable provision, one that can be invoked by private parties to challenge EU acts? This obligation for the EU to respect international law when exercising its powers, both customary international law and international agreements, pre-dates this treaty article, and was confirmed in *Poulsen*³² and in a number of subsequent cases.³³ This case-law and Article 3(5) TEU show that international law could potentially be used to invalidate an EU act, however, to date the Court has not done so. This raises questions about the conditions under which international law can be used as a benchmark to assess the validity of EU acts. Is any violation of international law binding on the Union capable of being invoked, or only serious violations, such as violations of *jus cogens* norms? In *Air Transport Association of America and Others*, a case involving a challenge to an EU directive based on its alleged contravention of principles of public international law, the Court set out certain conditions for assessing the compatibility of EU acts with international law. The Court reasoned that principles of customary international law could be invoked for such purposes where they may call into question the Union’s competence to adopt the act, and where the act is liable to affect individual rights derived from EU law.³⁴ Such an approach recognises that many rules of international law apply between states, and may not always be invoked by individuals before domestic courts. The Advocate General in this case rejected this approach as too restrictive, noting that “[i]t would be absurd to limit review of the contested acts solely to the question of the competence of the Union and automatically to preclude substantive review of those acts by reference to the most fundamental norms of international law which are relied on in the present case.”³⁵

Another question that was raised in the proceedings was whether the ‘Monetary Gold Principle’ was applicable in the proceedings. The principle derives from the *Case of the Monetary Gold Removed from Rome*³⁶ in which the International Court of Justice decided that it would not exercise jurisdiction where the legal interests of a third state not party to the proceedings “would not only be affected by a decision, but would form the very subject-matter of the decision.”³⁷ While the ICJ has interpreted the principle a number of times, it has only applied it on one other occasion, in *East Timor*.³⁸ Moreover, the principle has been applied almost exclusively in the context of ICJ proceedings, and it is subject to debate whether such principle applies to international arbitration or other international courts.³⁹ The principle would appear not to

³² ECJ 24 November 1992, Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*

³³ See for example ECJ 21 December 2011, Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* (‘ATAA’), para 101: ‘Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union’.

³⁴ ATAA, *supra* n. 33, para. 107.

³⁵ Opinion of Advocate General Wathelet, *supra* n. 25, para. 92.

³⁶ *Case of the Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) ICJ Reports 1954, p. 19.

³⁷ *Monetary Gold*, *supra* n. 36, p. 17.

³⁸ *Case Concerning East Timor* (Portugal v Australia) (Judgment) [1995] ICJ Rep 102, paras 28 and 34.

³⁹ N. Zamir, ‘The Applicability of the Monetary Gold Principle in International Arbitration’ 33 *Arbitration International*, (2017) pp.523–538.

fit with the EU system, however. For one, the principle derives from the idea that the ICJ, a court for the world community, could only exercise its jurisdiction with respect to a State with that State's consent. While there is a possibility that the Monetary Gold principle could be applied by analogy to other areas of international law, such as arbitration involving the rights of a State not represented, it is difficult to see how it could be applied in the EU context. The Advocate General argued that the Monetary Gold principle could not be applied to the EU Court of Justice because "it would automatically preclude the possibility of reviewing the compatibility with the EU and FEU Treaties of the international agreements concluded by the Union if the third State that signed the agreement with the Union was not a participant in the proceedings before it."⁴⁰ In this regard, it should be recalled that the EU Court of Justice is not an international court in the same way as the ICJ, but closer to a domestic court of one of the parties to the agreements.

4 Conclusion

The *Western Sahara Campaign UK* case is not the end of the story. The dispute remains subject to litigation before the EU courts, and it is likely that new cases will arise.⁴¹ Moreover, these judgments cast a shadow over the conclusion of future agreements and amendments to agreements with the Kingdom of Morocco.⁴²

On 11 June 2018, the Commission adopted two proposals for Council Decisions relating to an agreement amending the EU-Morocco Association Agreement.⁴³ This would allow for certain amendments in order to take into account the result of the Court's finding in *Polisario Front* that the Association Agreement and the Liberalisation Agreement did not apply to Western Sahara. It seeks to treat products originating from Western Sahara in the same way as exports originating from Morocco: "products originating from Western Sahara which are subject to the control of the Moroccan custom authorities benefit from the same commercial preferences granted by the EU to products covered by the association agreement". The Commission undertook public consultations with people in Western Sahara examining the economic and human rights impact of the proposal, and concluded that "most people now living in Western Sahara are very much in favour of the extension of tariff preferences to products from Western Sahara under the EU-Morocco Association Agreement."⁴⁴ Polisario Front, however, has rejected the idea of extending tariff preferences to goods originating from Western Sahara, mainly because it appears to recognise the status quo and would consolidate Moroccan sovereignty over the territory. The Commission dismissed such concerns as being 'political'. But this raises an important question. Does such extension of the agreement to the territory of Western Sahara need to be for the benefit of the people of Western Sahara, or must it take place with their consent? If so, who is entitled to represent the people of Western Sahara to give such consent? While Front

⁴⁰ Opinion of Advocate General Wathelet, *supra* n. 25, para. 57.

⁴¹ Case T-180/14, *Front Polisario v Council*; Case T-275/18 *Front Polisario v Council*. See 'Polisario initiates new law suit against EU-Morocco fish deal' Western Sahara Resource Watch, 18 June 2018.

⁴² G. Van der Loo, 'The Dilemma of the EU's Future Trade Relations with Western Sahara: Caught Between Strategic Interests and International law?' CEPS Commentary, 28 April 2018. Available at <https://www.ceps.eu/system/files/GVdL_WesternSahara.pdf>.

⁴³ Proposal for a Council Decision on 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 part (11 June 2018) and Proposal for a Council Decision relating to the signature, on behalf of the European Union, 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 par (11 June 2018).

⁴⁴ Commission Staff Working Document, Report on benefits for the people of Western Sahara and public consultation on extending tariff preferences to products from Western Sahara (2018), p. 31.

Polisario represents the people of Western Sahara in ongoing international political negotiations, it is not clear whether they are the only party that could be involved with regards to economic relations. Moreover, it is unclear whether the consultation process undertaken by the Commission amounts to the free and informed consent of the people of Western Sahara.

On 21 March 2018, the Commission proposed to negotiate an amendment to the Fisheries Partnership Agreement and the Protocol, taking into account the Court's finding in the *Western Sahara Campaign UK* case.⁴⁵ According to the negotiating directives, one of the aims of such an amendment would be to “[p]rovide for the access to the waters covered by the current Agreement and Protocol and to the waters adjacent to the non-self governing Territory of Western Sahara ...”⁴⁶ The directives set out that the Commission should ensure that “the people concerned by the agreement have been adequately involved”. Once again, it is not clear whether it would be sufficient to ensure that the policy is for the benefit of the people of Western Sahara, or whether it is also required that they give their explicit consent to such policy.⁴⁷ Given the legal and political context, it may be difficult to ensure the latter.

Article 3(5) TEU commits the Union to the “strict observance and the development of international law, including respect for the principles of the United Nations Charter”. Whereas the Court has found that EU acts violate EU primary law, particularly fundamental rights, it has been far less open to assess the validity of acts in the light of rules of international law. In examining the validity of the EU acts approving the international instruments in question, the Court focused mainly on the text of the agreements themselves, without having recourse to the actual application by the parties. This focus on the territorial application of the agreements has the effect of excluding other relevant questions arising under international law, particularly whether the EU’s policy towards Western Sahara amounts to recognition of an illegal situation resulting from the breach of international law. Nevertheless, the EU’s future policy towards Western Sahara must now take into account the findings of the Court, as well as the political pressure of the European Parliament and vocal Member States. The *Western Sahara Campaign UK* judgment demonstrates how the Court can still promote the observance of international law without having to resort to the drastic step of invalidating an EU act.

⁴⁵ “This proposal is presented following the ruling by the Court of Justice of the European Union of 27 February 2018 in Case C-266/16 (Western Sahara Campaign UK) by which the Court holds that the waters adjacent to the territory of Western Sahara are not part of the fishing zone referred to in the Fisheries Agreement.” Explanatory Memorandum, Recommendation for a Council Decision to authorise the Commission to open negotiations on behalf of the European Union for the amendment of the Fisheries Partnership Agreement and conclusion of a Protocol with the Kingdom of Morocco (21 March 2018).

⁴⁶ Annex to the Recommendation for a Council decision to authorise the Commission to open negotiations on behalf of the European Union for the amendment of the Fisheries Partnership Agreement and the conclusion of a Protocol with the Kingdom of Morocco.

⁴⁷ See Statement by Sweden: “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.” Summary Record, Permanent Representatives Committee, 11 and 13 July 2018. <<http://data.consilium.europa.eu/doc/document/ST-11441-2018-INIT/en/pdf>>.