International Law as Challenge to EU Acts: *Front Polisario II*

Case T-279/19, *Front Polisario v. Council*, Judgment of the General Court of 29 September 2021, ECLI:EU:T:2021:639 and Joined Cases T-344/19 and T-356/19, *Front Polisario v. Council*, Judgment of the General Court of 29 September 2021, ECLI:EU:T:2021:640

Jed Odermatt

1 Introduction

On 29 September 2021, the General Court of the European Union (General Court) issued two judgments[1] in which it annulled Council decisions approving trade and fisheries agreements concluded between the European Union and the Kingdom of Morocco. The cases were brought by Front Polisario (*Frente Popular de Liberación de Saguía el Hamra y Río de Oro*) the national liberation movement seeking independence for Western Sahara. It argued that the agreements, which applied with respect to the territory of Western Sahara, violated rules of public international law binding on the Union. In particular, the General Court found that the European Commission and the European External Action Service (EEAS) failed to obtain the consent of the people of Western Sahara before concluding the agreements. The judgments in *Case T-279/19* and *Joined Cases T-344/19 and T-356/19 (Front Polisario II)* are the latest in a line of cases involving legal challenges to international agreements between the European Union and Morocco on the basis that, since these agreements apply to the territory of Western Sahara without the consent of the people of Western Sahara, they were concluded in violation of international law. After providing some legal and factual background to the cases, this note will discuss how the General Court approached the public international law issues in these cases. It focuses on how the General Court addresses 'third parties' to treaties in public international law and EU law. It then discusses how the General Court understands the issue of 'consent' in international law. Although the General Court's reasoning is sound, its analysis is limited by the interpretation of international law in previous cases.

2 CJEU's Previous case-law on Western Sahara

Before analysing *Front Polisario II* it is worth recalling the CJEU's previous cases dealing with the EU's economic engagement with Western Sahara.[2] Not only do these previous cases provide background context to the reasoning and outcome in *Front Polisario II*, they also had a direct impact on the way the General Court approached the issues in the case. In 2015, in *Front Polisario v Council* (2015), the General Court annulled a Council Decision[3] approving

[1] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, EU:T:2021:640 and Case T-279/19, *Front Polisario v Council*, EU:T:2021:639.

[2] For an overview of these previous cases see Odermatt 'The EU's Economic Engagement with Western Sahara: Assessing the Compatibility of Agreements with International Law' in Duval and Kassoti (Eds.), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives* (Routledge, 2020), Ch. 6; Van der Loo, 'Law and Practice of the EU's Trade Agreements with Disputed Territories' in Garben and Govaere (eds), *The Interface Between EU and International Law* (Hart Publishing 2019) 14–17.

[3] Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the

the EU-Morocco Agreement on agricultural, processed agricultural and fisheries products. It did so on the grounds that the Council had failed to examine all the elements of the case before adopting the decision.[4] While the General Court found that there was no absolute prohibition on concluding an agreement that applies with respect to a 'disputed territory', it held that the Council is obliged to examine whether the agreement impacts the protection of fundamental rights of the population of such a territory.[5] In 2016, the Grand Chamber then set aside the General Court judgment on appeal, finding that the application brought by Front Polisario was inadmissible.[6] The Grand Chamber found that since Western Sahara has a separate and distinct status from Morocco in international law, the term 'territory of the Kingdom of Morocco' defining the agreement's territorial application could not be interpreted as applying to the territory of Western Sahara.[7] Thus, the Grand Chamber upheld the appeal because the applicants, Front Polisario, were not directly and individually concerned by the Council Decision. In addition to this action for annulment, in *Western Sahara Campaign UK,* international agreements concluded between EU and Morocco were indirectly challenged via reference for a preliminary ruling. While the applicants in *Western Sahara Campaign UK* were unsuccessful in their legal challenge, they did achieve a symbolic victory: the Grand Chamber confirmed that, since Western Sahara has a separate and distinct status in international law, the agreements at issue did not apply to the territory of Western Sahara or its adjacent waters.[8] This finding directly conflicted with Morocco's view that Western Sahara as part of its sovereign territory. It also diverged from the General Court's previous description of Western Sahara as a 'disputed' territory.[9] However, the Grand Chamber's decision meant that the applicants did not satisfy the standing requirements to challenge the decisions.

Front Polisario II must be understood in the light of these previous judgments since the legal reasoning and factual findings in these cases influenced the General Court's approach. Front Polisario had argued that, by concluding an agreement with Morocco that applies to the territory of Western Sahara without the consent of the people of Western Sahara, the Council had breached its obligation to comply with the Court's previous judgment in *Front Polisario I.*[10] This note will not re-examine the *Western Sahara Campaign UK* and *Front Polisario II* cases. Rather, it will show how the analytical frame adopted by the Court in these previous cases was replicated in *Front Polisario II.* In these previous cases, the Court frames the legal dispute as essentially one of treaty interpretation. Its reasoning focused on the application of the rules of customary international law in the *1969 Vienna Convention on the Law of*

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replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Association Agreement with Morocco, O.J. 2012, L 241.

[4] Case T-512/12 *Front Polisario v Council*, EU:T:2015:953, para. 247.

[5] Case T-512/12 *Front Polisario v Council*, EU:T:2015:953, para. 227.

[6] Case C-104/16 P *Council v. Front Polisario*, EU:C:2016:973, para. 134. Cannizzaro, 'In Defence of Front Polisario: The ECJ as a Global Jus Cogens Maker' (2018) *CMLRev* 569.

[7] Case C-104/16 P *Council v. Front Polisario*, EU:C:2016:973, para. 92.

[8] 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*, EU:C:2018:118. See commentary Odermatt, 'Fishing in Troubled Waters: ECJ 27 February 2018, Case C-266/16, R (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' 14(4) *EuConst* (2019) 751–766.

[9] See Case C-104/16 P, *Council v. Front Polisario*, Opinion of A.G. Wathelet, EU:C:2016:677, paras 26-30.

[10] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 251.

Treaties (VCLT).[11] Rather than examine the numerous international law and EU law issues that arise in relation to the contested agreements, the Court funnelled them into a question about the 'territorial scope' of the agreements.

In *Front Polisario II*, the General Court similarly narrows its focus on the law of treaties and the VCLT. This time, however, its focus is not on the territorial application of the agreements, but on the issue of consent of third parties to an international agreement and the principle of the relative effect of treaties. Such an approach allows the General Court to apply principles of public international law in a way that shows the its fidelity to international law, by upholding its duty to contribute to "the strict observance and the development of international law."[12] By annulling the Council Decision concluding the agreement with Morocco, the General Court plays an important role in ensuring that the EU institutions live up to their obligation to comply with international law in the exercise of their powers. Yet, as discussed below, by adopting this narrow judicial framing, the General Court avoids grappling with the main controversy at the root of these cases: the EU's involvement in the ongoing illegal occupation of Western Sahara.

3 Legal and Factual Background

The UN Committee on Decolonization considers Western Sahara, a territory situated on the north-west coast of Africa, to be a non-self-governing territory.[13] Since 1975, most of the territory of Western Sahara has been under control of Morocco, which considers Western Sahara to be part of its sovereign territory. The right of the people of Western Sahara to self-determination has been recognised in various legal forums, including by the International Court of Justice (ICJ),[14] the United Nations General Assembly[15] and in successive resolutions of the United Nations Security Council.[16] Neither the European Union nor any state has legally recognised Morocco's claims over the territory. The issue of its final status remains contested and subject to ongoing negotiations in the context of the UN Security Council. In successive resolutions, the UN Security Council has reiterated that "the status quo is not acceptable" and urges the parties to find a solution "based on compromise, which will provide for the self-determination of the people of Western Sahara".[17]

It is in this context that the European Union has concluded international agreements on trade and fishing opportunities with Morocco. However, it has kept its legal relations with Western Sahara somewhat ambiguous. Previous agreements with Morocco left the territorial scope ill-defined, stating merely that they apply with respect to the territorial area in which Morocco

[11] See Kassoti, 'Between Sollen and Sein: The CJEU's Reliance on International Law in the Interpretation of Economic Agreements Covering Occupied Territories' (2020) *LJIL* 371. Kassoti 'The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK' (2019) *CMLRev* 209.
[12] Article 3(5) TEU. An analysis of the Court's application of Article 3(5) TEU notes "The *Western Sahara* case is arguably the strongest evidence of Article 3(5) TEU's limited impact." Dunbar, Article 3(5) TEU a decade on: Revisiting 'strict observance of international law' in the text and context of other EU values' 28 *MJ* (2021) 479–497, at 495.
[13] See United Nations Special Committee on Decolonization, List of Non-Self-Governing Territories, Available at <https://www.un.org/en/decolonization/nonselfgovterritories.shtml>.
[14] *Western Sahara*, Advisory Opinion, 1975 ICJ Rep. 12, paras. 70, 162.
[15] UNGA Res. 34/37 'The Question of Western Sahara', 21 November 1979, A/RES/34/37.
[16] Most recently, see UNSC. Res. 2602 (2021) 29 October 2021, S/RES/2602 (2021).
[17] Ibid.

has jurisdiction. However, in practice, these agreements were applied with respect to goods originating from the territory of Western Sahara and its coastal waters, leading to the legal challenges mentioned earlier.

The key difference between *Front Polisario II* and the previous cases was that the agreements challenged in 2021 explicitly applied with respect to goods originating in the territory of Western Sahara and its coastal waters. This is because the EU-Morocco Association Agreement was amended explicitly to include the territory of Western Sahara, by extending trade preferences to goods originating in Western Sahara.[18] Similarly, the EU negotiated a protocol to the EU-Morocco Sustainable Fisheries Partnership Agreement that applies with respect to the waters adjacent Western Sahara.[19] The Council Decisions approving these instruments[20] reflect that they were renegotiated in direct response to the Court's judgments in *Front Polisario I* and *Western Sahara Campaign UK*. The Council maintains, however, that the conclusion of the Euro-Mediterranean Agreement is "without prejudice to the respective positions of the European Union with regard to the status of Western Sahara and of the Kingdom of Morocco with regard to that region".[21] The Council Decision is concluded 'without prejudice' to the positions of the parties:

> "The Union does not prejudge the outcome of the United Nations' political process on the final status of Western Sahara and has consistently reaffirmed its commitment to resolving the dispute in Western Sahara, presently listed by the United Nations as a non-self-governing territory, large parts of which are currently administered by the Kingdom of Morocco […]."[22]

The Council Decisions also emphasise that the application of these agreements with respect to Western Sahara does not signify that the Union recognises Morocco's sovereignty over Western Sahara or its adjacent waters.[23] The CJEU has never addressed the question whether

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[18] 'Joint declaration concerning the application 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 ("the Association Agreement"), Article 1 "Products originating in Western Sahara subject to controls by customs authorities of the Kingdom of Morocco shall benefit from the same trade preferences as those granted by the European Union to products covered by the Association Agreement."

[19] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 107: "It is clear from the pleas and arguments put forward in the application that the present action is based on the premiss that the [Sustainable Fisheries Partnership Agreement] applies to Western Sahara and the adjacent waters."

[20] Council Decision (EU) 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, O.J. (2019) L77. Council Decision (EU) 2019/217 of 28 January 2019 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, O.J. (2018) OJ L 34.

[21] 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, O.J. 2019, L 34/4.

[22] Council Decision (EU) 2019/217 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, O.J 2019, L 34/1. See Case T-279/19, *Front Polisario v Council*, EU:T:2021:639, para. 51.

[23] Council Decision (EU) 2019/441, Preamble, 12th recital: "there is nothing in the terms of the Fisheries Agreement or of the Implementation Protocol thereto which implies that it would recognise the Kingdom of Morocco's sovereignty or sovereign rights over Western Sahara and the adjacent waters".

the renegotiated agreements should be considered *de jure* recognition of Morocco's sovereignty. Nevertheless, the EU's policy can be viewed as consolidating Morocco's *de facto* control over the territory, arguably making a political settlement of the dispute more difficult. Even if the EU does not recognise Morocco's sovereignty over the territory, the EU's actions could be considered as recognising as legal a situation brought about by an unlawful use of force. In other areas of occupation, from Turkey's control of Northern Cyprus,[24] to Israel's settlements in the West Bank,[25] and Russia's occupation of parts of Ukraine,[26] the Union has gone to lengths to ensure that it does not engage with the authorities of the occupying power in a way that recognizes either its *de jure* or *de facto* control. The General Court has not examined whether the *de facto* recognition of Morocco's control of the territory would also give rise to legal implications for the Union. Rather, the General Court focuses on whether the people of Western Sahara have given their consent to the conclusion of the agreements. While both *Front Polisario I* and *Western Sahara Campaign UK* allowed the EU's agreements with Morocco to remain in force, the Court set out a clear legal requirement for an agreement to apply in respect to that territory: it must be concluded with the *consent* of the people of Western Sahara.

Following these cases, and before the Council Decisions concluding the agreements, the EU institutions sought to demonstrate that the people of Western Sahara consented to the application of the agreements to that territory. The Council Decisions approving the new agreements make explicit references to these previous cases and the conditions set out by the Court therein, in particular on the issue of consent:

> "*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."[27]

This passage refers to the 'consultations' made by the European Commission and EEAS prior to concluding the agreement extending tariff preferences to goods originating in Western Sahara.[28] These consultations took place to satisfy the requirements set out by the CJEU and

[24] Case C-432/92 *Anastasiou*, EU:C:1994:277. For commentary on the international law issues, see Talmon, 'The Cyprus Question Before the European Court of Justice', 12 *EJIL* (2001), 727-750, Greenwood and Lowe, 'Unrecognised States and the European Court', *CLJ* (1995) 4-6.

[25] C-386/08 *Brita*, EU:C:2010:91.

[26] See for example, Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas, O.J. 2022 LI 42/77. The restrictive measures prohibit the importation of goods into the European Union originating in the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine.

[27] Council Decision (EU) 2018/2068 of 29 November 2018 on the signing, on behalf of the Union, 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, 2018, L 331/1, preamble, 11th recital (emphasis added).

[28] European 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-

in the subsequent Council decision authorising negotiations. The Report concludes "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."[29] However, as will be discussed below, rather than demonstrating the consent of the people of Western Sahara, the EU institutions focused on whether the agreements were concluded for the 'benefit' of the population.

4 Overview of *Front Polisario II*

As with the previous *Front Polisario I* and *Western Sahara Campaign UK* cases, the applicants brought forward numerous legal arguments to challenge the Council decision. Front Polisario made 11 pleas in law to support its application, including lack of competence to adopt the contested decision, violations of fundamental rights and international humanitarian law, and arguments relating to proportionality and legitimate expectations and international responsibility.[30]

The General Court found that the EU-Morocco Sustainable Fisheries Partnership Agreement and the amendments to the EU-Morocco Association Agreement were concluded without the consent of the people of Western Sahara. In particular, it found that the EEAS/Commission Report demonstrated certain economic benefits for the people of Western Sahara, it failed to satisfy the requirement that the *consent* of the people of Western Sahara must be obtained. Thus, the Council had failed to comply with the requirement, stemming from Article 266 TFEU, to comply with the obligations in its previous case-law. The General Court annulled the Council decisions concluding these agreements. However, the General Court maintained the effects of these decisions pending appeal, on the grounds of ensuring 'legal certainty'.

Another important difference between *Front Polisario II* and the previous cases was that the General Court found that Front Polisario had legal standing to challenge the contested decision. Previously, the Court found that the applicants were not entities "directly and individually concerned" by the agreements, since the agreements did not apply *de jure* to the territory of Western Sahara. *Front Polisario II* thus further develops the Court's procedural law regarding which entities are capable of challenging EU acts via action for annulment.

The defendants challenged Front Polisario's standing. In particular, the Council argued that Front Polisario was not a 'legal person' with the capacity to bring proceedings before EU Courts within the meaning of the fourth paragraph of Article 263 TFEU.[31] It argued that Front Polisario does not have legal personality under the law of an EU Member State, nor international legal personality under international law. It was argued that Front Polisario failed to satisfy the standing criteria laid down by EU courts law for entities without legal personality. The General Court dismissed the argument that the applicant needs to possess legal personality under the law of an EU Member State.[32] It cites case-law demonstrating that the entities may be party to legal proceedings before EU Court irrespective of whether they

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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) SWD/2018/346 final/2.

[29] Ibid., Section 4.3.

[30] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 269.

[31] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 132.

[32] Case T-279/19, *Front Polisario v. Council*, paras 83-86.

have legal personality under national law.[33] In his Opinion in *Council v. Front Polisario*, AG Wathelet cautioned against an overly rigid approach to this criterion, as "the reality is always more complex than was imagined by the legislators, rejecting an excessively formalistic or rigid approach."[34] This more open approach was confirmed in *Venezuela v Council*, in which the Court allowed a third state to challenge the validity of EU acts.[35]

While Front Polisario does not have legal personality under national law, the General Court acknowledges that Front Polisario has been recognised by the United Nations as representative of the people of Western Sahara in international settings.[36] This recognition is limited to the framework of the self-determination process in Western Sahara. Nevertheless, the General Court found that Front Polisario has the "necessary autonomy and responsibility to act in that context".[37] Moreover, EU institutions had engaged with Front Polisario on these issues, and therefore could claim to be regarded as the 'legitimate interlocutor' to represent its position on the agreements at issue, including expressing its position on the conclusion of that agreement.[38]

The applicants' case was also challenged on the grounds that Front Polisario was not able to demonstrate that it was 'directly and individually concerned' by the contested decisions. The General Court found that the agreements at issue did affect Front Polisario's legal rights as a representative the people of Western Sahara and as a party to the process of self-determination in that territory. In *Front Polisario I,* the people of Western Sahara were regarded as a 'third party' whose consent is required for the agreements to apply in respect to that territory.[39] Front Polisario could thus show that it was directly and individually concerned by the agreements, satisfying the *locus standi* requirements. The next sections will examine how the General Court has dealt with the question of 'third parties' in international law and EU procedural law.

5 Commentary

5.1 'Third parties' and EU law – Standing before the Court of Justice of the European Union

Article 263(4) TFEU sets out the conditions under which 'natural and legal persons' may institute proceedings before the CJEU. Does this mean that challenges to EU acts can also be brought by entities with *international* legal personality? In Case C-872/19 P *Venezuela v Council* the Court found that a state that is not a member of the European Union ('third

[33] Case 175/73, *Union syndicale – Amalgamated European Public Service Union – and Others v Council*, EU:C:1974:95; Case 18/74, *Syndicat général du personnel des organismes européens v Commission*, EU:C:1974:96; Case 135/81, *Groupement des Agences de voyages v Commission*, EU:C:1982:371, Case C-229/05 P, *PKK and KNK v Council*, EU:C:2007:32, Case C-19/16 P, *Al-Faqih and Others v Commission*, EU:C:2017:466.
[34] Case C-104/16 P, *Council v. Front Polisario*, Opinion of A.G. Wathelet, para. 140.
[35] Case C-872/19 P, *Venezuela v Council*, EU:C:2021:507.
[36] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 149.
[37] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council,* para. 148.
[38] Case T-279/19, *Front Polisario v. Council*, para 98.
[39] Case C-104/16 P *Council v. Front Polisario*, EU:C:2016:973, para 106: "…the people of Western Sahara must be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties".

state') is a 'legal person' within the meaning of Article 263(4) TFEU and that, if all other criteria are satisfied, has standing before the EU Courts.[40] Does this provision also apply to international legal persons that are not states? The Court has emphasised that standing requirements should not be interpreted restrictively, emphasising the importance of values and the rule of law in the EU legal order. The question here was not only whether Front Polisario had legal personality, but also whether it was capable of representing the Sahrawi people in legal proceedings. The General Court not only examined whether Front Polisario as an entity met the conditions to challenge EU acts, but also whether that entity was "directly and individually concerned" by the measures. Importantly, the General Court found that the agreements applied with respect to the territory of Western Sahara, and that this produced 'legal effects' with respect to Front Polisario:

> "the conclusion by the European Union of the agreement at issue with one of the parties to the ongoing self-determination process in the territory of Western Sahara, a party which claims sovereign rights over that territory and itself concluded the said agreement on that basis, necessarily produces legal effects on the other party to that process, given the 'conflict of legitimacy' between those parties with regard to that territory."[41]

The General Court's approach appears to be in line with recent cases dealing with the EU's Common Foreign and Security Policy in which the Court stresses that judicial review of EU acts "of the essence to the rule of law."[42] Denying Front Polisario standing on narrow technical grounds would have meant that the Council's exercise of power would have escaped judicial review. The legal and factual situation in Western Sahara, and its status as a non-self-governing territory, has meant that Front Polisario's legal status has been somewhat indeterminate in international law. However, this indeterminacy should not be used as a reason to deny an internationally recognised group from challenging a legal act that will have a direct impact on its rights.

The Commission argued that allowing Front Polisario to challenge the decision would transform the General Court into a 'quasi-international' court.[43] On appeal, the Court could find that opening the Court to not only third states, but also third-party entities, would be a step too far. It could also find that such an approach would require the Court to decide on issues that fall outside the scope of EU law, and even require the Court to make 'political' decisions. Yet the Court has emphasised that the exercise of powers by the EU institutions cannot escape judicial review on this basis: the Court "cannot give priority to considerations of international policy and expediency over the rules on admissibility".[44] The CJEU has not accepted a 'political question' doctrine that would shield executive action in the field of international relations from judicial review.[45] Given the impact that the case will have on relations between Morocco and the European Union, however, the Court may still find other ways to avoid dealing with one of the most controversial and politically-sensitive issues in the EU's foreign policy.

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[40] Lonardo and Ruiz Cairó, 'The European Court of Justice Allows Third Countries to Challenge EU Restrictive Measures - Case C-872/19 P, *Venezuela v Council'* 18 *EuConst* (2021), 114-131.
[41] Case T-279/19, *Front Polisario v Council*, EU:T:2021:639, Para 210.
[42] Case C-72/15 *Rosneft*, EU:C:2017:236, para. 73. Case C-562/13 *Abdida*, EU:C:2014:2453, para. 45.
[43] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council,* para. 158.
[44] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 158.
[45] Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' 22 *EFA Rev* (2017), 571- 587.

5.2 'Third Parties' and International Law - The Law of Treaties and pacta tertiis

Front Polisario II and the other cases dealing with Western Sahara have all engaged with the customary international law principle of the relative effect of treaties, which is reflected in Article 34 VCLT. Located in Section 4 on 'Treaties and Third States', Article 34 VCLT sets out that "A treaty does not create either obligations or rights for a third State without its consent" (*pacta tertiis nec nocent nec prosunt*). Article 34 of the 1986 Vienna Convention Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations also includes a similar rule that a treaty cannot bind "a third State or a third organization" without its consent. This represents a fundamental principle in the law of treaties, along with *pacta sunt servanda*, that treaties are binding on states that have expressed their consent to be bound.

In *Brita*, the CJEU extended this concept by replacing the term 'third states' used in the VCLT with the broader notion of 'third parties'.[46] In that case, the Court sought to interpret the EC-Israel Association Agreement in conformity with the *pacta tertiis* principle. It found that an interpretation of that agreement to apply in respect of products originating in the West Bank would impose obligations on a third party, the Palestinian customs authorities, without their consent, and "would thus be contrary to the principle of general international law, '*pacta tertiis nec nocent nec prosunt*"'.[47] In the 2016 *Front Polisario* judgment, the CJEU considered "the people of Western Sahara" to be a 'third party' within the meaning of the *pacta tertiis* principle. [48]

> "… that third party may be affected by the implementation of the Association Agreement in the event that the territory of Western Sahara comes within the scope of that agreement, without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it. It is sufficient to point out that, in either case, that implementation must receive the consent of such a third party. In the present case, however, the judgment under appeal does not show that the people of Western Sahara have expressed any such consent."[49]

The CJEU's previous case law is clear. The Union cannot conclude a treaty that applies with respect to a third party without the consent of that party. Yet, what is not clear is how that consent is to be expressed. The Council and Commission argued that the consent of a third party may presumed in cases where the parties to the agreement confer rights upon the third party. This stems from Article 36(1) VCLT, which recognises that in certain instances treaties may intend to create rights for a third State:

> A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.[50]

In *Front Polisario II*, the General Court found that this principle was not applicable because the agreements at issue did not intend to confer rights on the people of Western Sahara as a

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[46] C-386/08 *Brita*, EU:C:2010:91, para. 52.
[47] Ibid.
[48] Case C-104/16 P *Council v. Front Polisario,* para. 106. See 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 *AJIL* (2017) 731–738.
[49] Case C-104/16 P *Council v. Front Polisario,* para. 106.
[50] Article 36(1) VCLT.

third party.[51] While the contested agreements might create rights for some individual exporters in Western Sahara, they do not confer rights on the people of Western Sahara. Moreover, the General Court stresses that while there might be 'socioeconomic' benefits, these are not legal rights to which a third party can consent. On the contrary, the General Court found that the agreement also imposes *obligations* upon the third party.[52]

The General Court makes it clear that the expression of consent by the third party must be explicit.[53] It also adds that this consent must be 'free and authentic'.[54] The General Court cites case-law from the International Court of Justice, including the 2019 *Chagos* Advisory Opinion, in which the ICJ found that the detachment of the Chagos Archipelago "was not based on the free and genuine expression of the will of the people concerned."[55] The Council argued that the consultations it carried out with people in Western Sahara were in conformity with principles of international law relating to consent, drawing upon the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries[56] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[57] Yet this argument confuses two distinct concepts. It conflates the right to prior consultation of indigenous communities or their representatives in decision-making ('free, prior and informed consent') with the expression of consent by a third party to the application of a treaty. In any event, UNDIP recognises that Indigenous peoples have the right to participate in decision-making "through representatives chosen by themselves".[58] Respecting the principles in the UNDIP or the ILO Convention would require consulting the representatives of the people of Western Sahara, not merely parties concerned. The General Court rightly dismissed the Council's arguments on these grounds, finding that the Commission's 'consultations' with 'parties concerned' did not meet the criteria for demonstrating that there was consent of the people of Western Sahara.[59]

The CJEU has applied the principle of state consent in the EU context. In *Wightman*, the CJEU found that it would be contrary to the EU Treaties to force a Member State "to leave the European Union despite its wish".[60] In *Manzi*, the Court found that to interpret secondary

[51] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 318. "the agreement at issue is not intended to confer rights on the people of Western Sahara as a third party to it."
[52] Ibid., para. 322 "Conversely, the effect of the agreement at issue is to impose an obligation on the third party in that it grants one of the parties to that agreement competence within the territory of the third party, which the latter is not therefore entitled to exercise itself or, as the case may be, delegate".
[53] Ibid., para. 322.
[54] Ibid., para. 325.
[55] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion ICJ Reports 2019, para. 172.
[56] ILO 'Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries' (signed 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.
[57] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 368.
[58] Article 18, UNGA Res 61/295 'United Nations Declaration on the Rights of Indigenous Peoples' (13 September 2007) GAOR 61st Session Supp 49 vol 3, 15: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves, in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."
[59] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 384: "the consultations conducted at the request of the Council by the Commission and by the EEAS cannot be regarded as having served to obtain the consent of the people of Western Sahara to the agreement at issue, in accordance with the principle of the relative effect of treaties as interpreted by the Court of Justice."
[60] Case C-621/18 *Wightman and Others v. Secretary of State for Exiting the European Union*, EU:C:2018:999, para. 66.

EU law in the light of an international law instrument to which not all Member States are bound would be incompatible with the *pacta tertiis* principle.[61] This approach adopts a positivist understanding of international law that international obligations only flow from the free will and consent of sovereign states.

The CJEU has been criticised for stretching the *pacta tertiis* rule to apply with respect to 'third parties' in addition to 'third states'.[62] The General Court acknowledges that it modified the language used in the VCLT, by replacing the term 'third state' with the wider term 'third party'. The General Court justifies this alteration by arguing "although the provisions of the Vienna Convention refer only to relations between States, the principles it codifies are capable of applying to other subjects of international law."[63] Its reasoning is self-referential: in support of its conclusion, it cites a passage from *Front Polisario I*,[64] which in turn cites a passage from the 2010 *Brita* case.[65] A commentary on the *Vienna Convention on the Law of Treaties* points out that "According to its clear wording, Art 34 does not cover the creation of rights and obligations for a **third party other than a State**."[66] One could argue that this is too state-centric, and that Article 34 VCLT gives expression to a more general principle *pacta tertiis nec nocent nec prosunt* (agreements do not harm or benefit a third party) and thus could be extended by analogy to third parties. Yet Article 34 VCLT was drafted with the intention of addressing third states, reflecting the sovereign equality of states, rather than a private law principle. Moreover, the application of treaties to 'third parties' is a debated issue in the law of treaties.[67] There has been debate about whether treaties can in certain circumstances bind 'third parties', such as individuals, without their consent.[68] In her study on the topic, Chinkin addresses the fact that the VCLT does not cover "international agreements concluded by or on behalf of other non-State entities".[69] The CJEU's extension of Article 34 VCLT to 'third parties' also raises more practical questions. In the case of states or international organizations, it is clear how consent is to be given: through written consent. As the present case demonstrates, establishing consent of a third party, particularly of a people living under occupation, is a more challenging task.

5.3 Analysing 'Consent'

[61] Case C-537/11 *Manzi and Compagnia Naviera Orchestra*, EU:C:2014:19, para 47.
[62] Aust, Rodiles and Staubach 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' 27 *LJIL* (2014) 75–112, at 103. "While the Court can be commended for its systematic explanation why it has to have recourse to the international rules of interpretation, the result of their application is somewhat stretching the scope of the *pacta tertiis* rule.
[63] Case T-272/19, *Front Polisario v Council*, para. 317.
[64] Case C-104/16 P *Council v. Front Polisario*, para. 100. The Court states that Article 34 VCLT is a 'specific expression' of the general international-law principle of the relative effect of treaties.
[65] C-386/08 *Brita*, EU:C:2010:91, para 52 addresses "the principle of general international law, 'pacta tertiis nec nocent nec prosunt', as consolidated in Article 34 of the Vienna Convention."
[66] Proelss, 'Article 34. General rule regarding third States' in Dörr, Schmalenbach (Eds.) *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed. (Springer Verlag, 2018) 2018, at 661.
[67] Chinkin, *Third Parties in International Law* (Clarendon Press, 1993); Fitzmaurice, 'Third Parties and the Law of Treaties', 6 *Max Planck Yearbook of United Nations Law* (2002) 37-137.
[68] See Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' 9 *Journal of International Criminal Justice* (2011) 25–52. Chinkin, *supra* 67, at 121. Proelss (*supra* note X) concludes "more and more fields of international law have emerged in recent years with regard to which it is accepted that obligations may directly be imposed by a treaty on individuals without their consent" at 662-663.
[69] Chinkin, *supra* n67, 135.

The General Court reiterated that the granting of tariff preferences to products originating in Western Sahara required the *consent* of the people of Western Sahara.[70] Yet the study undertaken by the Commission/EEAS analyses whether the people of Western Sahara benefit from application of the agreements to that territory. As the General Court notes, the Council did not focus on consent to the legal effects of the agreements, but on whether there was a "favourable opinion of a majority of local people". Moreover, in undertaking the study, the EEAS and the Commission understood the concept of 'benefit' in economic terms, framing convergence with EU standards as a form of sociopolitical benefit enjoyed by the people of Western Sahara:

> "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."[71]

The extension of tariff preferences may indeed benefit some groups and economic operators in Western Sahara. But this assessment dismisses the broader effect of applying an economic agreement with respect to an occupied territory: it either cements the *status quo* or consolidates Morocco's illegal occupation. Rather than consenting to the extension of the agreements to the territory of Western Sahara, Front Polisario explicitly rejected and opposed the amendments to the EU-Morocco agreements, arguing that to do so would consolidate Morocco's control over the territory. Remarkably, the European Commission brushed aside these concerns as "political reasons unrelated to the amendment itself."[72] These concerns are serious, as they can affect the future status of Western Sahara and its people. Even if the EU's economic engagement brings some economic benefit to the people of the territory, the practice could also strengthen Morocco's claims over the territory in negotiations, or encourage other actors to conclude similar agreements. The European institutions, including the European Parliament[73], took the narrow view of examining whether lower tariffs on goods originating in Western Sahara would provide economic benefits to the 'population' without analysing the broader effects of this practice on the people of Western Sahara.

This focus on the 'benefit' of the local population appears to come from a 2002 letter by Hans Corell, then Under-Secretary-General for Legal Affairs, addressing the international law issues related to the economic exploitation of mineral resources in Western Sahara.[74] The letter was requested by the United Nations Security Council and focused on the international law issues related to oil exploration contracts in Western Sahara issued by Morocco. The Corell letter and request addressed an entirely different matter from the one in the present case, as it related to private law contracts involving the territory of Western Sahara. The letter concluded that economic exploitation of natural resources by an administering power would be consistent with the UN Charter if it were "for the benefit of the peoples of those Territories, on their behalf or in consultation with their representative."[75] This derives from

[70] Case T-279/19, *Front Polisario v Council*, EU:T:2021:639, para. 196.
[71] European Commission Staff Working Document, *supra* note **Error! Bookmark not defined.**, part 2.3.
[72] Ibid.
[73] See European Parliament Press Release, 'Preferential tariffs to help Western Sahara to develop' 16 January 2019, available at <https://www.europarl.europa.eu/news/en/press-room/20190109IPR23018/preferential-tariffs-to-help-western-sahara-to-develop>.
[74] Under-Secretary General for Legal Affairs, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, to the President of the Security Council, UN Doc. S/2002/161 (2002).
[75] Ibid, para. 24.

an analysis of the principle of "permanent sovereignty over natural resources" and the law relating to Non-Self-Governing Territories. The opinion addresses the question of whether mineral resource activities in a Non-Self-Governing Territory by an administering power are illegal as such, or whether they might be legal if conducted considering the interests and needs of the people in that territory.

As discussed earlier, the General Court did not examine the dispute through this lens, framing the dispute as one of treaty interpretation. There is nothing in the letter or its analysis that suggests that the Union can legally conclude a treaty that applies with respect to Western Sahara if it is 'for the benefit' of the people of that territory. The Council's arguments distort this legal analysis. The General Court noted the differences between the situation in this case and the one dealt with in the letter and concluded "the Council was wrong to consider that it could rely on the letter of 29 January 2002 from the United Nations legal adviser to substitute for this requirement the criteria allegedly set out in that letter."[76] Even if the EU institutions were to demonstrate socio-economic benefits from the agreements, the Council still failed to show that there was *consent* of the people of Western Sahara.

The institutions' focus on 'benefits' to the 'population', rather than consent by a non-self-governing territory, meant that other important issues of international law were overlooked. Most legal commentary examining the exploitation of natural resources in Western Sahara focuses on whether this activity is in accordance with international law.[77] They deal with questions such as whether the EU's practice constitutes recognition as legal a situation resulting from a violation of the people's right to self-determination. While this note will not recite these various international law arguments, it should be noted that General Court's narrow framing of the question – whether a 'third party' consented to an agreement between the EU and Morocco – avoids addressing these more fundamental issues. It allows the Court and EU institutions to avoid discussing the legal obligations that arise form conceding an agreement with an occupying power in relation to an occupied territory.[78]

Front Polisario I and *Western Sahara Campaign UK* condense a range of legal issues to one main question: did the agreements *apply* with respect to Western Sahara? In *Front Polisario II*, the General Court similarly narrows its analysis: did the people of Western Sahara *consent* to the application of the agreements to that territory? On the one hand, this minimalist approach allows the General Court to focus on the most pertinent legal issues to decide the case. Yet this approach also means that some issues remain unaddressed. Beyond the consequences in EU law, what consequences flow in international law from the Union concluding a treaty with respect to a third party without its consent? Is the EU in violation of a duty not to render aid or assistance in the commission of an unlawful act?

[76] Case T-279/19, *Front Polisario v Council*, 391.

[77] Allan and Ojeda-García, 'Natural resource exploitation in Western Sahara: new research directions', *The Journal of North African Studies* (2021) (published online): "The vast majority deal with the extent to which the exploitation of various types of Western Sahara's natural resources is in accordance with international law."

[78] See Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement' 4 *European Papers* (2019) 307-317, at 313: " The conclusion of an agreement that facilitates the import into the EU of products obtained in conditions that do not respect the international law rules governing the exploitation of natural resources of a non-selfgoverning territory under occupation could arguably further encourage Morocco's unlawful conduct.".

5.4 Standard of Review

The General Court found that the Council failed to respect the requirements related to the principle of self-determination and the principle of the relative effect of treaties as set out in the CJEU's previous cases. The General Court used public international law as a benchmark to review the validity of EU acts. In previous cases, litigants had relied on Article 3(5) TEU, which commits the Union "to the strict observance and the development of international law" to use international law to challenge EU law. The CJEU has stated that Article 3(5) TEU may be used as basis to challenge the validity EU acts. However, to date, Article 3(5) TEU has not been applied to invalidate an EU act on the basis that it violates international law. In *Western Sahara Campaign UK*, for instance, the Court examined the acts under review in the light of Article 3(5) TEU:

> "the Court has jurisdiction, both in the context of an action for annulment and in that of a request for a preliminary ruling to assess whether an international agreement concluded by the European Union is compatible with the Treaties […] and with the rules of international law which, in accordance with the Treaties, are binding on the Union."[79]

Similarly, in *Air Transport Association of America (ATAA)*, the Court interpreted Article 3(5) TEU to mean that Article 3(5) could be used as a basis to review the validity of EU acts:

> "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."[80]

In cases where international law has been used to challenge the validity of EU acts, the Court has to determine the appropriate standard of review. In *ATAA*, for example, the Court found that when applying principles of customary international law, judicial review of EU acts must be limited to whether the institutions made a 'manifest error' in applying those principles.[81] In *Front Polisario II*, the General Court did not apply the 'manifest error' test used in previous cases. Unlike previous cases, the General Court does not go into much detail regarding the appropriate standard of review. On appeal, the Court may find that the Council acted within its discretion when interpreting how to give effect to rules of customary international law. Such an approach would allow the agreements to remain valid because the EU institutions had broad discretion when deciding how to apply those principles in its relations with external actors. In ***Front Polisario I***, the General Court found that because the principles of customary international law being applied are "complex and imprecise", judicial review must be limited to whether the Council made a 'manifest errors of assessment' in applying those rules.[82] On appeal, the Court could similarly regard the customary international rules on consent of third parties to be 'imprecise' and restrict judicial review on that basis.

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[79] 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*, EU:C:2018:118, para 48.
[80] Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, EU:C:2011:864, para. 101.
[81] Case C-366/10 *ATAA*, para. 110. "[J]udicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles".

[82] Case T-512/12 *Front Polisario v Council*, EU:T:2015:953, para 224. See also Case, C-162/96, *Racke*, EU:C:1998:293, para 52.

6 Conclusion

There has been plenty of debate about whether the CJEU is 'friendly' or 'open' towards international law. *Front Polisario II* will likely be put forward as an example of the CJEU moving towards greater openness to international law.[83] *Front Polisario II* does not show a fundamental shift in direction, but rather a logical continuation of the Court's approach to situation in Western Sahara. These cases tend to reveal a more fundamental disagreement about the very nature of the dispute and the legal problems it entails. From the perspective of the EU institutions, this is a dispute subject to an ongoing political process; the Union's agreements with Morocco are viewed as merely having economic effects, including supporting and developing the economy in Western Sahara. From the perspective of the international law, and the practice of UN bodies, the dispute deals with issues of occupation and the legal principles applicable to Non-Self-Governing Territories. This could explain why the Council argued that it had a margin of discretion to interpret the requirement of the consent, understanding that this would only require favourable opinions of the 'people concerned'.[84] The General Court rejected this re-interpretation, confirming that "the institutions' discretion may be limited, including in the context of such areas, by a legal concept establishing objective criteria."[85] These objective criteria derive from public international law, including the principle of self-determination and the relative effect of treaties. The Court had set "clear, unconditional and precise obligations imposed on the institutions" in relation to Front Polisario; the Council did not have the discretion essentially to reinterpret these conditions relating to consent.

In cases involving the EU's policy towards Western Sahara, the CJEU has approached international law issues primarily through the lens of the international law of treaties. Academic commentary on these cases has criticised the CJEU for at times misapplying these principles.[86] *Front Polisario II* also shows how the General Court's approach in these cases is restricted by the Court's past analysis; once the dispute is initially anchored in treaty interpretation, this becomes the starting point in the analysis in future cases. This might be because treaty interpretation is viewed as a technical and value-neutral field of international law. By framing the dispute in these terms the General Court addressed the dispute without analysing more sensitive political issues. If the General Court can come to the same conclusion by applying the law of treaties as it would have had it approached the dispute using the law of occupation or self-determination, one could argue that it should choose the less provocative approach. It should also be emphasised that the General Court's analysis is restricted by the interpretation and analysis of the previous judgments – it refers to principles of international law 'as interpreted by the Court of Justice'.[87]

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[83] Carrozzini, 'Working Its Way Back to International Law? The General Court's Judgments in Joined Cases T-344/19 and T-356/19 and T-279/19 Front Polisario v Council' 7 *European Papers* (2022), 31-41. https://www.europeanpapers.eu/en/europeanforum/working-way-back-to-international-law-general-court-judgments-front-polisario

[84] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 333.

[85] Joined Cases T-344/19 and T-356/19 *Front Polisario v Council*, para. 333.

[86] E Kassoti 'The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK' 56 *CMLRev* (2019) 209 – 236.

[87] Case T-279/19, *Front Polisario v Council*, EU:T:2021:639, para 384.

It is also worth highlighting that these cases deal with highly sensitive political issues for the Union and its relations with the Kingdom of Morocco. The General Court's technical approach in these issues, which tend to overlook the broader context of the dispute, might help shield it (and the Union) from criticism that it is involved in a political decision. Following the judgment, Morocco's Foreign Minister Nasser Bourita and the EU's High Representative for Foreign Affairs, Josep Borrell issued a joint statement stating they would "take necessary measures to ensure the legal framework guaranteeing the continuation and stability of trade between the EU and Morocco".[88] The General Court's decision to delay the effects of the judgment pending appeal also shows the sensitive nature of the judgment for the Union's close partner. The General Court's reasoning is sound as a matter of EU and international law. Yet on appeal, the CJEU may still find ways to prevent the political fallout that would be associated with annulling an agreement with the EU's close neighbour and partner. As discussed above, it may find that the General Court erred in its assessment when analysing the actions of the EU institutions, finding that they acted within their margin of appreciation when determining how the 'consent' of the people of Western Sahara is to be expressed.

[88] Blenkinsop and Eljechtimi, 'EU court annuls EU-Morocco trade deals over Western Sahara consent' 29 September 29, 2021 <https://www.reuters.com/world/europe/eu-court-annuls-eu-morocco-trade-deals-over-western-sahara-consent-2021-09-29/>.