6 The EU's economic engagement with Western Sahara: the *Front Polisario* and *Western Sahara Campaign UK* cases

Jed Odermatt

1 Introduction

There are currently 17 territories considered by the UN Special Committee on Decolonization as non-self-governing.[1] Two of the administering powers of these territories are Member States of the European Union (EU) (France and the United Kingdom), and one of these territories, Gibraltar, is a part of the EU. The EU does not have a unified or coherent policy towards areas of contested sovereignty. The EU's relationship with such territories, including its economic engagement, is ad hoc, shaped by geopolitical concerns as well as legal considerations. This chapter focuses on one area of contested sovereignty, Western Sahara. Western Sahara stands out from the other territories on the UN list in a number of respects. Whereas the other territories are mostly small, former colonial overseas territories, like British Virgin Islands or French Polynesia, Western Sahara stands out as a large territory with a land mass of 266,000 km and a population of 584,000. Whereas the other administering powers are Western colonial powers, such as the United Kingdom, France and the United States, Western Sahara is controlled by neighbouring Morocco. And whereas these other states administer these territories as distinct entities, such as overseas territories in the case of the United Kingdom, Morocco does not consider itself to be an

[1] See United Nations Special Committee on Decolonization, 'List of Non-Self-Governing Territories' (*United Nations*) <https://www.un.org/en/decolonization/nonselfgovterritories.shtml> accessed 8 November 2019.

administering state, but considers Western Sahara to be an integral part of the Kingdom of Morocco. Western Sahara, in the view of many experts, is considered an occupied territory.[2]

The first part briefly discusses the EU's international legal obligations towards areas of contested sovereignty. The lack of a consistent policy and clear understanding of what these obligations entail is at the core of many of the legal problems discussed in this chapter. The next part discusses the two main cases that have come before the Court of Justice of the European Union (CJEU) dealing with Western Sahara, analysing in particular the way the Court approaches issues of international law in these cases. The final part turns to the EU's continued engagement with Western Sahara since these judgements. It argues that the Court's narrow framing of the legal issues in the case allowed it to avoid some of the most politically sensitive questions raised in these proceedings, but has mostly failed to give guidance to the EU institutions as it seeks to maintain economic relations with Morocco in a way that conforms with its obligations under international and EU law.

1.1 The EU's obligations towards areas of contested sovereignty

1.1.1 Overview

[2] See Eyal Benvenisti, *International Law of Occupation* (Second Edition, OUP 2012) 171 "This also a tale of illegal annexation internationally recognized as such"; Steven R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' [2005] 16 *European Journal of International Law* 695, 700; Ben Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' [2015] 27 *Global Change, Peace & Security* 301, 319: "..Western Sahara has been occupied territory since early 1976…"; Pål Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara' [2019] 52 *Israel Law Review* 3.

Most of the territory of Western Sahara has been under Moroccan control since 1975. Morocco considers Western Sahara to be a part of its territory; however no other states have recognised this. The conflict remains subject to ongoing international negotiations, and in a resolution of 30 April 2019, the United Nations Security Council renewed the mandate of the United Nations Mission for the Referendum in Western Sahara (MINURSO). This resolution stresses the need for the parties to continue negotiations in the context of the United Nations, reaffirming "that the *status quo* is not acceptable, and […] that progress in negotiations is essential in order to improve the quality of life of the people of Western Sahara in all its aspects".[3] The UN Security Council emphasises the need for a *political* solution to the ongoing dispute. EU policy, therefore, should not undermine the possibility of such a resolution, for instance, by further cementing the *status quo* in the territory.

The International Court of Justice (ICJ) rendered an advisory opinion on the dispute, finding that the ties between Morocco and Western Sahara were insufficient to establish Morocco's sovereignty over the territory. Importantly, it emphasised that people of Western Sahara, the Saharawi people, had the right to self-determination in relation to the territory.[4] Despite calls from the UN Security Council, the UN General Assembly and other states to withdraw from the territory, Morocco has continued to settle people in the territory, a process that makes the eventual resolution of the dispute more complicated.

The EU has entered into a series of agreements with Morocco on trade liberalisation and fishing opportunities (discussed below). These agreements specify that they apply to the territorial area in

[3] UN Security Council Resolution 2468 (2019), 30 April 2019, S/RES/2468 (2019).

[4] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, paras 70, 162.

which Morocco has jurisdiction, leaving undefined the precise scope of application. The agreements have been applied in practice to the territory of Western Sahara and its coastal waters. This issue is the source of the legal problems faced by the CJEU in these cases. What, exactly, are the EU's international law obligations to Western Sahara, especially when it engages in agreements that apply *de facto* to its territory? The approach of the Court, as discussed below, has been to focus on the text of the agreements, in a way that ignores the clear intention of the parties and the broader context in which they have been applied.

The economic exploitation of resources in Western Sahara was more specifically dealt with in a 2002 letter of Han Corell, who was requested by the United Nations Security Council to examine some of these international law issues.[5] The request focused on the oil exploration contracts in Western Sahara (issued by Morocco), and therefore does not deal with all of the legal issues related to economic engagement with the territory. The letter is important, however, since it has played an important role in the reasoning of the CJEU. According to Corell's advice, the territory is to be viewed through the prism of a non-self-governing territory. Although it does not go into detail on the implications of the territory being occupied under international law, it should be noted that the two legal statuses are not mutually exclusive.[6] One of the important conclusions of the letter was that the economic exploitation in this place could be deemed lawful if undertaken "for the benefit

[5] Letter from the Under-Secretary-General for Legal Affairs, the Legal Counsel, to the President of the Security Council (29 January 2002).

[6] Eugene Kontorovich, 'Economic Dealings with Occupied Territories' [2015] 53 *Columbia Journal of Transitional Justice* 584. Kontorovich is critical of the Commission's assessment: "… the Commission considers non-self-governing (NSG) status and occupied status to be mutually exclusive, a notion with no support in international law or practice".

of the peoples of those [t]erritories, on their behalf or in consultation with their representatives".[7] The people have a right to those natural resources, and therefore must benefit from their exploitation. The letter focused on the issuing of mining contracts, but did not examine other forms of economic engagement, such as the export of agricultural goods, and of fishing resources, both of which have been the subject of the cases discussed in this chapter.

2 Front Polisario

The EU's policy towards Western Sahara had been subject to criticism from non-governmental groups, human rights campaigners, legal experts and academics. However, it was not until cases were brought before the CJEU that the EU institutions were forced to grapple with the legal implications of such policy. While the EU maintained that its policy respected its obligations under international law, critics argued that the EU's economic agreements with Morocco, to the extent that they applied to the territory of Western Sahara, violated a number of the EU's (and the Member States') international legal obligations. The following sections focus on the two main sets of litigation, examining the ways in which the CJEU frames the legal issues.

2.1 General court

In *Front Polisario v Council*,[8] the EU General Court (GC) was asked to annul the Council Decision approving a 2010 Liberalisation Agreement between the EU and Morocco. The case was brought by Front Polisario (*Frente Popular de Liberación de Saguía el Hamra y Río de Oro*), the national

[7] Kontorovich (n 6), footnote 77.

[8] Case T-512/12 *Front Polisario v Council* [2015] EU:T:2015:953.

liberation movement that represents the people of Western Sahara in international negotiations on the dispute.[9] Front Polisario challenged the Council Decision on the basis that it violated EU law and international law binding on the Union. The case involved two main questions. First, did Front Polisario have legal standing to contest the decision? Second, if so, did the decision violate EU law or public international law?

The first, procedural, question depended on whether Front Polisario could be considered as being legally affected by the Council Decision in question. The GC found in this regard that the contested decision was of "direct and individual concern" to Front Polisario, thus fulfilling the criteria for instituting proceedings to challenge an act under EU law.[10] Front Polisario is a subject of international law, but is not established under the law of any state. It produced evidence that it is a recognised national liberation movement under international law, pointing to UN Security Council and General Assembly Resolutions that confirm such status.[11] The GC emphasised that the question was not whether Front Polisario was recognised as a national liberation movement, but whether it had standing under EU law.[12] The GC reviewed the case law on standing, including *Lassalle v Parliament*,[13] and found that entities without legal personality under the law of a Member State or of a non-Member State could still be regarded as a "legal person" in certain

[9] On legal status, see Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' [2017] 2 *European Papers* 339–356.

[10] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326, art 263(4).

[11] *Front Polisario v Council* (n **Error! Bookmark not defined.**) para 37.

[12] Ibid., para 46.

[13] Case 15–63 *Lassalle v Parliament* [1964] ECLI:EU:C:1964:9.

circumstances.[14] This is when an "entity in question has constituting documents and an internal structure giving it the independence necessary to act as a responsible body in legal matters…".[15] Front Polisario, which has its own constituting document and fixed internal structure, met these requirements.[16] The GC also found that Front Polisario could not be required to be established under the law of a state; in fact, it would have been impossible for it to be established under the law of Morocco.

Having found that Front Polisario possessed legal personality for the purposes of Article 263(4) Treaty on the Functioning of the European Union (TFEU), the next question was whether the contested decision was of direct and individual concern to Front Polisario. The Council argued that the international agreement in question was between the Union and the Kingdom of Morocco, and by its nature as a bilateral agreement could not produce legal effects on third parties such as Front Polisario. Here, the GC made an important finding, one which continues to have importance in future legal developments. It reasoned that in order for the decision to have legal effects on Front Polisario, the agreement in question must apply to the territory of Western Sahara. The GC thus ties the issue of "legal effects" to the agreement's territorial scope.[17] The Commission argued that, as a UN non-self-governing territory, Western Sahara has a separate and distinct status under international law, and the agreements cannot apply to the territory of Western Sahara without

[14] Ibid., para 52.

[15] Ibid., para 53.

[16] Ibid., paras 53, 54.

[17] Ibid., paras 53, 73.

explicit extension to that territory.[18] Front Polisario replied by arguing that Western Sahara is not "administered" by Morocco under Article 73 of the United Nations Charter, but rather it is under military occupation. Moreover, Front Polisario pointed to the practice of the parties to that the agreement in question, which have applied it *de facto* to goods originating in the territory of Western Sahara. [19] This was not contested; an answer to a question from the Court, the Commission and Council stated that the agreement was applied *de facto* with respect to the territory of Western Sahara.[20]

Despite this *de facto* application of the agreement with respect to the territory of Western Sahara, the Court found that the question of admissibility still hinged on whether the agreement applied *de jure* to that territory, a question which involved treaty interpretation.[21] The GC thus made a differentiation between practical effects, which were evident, and *legal effects*, which flowed from the terms of the agreement. In order to do this, it required looking at the territorial scope of the agreement, which did not define the territory of Morocco.[22] The EU and Morocco clearly disagree on what this term is supposed to mean. The GC found it to be legally significant that the agreement in question was concluded 12 years after the Association Agreement, with no change being made to the territorial application. The GC held that

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[18] Ibid., paras 53, 75.

[19] Ibid., paras 53, 77–80

[20] Ibid., paras 53, 87.

[21] Ibid., paras 53, 88 "It should be noted that the question [whether the agreement applies to applies to the territory of Western Sahara] ultimately requires an interpretation of the agreement, the conclusion of which was approved by the contested decision".

[22] Article 94 of the Association Agreement simply refers to the territory of the Kingdom of Morocco.

> If the EU institutions wished to oppose the application to Western Sahara of the Association Agreement, as amended by the contested decision, they could have insisted on including a clause excluding such application into the text of the agreement approved by that decision.[23]

The GC thus put quite some emphasis on the intention of the parties to the agreement.

Once the GC had found that the agreement does apply to the territory of Western Sahara, it was then able to find that it did produce legal effects on Western Sahara, and that Front Polisario was to be considered as being individually concerned by the contested decision.[24] Having found that the case was admissible, the Court then turned to the substantive questions. Front Polisario challenged the contested decision on 11 grounds. The pleas in law related to the international law arguments ("external legality") and arguments founded in EU law ("internal legality"). These were (1) failure to state adequate reasons, (2) failure to comply with the "principle of consultation", (3) infringement of fundamental rights, (4) "breach of the principle of consistency of the policy of the European Union, by failing to observe the principle of … sovereignty", (5) "breach of the fundamental values of the European Union … and the principles governing its external action", (6) "failure to achieve the objective of sustainable development", (7) "incompatibility" of the contested decision "with the principles and objectives of the European Union's external action in the area of development cooperation", (8) breach of the principle of protection of legitimate expectations, (9) "incompatibility" of the contested decision "with several agreements concluded by the European Union", (10) the "incompatibility" of the contested decision with "general international law" and (11) the "law of international liability in EU law".

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[23] *Front Polisario v Council* (n **Error! Bookmark not defined.**) paras 53, 102.

[24] Ibid., paras 53, 111.

For the GC, the issues in the application were essentially about one key question: whether there was an absolute prohibition on the EU from concluding an agreement with a third state, an agreement which applies to a "disputed territory".[25] A related question, in that regard, concerned the discretion of the EU institutions in concluding that agreement. The GC thus condensed the applicant's pleas in law to the question "whether and, if appropriate, under what conditions the EU may conclude an agreement with a third State such as that approved by the contested decision which is also applicable to a disputed territory".[26] It can be questioned whether it was appropriate for the GC to distil a multitude of complex legal questions to a single issue. The GC went through each of the pleas in law, and dismissed most of them by answering that they did not give rise to an absolute prohibition. Take, for example, the fifth plea, which argued that the contested decision is contrary to the EU's fundamental values which govern its external action. The GC answered that the EU institutions enjoy a wide discretion in the field of external economic relations, and stated

> it cannot be accepted that it follows from the 'values on which the European Union is based'… that the conclusion by the Council of an agreement with a third State which may be applied in a disputed territory is, in all cases, prohibited.[27]

The GC does not examine whether the agreement and the contested decision actually violate the EU's fundamental values in external action; rather, it states that the conclusion of an agreement with a contested territory is not prohibited in *all cases*. The GC thus sets a high benchmark – and

[25] Ibid., paras 53, 117.

[26] Ibid., para 53.

[27] Ibid., paras 53, 165.

finds that nothing in the applicant's pleas show an absolute prohibition, under EU law or international law, against the conclusion of an agreement with a third state that is applied to a dispute territory.[28]

Having found that there was no absolute prohibition under EU law or international law, the GC then turned to the issue of the discretion of the EU institutions when concluding the agreement. The GC observed that the EU institutions have wide discretion in the area, partly, because "the rules and principles of the international law applicable in the area are complex and imprecise".[29] Citing the *Racke*[30] judgement, the GC finds that judicial review must be limited to whether the Council made "manifest errors of assessment" by approving the conclusion of the agreement. This means, among other things, that the Court must assess whether the EU institution has examined carefully and impartially all the relevant facts of the individual case before reaching its decision.[31] While the Court recognised that there was no absolute prohibition on such agreements, as discussed earlier, it did recognise that the export of products to the EU Member States that originate in a country which were produced under conditions that do no respect fundamental rights, they may indirectly encourage or profit from that practice.[32] The GC found that the Council

[28] Ibid., paras 53, 215.

[29] Ibid., paras 53, 124.

[30] Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] EU:C:1998:293.

[31] *Front Polisario v Council* (n **Error! Bookmark not defined.**) paras 53, 225.

[32] Ibid., paras 53, 231.

> should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights.[33]

The Council had failed to do so. As the Council had failed to fulfil its obligation to examine these issues before approving the conclusion of the agreement, the Court annulled the decision approving the agreement insofar as it applied to Western Sahara.

The GC thus found legal deficiencies, not stemming from public international law obligations, but from internal EU law obligations. The judgement was criticised on a number of grounds. The finding that Western Sahara is a "disputed territory" was particularly problematic. Kassoti stresses that Western Sahara is a non-self-governing territory, whose status is confirmed by the UN and an ICJ advisory opinion.[34] Similarly, the GC's approach to the question Front Polisario's legal personality of was criticised for essentially equivocating on its status under international law. The GC understandably sought to avoid dealing with making pronouncements on the legal status of Western Sahara or Front Polisario, and therefore found a way to address the case without having to answer such thorny issues. The GC perhaps did not want to prejudice the ongoing political process by weighing in on such issues. Yet as Kassoti has observed, the international law obligations owed by the EU depend upon issues of status.[35] Legal classification matters in international law, and by avoiding the issue of status, the GC's legal analysis fails to deal with the essential questions raised by the case. As discussed below, the way in which the Court narrowly

[33] Ibid., paras 53, 241.

[34] Kassoti (n 9) 352.

[35] Ibid., 353.

frames the legal issues – by focusing on standing and territorial application – continues to shape the Court's legal rationale in later developments.

Following the GC's judgement, High Representative Federica Mogherini held a press conference with Salaheddine Mezouar, the Moroccan Minister for Foreign Affairs and Cooperation. Mogherini stated that "[w]ith regard to the judgment of the General Court of the European Union of 10 December 2015, I am well aware of the strategic importance of this issue, both for Morocco and for the European Union".[36] In a joint press conference, the Moroccan Foreign Minister stated "[t]he judgment of the Court is legally wrong and politically biased. It seriously jeopardizes cooperation between Morocco and the European Union".[37] Underlining the political importance of the case, he states, "this is not a simple court case, but an eminently strategic case, a fundamental element for the partnership's success".[38] The Council appealed the GC's decision.

2.2 Advocate general opinion

[36] 'Statement by High Representative/Vice-President Federica Mogherini at the press point with Mr Salaheddine Mezouar, the Moroccan Minister for Foreign Affairs and Cooperation' (*European External Action Service*, 4 March 2016) <https://eeas.europa.eu/headquarters/headquarters-homepage/2842/statement-high-representativevice-president-federica-mogherini-press-point-mr-salaheddine_en> accessed 9 November 2019.

[37] 'Joint press point by Federica Mogherini and Moroccan Foreign Minister Salaheddine Mezour' (*European External Action Service*, 6 July 2016) <https://eeas.europa.eu/headquarters/headquarters-homepage/4743/joint-press-point-federica-mogherini-and-moroccan-foerign-minister-salaheddine-mezouar_en> accessed 9 November 2019. (Unofficial translation by the author).

[38] (Unofficial translation by the author).

On 13 September 2016, Advocate General (AG) Wathelet delivered his opinion in the appeal, arguing that the GC decision be set aside, and that Council Decision should not be annulled.[39] The AG's reasoning, like that of the GC, turned on an assessment of the "territorial scope" of the agreement, an issue which was "of paramount importance … because it permeates the entire action for annulment".[40] The AG therefore continued with the initial legal framing established by the GC, which asserted that the legal questions were fundamentally related to the issue of *de jure* territorial application. The AG disagreed with the GC's description of Western Sahara as a "disputed territory". Rather, he contended, Western Sahara has a separate and distinct status from the administering state under international law.[41] Because of Western Sahara's status as a non-self-governing territory, as determined by Article 73 of the United Nations Charter, the Liberalisation Agreement did not apply to Western Sahara without the express extension to that territory at the time of ratification.[42]

Whereas the GC dealt with issues of public international law in a superficial way, the AG was more robust and detailed in his analysis. However, since the AG had framed the main legal issue to be one of territorial application, this meant that international law issues were mainly related to

[39] Case C-104/16 P *Council v. Front Polisario* [2016] EU:C:2016:677, Opinion of AG Wathelet.

[40] Ibid., para 54.

[41] Ibid., para 75.

[42] Ibid., paras 75–82.

the rules on the interpretation of treaties such as the relative effect of treaties[43] and subsequent practice.[44]

2.3 Appeal

On 21 December 2016, the CJEU set aside the judgement of the GC and dismissed Front Polisario's action as inadmissible.[45] The judgement largely followed the reasoning of the AG, finding that the Liberalisation Agreement did not apply territory of Western Sahara, and as such, Front Polisario lacked standing to challenge the contested decision. In order to determine the territorial application of the Liberalisation Agreement, the CJEU reasoned, it had to engage in the process of treaty interpretation. It thus took account of the methods of treaty interpretation set out in the 1969 Vienna Convention on the Law of Treaties (VCLT). [46] The CJEU has held on a number of occasions that the VCLT rules on treaty interpretation represent customary international law, and are principles binding upon the EU.[47] These rules, in essence, are tools that allow the interpreting body to decipher the intention of the parties to understand its meaning and contents. Article 31 VCLT sets out that a general rule that "[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

[43] Ibid., para 109.

[44] Ibid., para 87.

[45] Case C-104/16 P *Council v Front Polisario* [2016] EU:C:2016:973.

[46] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Morocco has been a party since 1972, but the European Union is not.

[47] See Case C-386/08 *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* [2010] EU:C:2010:91, para 42.

the light of its object and purpose". However, rather than starting from the text of the treaty itself, the CJEU considered Article 31(3)(c), according to which a treaty is to be interpreted taking into account relevant rules of international law applicable between the parties, in order to understand context.[48] In this regard, the CJEU referred specifically to: (1) the principle of self-determination, (2) the territorial scope of treaties and (3) the *pact tertiis* principle of the relative effect of treaties. The Court acknowledged that these principles are somewhat overlapping, but are autonomous rules, and dealt with each in succession.

Regarding the principle of self-determination, the Court found that this was not only a principle of customary international law but also "a legally enforceable right *erga omnes* and one of the essential principles of international law".[49] It referred to Article 1 of the Charter of the United Nations,[50] the ICJ judgements in *Western Sahara* and *East Timor*, and UN General Assembly Resolutions that have reaffirmed the principle, including Resolution 1514 (XV) "Declaration on the granting of independence to colonial countries and peoples".[51] The principle is thus applicable to the relations between Morocco and the EU, and one of which the Court is to take account.[52] The CJEU rejected the Commission's argument that the term "territory of the Kingdom of Morocco"

[48] *Council v Front Polisario* (n 45) para 86.

[49] Ibid., para. 88.

[50] "The Purposes of the United Nations are: … " 2. To develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, and to take other appropriate measures to strengthen universal peace".

[51] UNGA Res 1514 (XV) (1960) UN Doc A/RES/1514(XV), para 2: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

[52] *Council v Front Polisario* (n 45) para 89.

in Article 94 of the Association Agreement should be interpreted to include the territory of Western Sahara. Whereas the GC did not attach legal significance to the fact that Western Sahara had been included in the list of non-self-governing territories since 1963, the CJEU found this to be significant, and found that the words "territory of the Kingdom of Morocco" could not be interpreted so as to include the territory in the Association Agreement.[53]

This interpretation was also supported by the principle enshrined in Article 29 VCLT, according to which, "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory". Article 29 was intended merely to set out a general rule that a treaty is to apply with respect to the territories of its parties, and usually applies where a treaty does not define its territorial application.[54] However, here the Court gives much more significance to the principle, finding that a treaty only applies with respect to territory over which a state exercises full sovereign powers, unless there is an *express provision* providing for its application to other territory. Accordingly, the term "territory", in its ordinary meaning, applies to geographical space in which a state exercises sovereign powers under international law.[55] Since the Association Agreement did not expressly state that it applied to Western Sahara, the CJEU reasoned, it could not be interpreted as applying to a non-self-governing territory.

The third main principle was the rule on the relative effect of treaties. This principle recognises the independence and sovereignty of states, and establishes that a treaty does not create rights and

[53] Ibid., para 92.

[54] ILC, 'Draft Articles on the Law of Treaties and Commentaries, Commentary to Art. 25' (1966) UN Doc A/6309/Rev.1, 213, para 5.

[55] *Council v Front Polisario* (n 45) para 95.

obligations for a third state without its consent (*pacta tertiis nec nocent nec prosunt)*. Article 34 VCLT refers to "third *states*".[56] Yet the CJEU refers to obligations on "third parties", without mentioning why it does so. The Court also did this when it previously applied the principle to interpret the EU-Israel Association Agreement in *Brita*.[57] In that case, the CJEU found that the agreement could not be applied to the territory of the West Bank since doing so would apply a treaty to a third party without its consent. A relevant difference between *Brita* and *Front Polisario* is that in the former case, there was an existing agreement between the Palestine Liberation Organization (PLO) and the EU, whereas there is no similar agreement between the EU and Western Sahara or other entity. Like *Front Polisario*, *Brita* was criticised, inter alia, for utilising international law to avoid more politically sensitive questions.[58] The CJEU considered Western Sahara a "third party" within the meaning of the *pacta tertiis* principle, and therefore the Association Agreement could not apply to it.[59] The CJEU opines at this point what would be necessary for the Agreement to apply to the territory of Western Sahara:

> 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,

[56] Under Article 2(1)(h) of the VCLT, "Third State" is defined as "a State not a party to the treaty".

[57] *Brita* (n 47).

[58] See e.g. Helmut Aust, Alejandro Rodiles and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' [2014] 27 *Leiden Journal of International Law* 75, 103 arguing that it is an example of the Court "somewhat stretching the scope of the *pacta tertiis* rule" in order to avoid the politically sensitive question of the territorial limits of Israel.

[59] *Council v Front Polisario* (n 45) para 106.

> 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.[60]

The CJEU notes that *consent* of the third party would be necessary in order for the agreement to apply to the territory of Western Sahara. The issue of what is considered consent, and who is to be considered representing the people of Western Sahara, is discussed below in Section 4.

The CJEU also differed from the GC in its analysis and application of the "subsequent practice" of the parties in the interpretation of the agreement. Article 31(2)(b) VCLT sets out that, in interpreting a treaty, account can be taken of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". This recognises that, in addition to a treaty's text, the practice of the parties is also relevant, especially since the aim of interpretation is to find the meaning and intention of the parties. The CJEU took into account the practice of the EU and Morocco in applying the Association Agreement. The CJEU found, however, that the GC erred in law, by failing to enquire whether such practice reflected the existence of an agreement between the parties, as required by VCLT Article 31(3)(b).[61] The fact that the agreement had been applied products originating from the territory of Western Sahara in certain cases was not contested. Yet, the CJEU held that this practice alone was not enough to alter

[60] Ibid.

[61] Ibid., paras 120–125.

the language of the agreement, as it did not reflect the existence of an agreement between the parties to "amend the interpretation of … the Association Agreement".[62]

The issue here turned on the intention of the parties, with particular focus on the intention of the EU. Did the EU intend the agreements to apply to the territory of Western Sahara? The CJEU reasoned that, if this were the case, then this

> would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties, even though the European Union repeatedly reiterated the need to comply with those principles, as the Commission points out.[63]

The CJEU also referred to the principle "that Treaty obligations must be performed in good faith".[64] The CJEU seems to argue that since the EU institutions profess to respect international law, the Association Agreement must be interpreted in a way that assumes the EU intends to act in a way that respects principles of international law. It is an unusual approach to treaty interpretation. It uses the EU's apparent fidelity towards international law, to interpret an international agreement between two subjects of international law. Moreover, the CJEU does not make a convincing distinction between instances of *de facto* application of the agreement and examples of "subsequent practice" relevant for treaty interpretation. The CJEU was asked to determine whether the EU is violating its obligations under international law. It is odd, then, to use

[62] Ibid., para 122.

[63] Ibid., para 123.

[64] Ibid., para 124.

the EU's commitment to international law as a basis of interpretation when addressing this very question.

The CJEU's judgement is significant in that it recognises that Western Sahara is a non-self-governing territory with a separate and distinct status in international law, and not a part of the territory of Morocco. The Court's focus on the territorial application of the agreement, however, means that its analysis is limited solely to that question, and it does not examine the consequences of the EU concluding an agreement that applies *de facto* to the territory of Western Sahara. For instance, it does not analyse whether the EU is obligated not to recognise as lawful a situation created through a serious breach of peremptory norm of international law. In contrast with the GC's approach, it does not deal with the obligations the EU has, under international law or EU law, to respect the human rights of the people of Western Sahara. One might argue that the CJEU could not examine such issues, since it found Front Polisario did not have standing, and therefore it would be inappropriate to deal with such substantive questions. However, this is a consequence of the Court's legal framing; by narrowing the case to the issue of territorial application, and narrowing that issue to one of treaty interpretation, the CJEU avoided dealing with the broader context of the conflict.

3. Western Sahara Campaign UK

Western Sahara Campaign UK involved a challenge in the courts of England and Wales to several of the EU's agreements with Morocco. Western Sahara Campaign UK (WSCUK) is a non-governmental organisation based in the United Kingdom, whose aim is to support the right of the people of Western Sahara to self-determination and to promote the human rights of Saharawi people. It brought action before the High Court of Justice (England & Wales). Its first action

concerned whether the Commissioners for Her Majesty's Revenue and Customs, United Kingdom (HMRC) were entitled to accept the importation, 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.[65] 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 (FPA),[66] its 2013 Protocol[67] and acts of secondary legislation whereby the EU allocated fishing opportunities to the Member States. WSCUK essentially argued that the EU's agreements with Morocco – the Association Agreement, the FPA and the 2013 Protocol, as well as secondary legislation implementing fishing opportunities – were contrary to Article 3(5) TEU. Like in the *Front Polisario* case, the proceedings dealt with the question of whether these agreements were concluded in violation of public international law. There were some key differences between the cases. First, the proceedings originated by way of a reference for a preliminary ruling in a Member State, rather than a direct challenge. The case was brought by an NGO based in an EU Member

[65] 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 [2000] OJ L 70, 2 ("Association Agreement").

[66] Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2006] OJ L 141, 4 ("Fisheries Partnership Agreement").

[67] 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 [2013] OJ L 328, 2 ("2013 Protocol").

State, rather than an internationally recognised national liberation movement. The case also dealt with the FPA, which gave rise to questions about the application of the agreement to waters off the coast of Western Sahara. Despite these differences, the CJEU applied similar legal reasoning to find that the WSCUK did not have standing to bring the dispute.

3.1 National court proceedings

In order to determine whether to make a reference under Article 267 TFEU to the CJEU, Blake J sought to determine whether there was "a credible arguable challenge to the validity of the EU measures".[68] Blake J noted, however, that while Article 3(5) TEU requires the EU to respect international law, it does not give detail on the standard of review required. The relevant case in that regard is *Air Transport Association of America*,[69] a case involving a challenge to EU legislation on emissions trading applied to aircraft. In that case, the CJEU examined some of the conditions under which EU legislation could be challenged under Article 3(5) TEU, and the standard of review. In that case, the CJEU set out different tests, depending on whether the principle of international law has its basis in a treaty, or in customary international law. Regarding the application of customary international law, the CJEU held that the review was to be confined to the question whether the EU institutions made a "manifest error of assessment" in applying those principles. After reviewing the arguments of the parties, Blake J found that there was an arguable case that the Commission had made a manifest error in applying international law to the

[68] *R (Western Sahara Campaign UK) v The Commissioners for HMRC and the Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 2898 (Admin) para 5.

[69] Case C-366/10 *Air Transport Association of America* [2011] EU:C:2011:864.

agreements. The judgement and the arguments of the parties paid particular attention in this regard to sources that were given less prominence in the CJEU judgement: the 2002 legal opinion of Hans Corell, the writing of scholars and the concerns about the agreements by some EU Member States and the European Parliament were all discussed.

It is also interesting to note that, had the case not concerned EU agreements, the English Court would not have had the power to review the validity of the agreement. The Court notes that "[t]here is little doubt that if the present challenge was solely based on common law rules, a domestic court might dismiss a claim that depends on an assessment of the legality of actions of a foreign sovereign".[70] The EU Treaties, particularly Article 3(5) TEU, allow challenges of acts of the EU that are alleged to not be in conformity with international law. Unlike some domestic legal systems, the EU legal order does not have an act of state doctrine, or political question doctrine, that would preclude cases that challenge the actions of a foreign sovereign.[71]

3.2 Advocate general opinion

The case concerned the application of the agreements to the territory of Western Sahara and to the waters off its coast. WSCUK argued that the inclusion of Western Sahara within the agreements violated international law binding on the Union. This 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

[70] *Western Sahara Campaign UK* (n 68) para 7.

[71] See Jed Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' [2018] 14 *International Journal of Law in Context* 221.

non-self-governing territories, (iii) provisions of the UN Convention on the Law of the Sea,[72] (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. WSCUK further 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.[73]

AG Wathelet analysed the issue of jurisdiction before turning to the substantive questions raised by the referring court. The first issue was whether the Court had jurisdiction to give a preliminary ruling on the validity of the FPA. The Council argued that an international agreement was not an act of the instructions under Article 267 TFEU, and that the only procedure for analysing the validity of an agreement was the opinion procedure under Article 218(11) TFEU. Unlike *Front Polisario*, which dealt with the Council Decision approving the conclusion of an agreement, this case dealt with the validity of the agreement itself. The agreements between the EU and Morocco are acts on the international plane, and "are part of the international legal order".[74] Nonetheless, the AG did find the Court had jurisdiction to review the validity of the contested acts.

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[72] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994) UNTS 1833 (UNCLOS).

[73] 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* [2018] EU:C:2018:1, Opinion of AG Wathelet, para 32.

[74] Opinion of AG Wathelet (n 73) para 48.

On the substantive issues, AG Wathelet found that the Fisheries Agreement and the 2013 Protocol are indeed applicable to the territory of Western Sahara and to the adjacent waters. AG Wathelet came to this conclusion based on applying the rules on the interpretation of treaties, in particular Article 31 VCLT.

The AG discussed the conditions set out in *Air Transport Association* (discussed earlier) for challenging the compatibility of an international agreement with Article 3(5) TEU. The AG recognised that individuals must satisfy certain conditions in order to be able to rely on international law; however, he added that "those conditions cannot be such as to render effective judicial review of the external action of the Union impossible in practice".[75] Relying on the *Air Transport Association* test, he argued, "would automatically preclude the possibility for individuals to rely on rules, however essential, of international law, such as the peremptory norms of general international law or the obligations erga omnes of international law…".[76] The AG argued that this approach, which focuses on the *competence* of the Union to conclude an agreement, is too restrictive:

> [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.[77]

[75] Ibid., para 86

[76] Ibid., para 90

[77] Ibid., para 92.

The AG seeks to move the Court away from its previous case law, which focuses on the "manifest error" standard with regard to customary international law. He calls into question the Court's approach to treat customary law as fundamentally different from that of treaty law. The Court originally made this distinction on the assumption that customary international law, by its nature, does not have the same "degree of precision" as international agreements.[78] This assumption was challenged in the literature, and by AG Kokott in *Air Transport Association*. AG Wathelet makes the point that when rules of customary international law have been "codified", they do not necessarily lack the same precision as a treaty, and therefore there is no reason to apply different standards depending on the source of international law. He proposes a unified approach be applied: "the Union must be bound by the rule relied on, the content of which must be unconditional and sufficiently precise and, last, the nature and the broad logic of which do not preclude judicial review of the contested act".[79]

The AG then examined whether the "nature and its broad logic" of the rules being relied upon precluded them from being used to assess the validity of the contested acts. He examined the right to self-determination and the principle of permanent sovereignty over natural resources, and rules of international humanitarian law applicable to the conclusion of international agreements concerning the exploitation of the natural resources of the occupied territory, and concluded that they do not preclude judicial review of the contested acts. The AG found that the contested acts are contrary to international law, and therefore violate the obligation in Article 3(5) TEU.

[78] *Air Transport Association of America and Others* (n 69) para 110.

[79] Opinion of AG Wathelet (n 73) para 96.

Significantly, the AG found that the EU policy amounted to recognition of an illegal situation resulting from a breach of the right to self-determination of the people of Western Sahara.[80]

The full reasoning and assessment of the AG will not be analysed here. It should be noted, however, how the approach of the AG differs significantly from that of the Court. Whereas the AG's assessment goes into detail on a number of issues of international law, the Court does not conduct the same assessment. This turns on the Court's very different approach to the issue of territorial application.

3.3 Court of justice

In *Western Sahara Campaign UK*, the CJEU departs from the AG in a number of areas, and mainly uses the approaches adopted in *Front Polisario*, discussed earlier. On the procedural question, the CJEU held that it did have the power to assess whether international agreements concluded by the EU are compatible with international law, via the preliminary reference procedure.[81] When the Court receives a request for a preliminary ruling concerning the compatibility of such an agreement, it reasoned, such request must be understood as relating to the EU act approving its conclusion.[82] Review of its validity is to be conducted "in the light of the actual content of the international agreement at issue".[83] Since the EU Treaties set out that the Court shall give

[80] Ibid., para 212.

[81] 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* [2018] EU:C:2018:118, para 48.

[82] Ibid., para 50.

[83] Ibid., para 51.

preliminary rulings on the interpretation of *Union law* or on the validity of *EU acts*,[84] it would appear that this does not apply to acts on the plane of international law. Indeed, a procedure for determining whether an "envisaged" agreement is compatible with the Treaties exists in Article 218 (11) TFEU. Such procedure allows an ex ante assessment of whether an agreement concluded by the Union is compatible with the Treaties, thus preventing the situation whereby an agreement is later found to be incompatible and engaging the international responsibility of the Union. It had been discussed in some academic literature whether the validity of an international agreement could also be assessed via other procedures such as through the preliminary reference procedure. Lenaerts et al. argued that there was little practical distinction between the international agreement and the internal EU act concluding it. [85] In practical terms, this is correct; however, it should be remembered that there is a significant difference between the two legal sources. The agreement, as a source of law on the international plane, can only be found to be invalid according to the rules enshrined in the law of treaties; an issue regarding the internal procedure would only have internal legal ramifications for that party. The CJEU does not have the power to render invalid an act on the international plane. Importantly, this procedure does not involve the consent of the other party to the agreement, in this case Morocco. In the event the CJEU found the internal act (the decision approving the agreement) to be invalid, the EU institutions would be required to take steps to rectify the situation.

Like in *Front Polisario*, the Court determined that the legal questions all turned on the issue of the agreements' territorial scope: did the FPA and its Protocol apply to the territory of Western Sahara?

[84] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 19 (3) (b).

[85] See Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (OUP, 2014) 459–460.

[86] In order to address this question, the CJEU again found that it had to engage in an exercise in treaty interpretation. It focused, primarily, on the provisions of those agreements dealing with spatial application and scope. The FPA uses the term "the territory of Morocco and to the waters under Moroccan jurisdiction".[87] The agreement permits vessels flying the flag of an EU Member State to "engage in fishing activities in [the] fishing zones [of the Kingdom of Morocco]".[88] It defines "Moroccan fishing zone" as "the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco". The FPA provisions therefore did not provide much guidance on the issue, beyond asserting that they apply with respect to Morocco and its adjacent waters. Rather than assess the instruments (the Association Agreement, the FPA and 2013 Protocol) separately, the CJEU considered them collectively as a body of agreements, whose aims and purpose are closely related.[89] This meant that the understanding of "territory of Morocco" should be given a consistent meaning throughout. The FPA, therefore, was understood as defining "territory of the Kingdom of Morocco" in the same way as in Article 94 of the Association Agreement. As discussed earlier, the Court had previously held in *Front Polisario* that the term "territory of the Kingdom of Morocco" as referring to the area over which Morocco exercises sovereignty under international law, which excludes application to other territories such as Western Sahara. The Court confirms this finding by using the same logic it applied in *Front Polisario*, when it

[86] *Western Sahara Campaign UK* (n 81) para 56.

[87] Fisheries Partnership Agreement, art 11.

[88] Ibid., art 5.

[89] *Western Sahara Campaign UK* (n 81) para 59.

interpreted the agreement in the light of the EU's self-proclaimed fidelity to international law. The Court reasoned that

> 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 […][90]

The Court thus diverges from the Opinion of the AG on a key point, that is, the importance to be attached to the *de facto* application of the agreements with respect to Western Sahara. For the AG, such application in practice demonstrated the intention of the parties, and was relevant to interpreting the scope of the agreement. The CJEU, on the other hand, dismisses the importance of the *de facto* application, and reasons that the Union could not have intended to apply the agreement to Western Sahara, because to do so would have meant the Union would be breaching international law. The Court separates the questions of the implementation of the agreements and their *de jure* application according to the text of the agreements. In the proceedings before the referring court, the defendants challenged the *application* of the agreement to goods that originate from the territory of Western Sahara and the application of the FPA to territorial waters of Western Sahara. The question referred to the CJEU focused on the validity of those agreements in the light of international law and Article 3(5) TEU.[91]

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[90] *Western Sahara Campaign UK* (n 81) para 63.

[91] In particular, the referring court asked

Even if the FPA and protocol did not apply to the territory of Western Sahara and its coastal waters, could the parties have still agreed to establish a "special meaning" to the term? Article 31(4) VCLT sets out that "[a] special meaning shall be given to a term if it is established that the parties so intended". However, the CJEU finds that the EU could not have had such an intent. This is because such a "special meaning" given to the agreement would violate international law, and thus

> it would be contrary to the rules of international law referred to in paragraph 63 of the present judgment … if it were agreed that the waters directly adjacent to the coast of the territory of Western Sahara were to be included within the scope of that agreement.[92]

This is another example of the Court interpreting the agreement in the light of the EU's internal commitments to international law. The EU could not have intended to apply the agreements in a way that violated international law, the Court reasons, since if it were to do so, this means that the EU had intended to violate international law. The Court does not appear to be open to the other plausible interpretation: that the EU concluded an agreement that applies to the territory of Morocco, in violation of international law and Article 3(5) TEU.

> 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?

Ibid., para 41.

[92] Ibid., para 71.

In contrast to the AG, the Court attaches very little weight to the implementation of the agreement. The fact that the Council and the Commission were both of the position that the FPA and Protocol do apply to Western Sahara seems to play little role in its reasoning. To further support its conclusion that the agreements do not apply to the waters adjacent to the territory of Western Sahara, it refers to the geographical coordinates and baselines of its fishing zone supplied by 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.[93] Even if they did not technically form part of the text of the protocol, these are still evidence of the intention of the parties, and form part of the broader context in which the agreements are interpreted and applied by the parties. This approach is in stark contrast to that of the AG, who looked at charts showing the extent of the fishing zones (supplied by the Commission), the minutes of 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. To the AG, this evidence all pointed to the conclusion that the parties' intention to apply the agreement to the waters of Western Sahara was "manifestly established".[94] Such an approach, focusing on the parties' actual intent, would have been more in line with the established approach to treaty interpretation. The Court examined the EU's intent by referring to the EU's own constitutional provisions, namely Article 3(5) TEU, the very same article that was being replied upon to review the legality of the contested acts.

[93] Ibid., para 81.

[94] Ibid., para 72.

3.4 Debate and criticism

The *Western Sahara Campaign UK* and *Front Polisario* cases have been commented and criticised in legal circles, mainly for the way in which they have dealt with important aspects of public international law. Criticism has focused, for example, on how the EU Courts have misapplied international law of treaties. Kassoti argues that the Court's approach to treaty interpretation and application of the Vienna rules is "highly problematic".[95] The Court is criticised, among other reasons, for giving excessive weight to Article 31(3)(c) VCLT at the expense of other means of interpretation.[96] Importantly, it overlooks the main goal of treaty interpretation, that is, to ascertain the intention of the parties to the agreement. The criticism is that, while the EU and its court seek to uphold the image of being "friendly" towards international law, it is problematic that the Court "applied international law rules on treaty interpretation in a way that few international lawyers would recognize".[97]

Another form of criticism is that the EU's policy towards Morocco is hypocritical, since it does not treat similar cases of occupation alike. For instance, Harpaz argues that the EU's policy of denying Israel the trade benefits with respect to the Occupied Palestinian Territories, while at the same time applying the Association Agreement with Morocco to the occupied territory of Western

[95] Eva Kassoti, 'The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK' [2019] 56 *Common Market Law Review* 219.

[96] Kassoti (n 95) 219: "The Court's excessive reliance on Article 31(3)(c) VCLT, and the fact that it did not take into account the other means of interpretation contained in the Article, go against the 'crucible approach' intended by the ILC and employed in international judicial practice".

[97] Ibid., 219.

Sahara, "is not in line with the EU's commitment to strict observance of international law and that it erodes the credibility and legitimacy of the EU as a Normative Power".[98] The EU's policy of "application with no recognition" towards Morocco is at odds, he argues, with its policy towards Israel. This is not just contradictory, he argues, but potentially violates the letter and spirit of the Most Favoured Nation (MFN) principle in trade law.[99] Frid de Vries also argues that the CJEU overlooked a potentially important area of international law in these cases, that is, international trade law, and the GATT in particular.[100] By adopting a trade law approach, Frid de Vries argues, the Court could also have averted some of the "sensitive political issues" in the case.[101]

This criticism and commentary has mostly engaged with the CJEU's legal reasoning and debated the Court's approach on its own terms. It finds faults in the Court's application of specific rules or points to inconsistencies. Yet on a broader level, it is the very way that the CJEU framed the legal questions that are most problematic. The approach taken by AG Wathelet, while still examining the issues in terms of treaty interpretation, focuses more on the broader context of the dispute. It deals with what I consider to be the real legal question in this debate, the question of what the EU's international legal obligations are towards the territory of Western Sahara, and whether its policy

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[98] Guy Harpaz, 'The Front Polisario Verdict and the Gap between the EU's Trade Treatment of Western Sahara and Its Treatment of the Occupied Palestinian Territories' [2018] 52 *Journal of World Trade* 619. See Guy Harpaz and Eyal Rubinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita' [2010] 35 *European Law Review* 551.

[99] Harpaz, 'The Front Polisario Verdict' (n 98) 626.

[100] Rachel Frid de Vries, 'EU Judicial Review of Trade Agreements Involving Disputed Territories: Lessons from the *Front Polisario* Judgments' [2018] 24 *Columbia Journal of European Law* 497.

[101] Ibid., 524.

conforms with this. The Court's approach was to limit the legal questions to that of territorial application of the agreements. Perhaps this is understandable given the sensitive subject matter, but a more thorough engagement with the substantive legal questions would have given the EU institutions greater clarity about how to act in the future when engaging with Morocco. This lack of certainty and guidance can help explain the behaviour of the other EU institutions since the judgements.

4. Continued engagement with Western Sahara

The approach taken by the Court allows it to tread a very delicate path: it was able to uphold the internal and external legality of the agreements with Morocco, while at the same time giving clear warning signals about the EU's policy towards Western Sahara. Front Polisario and WSCUK were both unsuccessful in their legal challenges; however, their challenges did allow the CJEU to recognise the separate and distinct status of Western Sahara, and to implicitly criticise EU policy, without going so far as to openly challenge its validity. The judgement has a number of effects beyond the legal challenge. At one level, it has simply brought the issue of Western Sahara to the attention of some people who would otherwise have never heard of the case. Another effect is that, as the EU negotiates new agreements with Morocco, it must ensure that it complies with the legal requirements established by the Court. The judgements keep legal (and diplomatic) relations between the EU and Morocco intact, but also clearly show that any future agreements must respect the right of the people of Western Sahara to self-determination.

On 4 March 2019, the Council adopted a decision approving the conclusion of a sustainable FPA.[102] The preamble of that decision refers to the judgements in *Western Sahara Campaign UK*: "the Court held that neither the Agreement nor the Implementation Protocol thereto apply to the waters adjacent to the territory of Western Sahara".[103] It refers to the steps taken by the Commission and European External Action Service to assess whether the Fisheries Agreement would be for the "benefit" of the people of Western Sahara, and in compliance with the CJEU judgement:

> In view of the considerations set out in the Court of Justice's judgment, the Commission, together with the European External Action Service, took all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent. Extensive consultations were carried out in Western Sahara and in the Kingdom of Morocco, and the socioeconomic and political actors who participated in the consultations were clearly in favour of concluding the Fisheries Agreement. However, the Polisario Front and some other parties did not accept to take part in the consultation process.[104]

The results of the Commission's study were published in a Commission Staff Working Document on "Report on benefits for the people of Western Sahara and public consultation on extending

[102] Council Decision 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement [2019] OJ L 77.

[103] Ibid., Preamble, para 3.

[104] Ibid., Preamble para. 11.

tariff preferences to products from Western Sahara".[105] The Commission undertook public consultations with people in Western Sahara, examining the economic and human rights impact of the proposal. The Report concludes 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". The Commission document also notes that Front Polisario rejects the amendment to the EU-Morocco Association Agreement extending tariff preferences to products from Western Sahara, but dismisses these concerns, as they are "political reasons unrelated to the amendment itself". Front Polisario is of the view that such an extension would be viewed as consolidating Morocco's sovereignty over the territory.

The Commission's report has a number of flaws. It was constrained in its ability to attain appropriate data, particularly on the goods originating from Western Sahara. It was also constrained in its ability to obtain reliable information about whether the "people" of Western Sahara approve the agreement. Does this entail only the representatives of the people of Western Sahara, or also, for example, other civil society organisations, businesses and individuals? However, the main methodological shortcoming is the way that the Commission understands and

[105] Commission,

> 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, Accompanying the document Proposal for a Council decision on the conclusion of an agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco on amending Protocols 1 and 4 of 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.

(2018) COM 481 final.

defines the idea of "benefit". It is almost entirely conceived in terms of economic benefit, and focuses on the potential impact on the Western Saharan economy. When analysing the potential impact on human rights, the Commission concludes: "By promoting a convergence of rules with EU standards in various fields, the Agreement will lead to indirect improvements in areas such as working conditions (including safety), labour legislation (including child labour), plant health measures and consumer protection". This is a rather narrow way of examining a complex and multi-faceted issue – it conflates convergence of EU rules with the improvement of human rights, without examining the broader impact of the policy.

On 16 January 2019, the European Parliament gave its consent to draft Council Decision on the conclusion of the agreement between EU and Morocco.[106] The accompanying Press Release entitled "Preferential tariffs to help Western Sahara to develop" demonstrates the approach taken by the EU institutions generally.[107] It states that the proposal to lower tariffs in the territory of Western Sahara will benefit local populations. The European Parliament resolution also notes that the CJEU judgements on Western Sahara "did not specify … how the people's consent has to be

[106] European Parliament non-legislative resolution of 16 January 2019 on the draft 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 (10593/2018 – C8–0463/2018 – 2018/0256M(NLE), 16 January 2019.

[107] 'Preferential tariffs to help Western Sahara to develop' (*European Parliament Press Service*, 16 January 2019) <http://www.europarl.europa.eu/news/en/press-room/20190109IPR23018/preferential-tariffs-to-help-western-sahara-to-develop> Accessed 9 November 2019.

expressed and considers therefore that some uncertainty remains as regards this criterion".[108] It recognises the difficulties of the Commission to ascertain the benefits of the policy to the people of Western Sahara, but concludes that there is overall support for the tariff preferences. Like the Commission report, it acknowledges that there was opposition in Western Sahara, stating, "others consider that the settlement of the political conflict should precede the granting of trade preferences".[109] The emphasis, then, is primarily on the socio-economic benefits to the population. It downplays concerns that such policy may have the effect of cementing the *status quo* and consolidating Morocco's control over the territory. While such arguments may be dismissed as "political", the fact that the internationally recognised political representatives of Saharawi people, Front Polisario, oppose the policy should be taken into account. When seeking to understand whether it will have a benefit for the people of Western Sahara, the effect of the agreements on the underlying territorial dispute must be given consideration.

While the CJEU judgement appears to be taken into consideration, the follow-up by the EU institutions acts on a narrow interpretation of that judgement. It focuses entirely on the issue of whether the application of tariff preferences would have a positive economic impact, but appears to overlook other issues dealt with by the judgement. For example, what are the obligations on the EU to respect the self-determination of the people of Western Sahara? Does this not entail, in addition to an economic impact assessment, an assessment on the impact EU policy has on the enjoyment of that right? The Council Decision on Sustainable Fisheries Partnership Agreement asserts that it is compliant with international and European law, but it does not appear to fully

[108] European Parliament non-legislative resolution (n 106) para 12.

[109] Ibid., para 11.

assess what, precisely, that law requires. The EU's policy towards Western Sahara and its economic relations with Morocco will likely lead to new disputes before the CJEU. However, the Court will not be able to side-step these thorny questions by stating that the agreement in question does not apply to the territory of Western Sahara. It may still use some avoidance strategies to limit full review, for example, by limiting the standing of the applicants, or by the narrow framing of the legal questions.

5. Conclusion

Like the other examples of occupation and contested sovereignty discussed in this volume, the situation of Western Sahara is a highly sensitive political issue. The EU and its Member States value the importance of good relations with Morocco, which involves much more than economic ties, but important cooperation on migration, counter-terrorism and security. This chapter has examined the cases that have come before the CJEU involving the EU's engagement with Western Sahara, and in doing so has focused mainly on the issues of EU and international law. It found weaknesses in certain parts of the EU Court's reasoning, particularly in the way it approached several aspects of the law of treaties, and the way it framed the legal questions before it. It is understandable why the CJEU would approach the case in such a way. The Court faced a myriad of legal issues – from the issue of recognition, to self-determination, and international humanitarian law, to questions under EU law. One might argue that as a regional integration court, the CJEU is not well-equipped to deal with fundamental questions of public international law, and has shown little engagement with such issues in past cases. By framing the legal issue as one of *de jure* territorial application, the CJEU was able to reaffirm the EU's commitment to international law, and to criticise the EU's policy towards Western Sahara, but in a way that was less

antagonistic than declaring the agreements to be invalid. The CJEU relies, however, on a certain legal fiction – that the people of Western Sahara are not "affected" by these agreements, because they do not *legally* apply to that territory.

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