Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 21 March 2024[1]

Joined Cases C-779/21 P and C-799/21 P

European Commission
v
Front populaire pour la libération de la saguia el-hamra et du rio de oro (Front Polisario), Council of the European Union (C-779/21 P)
and
Council of the European Union
v

Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) (C-799/21 P)

(Appeal – EU-Morocco Association Agreement – Council decision authorising the extension of preferential tariff treatment to goods originating in Western Sahara – Judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973) – 'Consent' of the people of Western Sahara – Principle of the relative effect of treaties – Right to self-determination)

I. Introduction

1. When engaging with the rest of the world, the European Union must respect international law, including the principles of the Charter of the United Nations ('the UN Charter').[2]

2. In that context, the Court of Justice is faced with three sets of cases that question whether the EU institutions respected international law when engaging with the territory of Western Sahara.

3. The present set of appeals raises the question as to whether the European Union has respected the right to self-determination and the principle of the relative effect of treaties when it amended the association agreement with the Kingdom of Morocco[3] with a view to extending tariff preferences to goods originating in the territory of Western Sahara.[4]

1 Original language: English.

2 See Article 3(5) TEU.

3 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 (OJ 2000 L 70, p. 2; 'the Association Agreement').

4 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 (OJ 2019 L 34, p. 4; 'the agreement at issue').

4. In the judgment under appeal,[5] the General Court concluded that the European Union did not respect those rules of customary international law, as interpreted in the earlier case-law of the Court of Justice.[6] Accordingly, that court annulled Decision (EU) 2019/217,[7] which approved the amendments to the Association Agreement.[8] The Council and the Commission are now appealing that judgment before the Court of Justice.

5. The present appeals are directly related to a set of parallel appeals questioning the validity of the Council decision concluding the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco[9], which covers the waters adjacent to Western Sahara,[10] and a preliminary reference seeking guidance on the correct country of origin labelling of products originating in the territory of Western Sahara.[11] I deliver my Opinions in all of those cases today. They should be considered together.

6. As demonstrated by the historical overview which I will present in this Opinion, but which is relevant also for my Opinions read today in the two other cases, almost 50 years since the start of process of self-determination of the people of Western Sahara, those people are no closer to deciding the future status of their territory.

7. While that represents a clear failure of the UN-led political process, this does not mean that the resolution of the Western Sahara question can be entrusted to the EU Courts. Those courts will not decide the future of Western Sahara.

II. Background to these proceedings

A. A short history of the question of Western Sahara

8. Western Sahara was a Spanish colony. The process of the decolonisation of the territory began in the 1960s, at which time Spain acknowledged its status as a non-self-governing territory ('NSGT'). The UN General Assembly subsequently added Western Sahara to the list of NSGTs.[12] It remains on that list to date.[13]

5 Judgment of 29 September 2021, *Front Polisario* v *Council* (T-279/19, EU:T:2021:639; 'the judgment under appeal').

6 That is, in judgments of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973; 'the judgment in *Council* v *Front Polisario*'), and of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118; 'the judgment in *Western Sahara Campaign UK*').

7 Council Decision 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 (OJ 2019 L 34, p. 1; 'the contested decision').

8 Judgment under appeal, paragraphs 391 and 392.

9 OJ 2019 L 77, p. 8; 'the Sustainable Fisheries Partnership Agreement'.

10 Joined Cases C-778/21 P and C-798/21 P, *Commission and Council* v *Front Polisario*.

11 Case C-399/22, *Confédération paysanne (Melons and tomatoes from Western Sahara)*.

12 United Nations, Report of the Committee on Information from Non-Self-Governing Territories, Supplement No 14 (A/5514) (1963), Annex III, 'List of Non-Self-Governing Territories under Chapter XI of the Charter at 31 December 1962 classified by geographical region', p. 34.

13 Seventeen territories remain listed as NSGTs, Western Sahara being the only such territory in Africa, available at https://www.un.org/dppa/decolonization/en/nsgt.

9. In 1960, the UN General Assembly adopted Resolution 1541 (XV).[14] According to that resolution, a NSGT can be said to have reached a full measure of self-government in one of three ways: by (1) emergence as a sovereign independent State; (2) free association with an independent State; or (3) integration with an independent State.[15]

10. In 1966, the UN General Assembly confirmed the right of the people of Western Sahara to self-determination and invited Spain to enable and organise the exercise of that right,[16] which Spain decided to enable through a referendum.

11. Front Polisario,[17] an anti-colonial movement created in 1973,[18] supported the idea of a referendum.

12. The Kingdom of Morocco, however, opposed the idea that decolonisation ought to be accomplished by means of a referendum on self-determination. That State considered that, prior to the colonisation of Western Sahara by Spain, it was (what is now) the Kingdom of Morocco that held sovereignty over that territory. Therefore, the Kingdom of Morocco took the position that, during the process of decolonisation, Western Sahara should be reintegrated into the territory of the Kingdom of Morocco.[19] That position remains its stance to date.

13. The above opposing views on who possessed a valid claim to the territory of Western Sahara led to the Advisory Opinion on Western Sahara, requested by the UN General Assembly.[20]

14. In that advisory opinion, the International Court of Justice ('ICJ') recognised the people of Western Sahara to hold the right to self-determination.[21] It also found that 'the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonisation of Western Sahara and, in particular, of the right to self-determination through the free and genuine expression of the will of the peoples of the Territory'.[22]

14 UN General Assembly Resolution 1541 (XV) of 15 December 1960, 'Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter'.

15 See Principle VI.A of the annex to UN General Assembly Resolution 1541 (XV) of 15 December 1960, 'Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter; cited in the Advisory Opinion on Western Sahara (ICJ Reports 1975, p. 12, paragraph 57). See also Crawford, J., *The creation of states in international law*, 2nd edition, Oxford University Press, Oxford, 2007, p. 621.

16 UN General Assembly Resolution 2229 (XXI) of 20 December 1966, 'Question of Ifni and the Spanish Sahara'.

17 Front Populaire pour la libération de la saguia-el-hamra et du rio de oro ('Front Polisario').

18 According to Deubel (Deubel, T.F., *Between homeland and exile: Poetry, memory, and identity in Sahrawi communities*, PhD Dissertation, University of Arizona, 2010, p. 76, available at http://hdl.handle.net/10150/146067), Sahrawi identity started forming in opposition to Spanish colonisation. It became more pronounced in the 1970s in reaction to the decolonisation process, which influenced the anti-colonial movements to form. The first anti-colonial movements were created by youth leaders who were educated in neighbouring countries, including in the Kingdom of Morocco, and under the strong influence of decolonisation movements in other countries, especially in Algeria.

19 See, in that respect, Advisory Opinion on Western Sahara (ICJ Reports 1975, p. 12, paragraph 49).

20 It appears that the advisory opinion was requested on the initiative of the Kingdom of Morocco, which first tried to obtain Spain's agreement to submit their dispute over the sovereignty of Western Sahara to the ICJ for a decision in contentious proceedings. See Advisory Opinion on Western Sahara (ICJ Reports 1975, p. 12, paragraphs 29 and 36).

21 Advisory Opinion on Western Sahara (ICJ Reports 1975, p. 12, paragraph 162).

22 Advisory Opinion on Western Sahara (ICJ Reports 1975, p. 12, paragraph 162).

15. In 1975, interpreting the ICJ's opinion as not affirming the people of Western Sahara's right to self-determination, but rather as endorsing the Kingdom of Morocco's historical sovereignty over that territory, [23] King Hassan II invited Moroccan citizens to a 'Green March', during which some 350 000 people entered the territory of Western Sahara as a demonstration of the Kingdom of Morocco's sovereign right over the territory. The UN Security Council reacted by calling on the Kingdom of Morocco to end the march immediately. [24]

16. At approximately the same time, Spain, the Kingdom of Morocco, and the Islamic Republic of Mauritania signed the Declaration of Principles on Western Sahara (also known as the 'Madrid Accords'), [25] by which the territory of Western Sahara was partitioned between the latter two States. Soon after, in January 1976, the Moroccan army entered the territory of Western Sahara.

17. On 26 February 1976, Spain informed the UN Secretary-General that it had terminated its presence in Western Sahara and renounced its position as the administering power under Article 73 of the UN Charter. [26]

18. The day after Spain's departure from Western Sahara, Front Polisario declared the establishment of the Saharan Arab Democratic Republic ('SADR'). [27] The seat of the SADR government is in a Sahrawi refugee camp in Tindouf (Algeria).

19. Today, the SADR is recognised by 47 UN Member States. [28] Neither the European Union nor any of its Member States have recognised the SADR.

20. After the Kingdom of Morocco entered the territory of Western Sahara – and until September 1991, when a ceasefire was agreed – the Kingdom of Morocco and Front Polisario were engaged in an armed conflict. This resulted in more than 100 000 refugees from Western Sahara, most of whom now live in refugee camps in Algeria. [29]

21. The 1991 ceasefire opened the possibility to renew political dialogue on the resolution of the Western Sahara question. However, as no solution was found, fighting resumed in 2020.

22. Since the 1970s, the UN has been engaged in finding a solution for the decolonisation of Western Sahara. At that time, the UN General Assembly initiated and afterwards supported the idea of the organisation of a referendum through which the people of Western Sahara could express their wishes regarding the future of that territory. The idea of a referendum on self-determination was renewed in a settlement plan, which was 'in principle' endorsed by Front Polisario and the Kingdom of Morocco, and which preceded the 1991 ceasefire.

23 Morocco stressed the first sentence of paragraph 162 of the Advisory Opinion on Western Sahara (ICJ Reports 1975, p. 12), which states that 'the materials and information presented to the Court show the existence, at the time of Spanish colonisation, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara'.

24 UN Security Council Resolution 380 (1975) of 6 November 1975 (calling upon the Kingdom of Morocco to withdraw its troops from Western Sahara).

25 See *United Nations Treaty Series*, Vol. 988, p. 259.

26 That provision is part of Chapter XI of the UN Charter, which deals with non-self-governing territories. It requires that members of the UN 'which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government', inter alia, 'develop self-government [for those peoples], to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions'.

27 Today's relationship between the SADR and Front Polisario is not clear, nor was it made more understandable at the hearing.

28 At the outset, more countries recognised the SADR, but have since revoked that recognition.

29 For the current situation and number of refugees, see the UN Refugee Agency, UNHCR Fact Sheet, 'Algeria', available at https://reliefweb.int/report/algeria/unhcr-algeria-fact-sheet-april-2023.

23. In order to monitor, among other aspects, the ceasefire and to help in the organisation of that referendum, the UN Security Council established the UN Mission for the Referendum in Western Sahara ('MINURSO') in April 1991, [30] the mandate of which is prolonged every year, and still exists to date. [31] Despite additional initiatives [32] and the finalisation of the list by MINURSO of persons which would be entitled to vote in a referendum, no referendum has been organised as of yet.

24. Apart from the UN, the African Union (and its predecessor, the Organisation of African Unity) was also engaged in finding a solution to the Western Sahara question. It has supported the right of the Sahrawi people to self-determination. In 1984, the SADR was admitted as a member to the Organisation of African Unity, which resulted in the withdrawal of the Kingdom of Morocco from that organisation in protest. In January 2017, the Kingdom of Morocco applied for membership and was readmitted to join the African Union. [33]

25. In 2006, the UN Secretary-General considered that the parties would need to find 'a compromise between international legality and political reality', and that this could only be achieved through direct negotiations. [34]

26. In 2007, both Front Polisario and the Kingdom of Morocco proposed their plans for solving the Western Sahara question. Front Polisario maintained its position that the right to self-determination requires the holding of a referendum. The Kingdom of Morocco proposed a plan which offers autonomy to Western Sahara under Moroccan sovereignty. [35]

27. Scholarship suggests that, since 2018, support for the 2007 autonomy plan by the Kingdom of Morocco appears to be growing. [36] Likewise, the rhetoric in the UN Security Council resolutions appears to have changed. [37] Thus, starting in 2018, the text of the UN Security Council's

30 See UN Security Council Resolution 690 (1991) of 29 April 1991 (deciding 'to establish, under its authority, a [UN] Mission for the Referendum in Western Sahara').

31 For the latest renewal, until 31 October 2024, see UN Security Council Resolution 2703 (2023) of 30 October 2023.

32 See, for instance, the 2001 Baker Plan (and its 2003 revision) (formally, 'Peace Plan for Self-Determination of the People of Western Sahara'), arising from talks under the auspices of UN representative James Baker III; see, in that respect, Zunes, S. and Mundy, J., *Western Sahara: War, nationalism, and conflict irresolution*, 2nd edition, Syracuse University Press, 2022, Chapter 9.

33 In 2018, in response to that readmission, Mr Bernard Mornah, a Ghanaian national, filed an application against eight Member States of the African Union before the African Court on Human and Peoples' Rights, claiming that those States had violated various obligations under the African Charter on Human and Peoples' Rights when agreeing to readmit the Kingdom of Morocco to the African Union without that State being requested to stop its alleged occupation of the territory of Western Sahara. However, the African Court on Human and Peoples' Rights rejected that challenge, concluding that the respondent States had not breached their obligations under the African Charter on Human and Peoples' Rights, including the right to self-determination, by admitting the Kingdom of Morocco to be a member of the African Union. At the same time, that court confirmed the right of the Sahrawi people to self-determination, and considered the right to self-determination a peremptory norm of international law. See African Court on Human and Peoples' Rights, judgment of 22 September 2018, *Bernard Anbataayela Mornah* v *Republic of Benin and Others* (Application No 028/2018), paragraph 343(v).

34 See the report of the UN Secretary-General of 19 April 2006, 'Situation concerning Western Sahara (S/2006/249)', paragraphs 32 and 34. See also Allen, S. and Trinidad, J., *The Western Sahara question and international law. Recognition doctrine and self-determination*, Routledge, Oxford, 2024, p. 17.

35 See United States Congressional Research Service, 'Western Sahara', RS20962, updated 8 October 2014, p. 4.

36 It has also been claimed that the change in policy of some UN Member States may have been prompted by President Donald J. Trump's 2020 proclamation recognising the sovereignty of the Kingdom of Morocco over Western Sahara (see 'Proclamation on Recognizing The Sovereignty Of The Kingdom Of Morocco Over The Western Sahara', available at https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-sovereignty-kingdom-morocco-western-sahara). For a detailed overview of the political developments at the level of the UN Security Council, General Assembly and individual UN Member State positions, as well as a discussion of the implications of the growing support for the Moroccan position on Western Sahara, see Allen, S. and Trinidad, J., *The Western Sahara question and international law. Recognition doctrine and self-determination*, Routledge, Oxford, 2024, p. 47 et seq.

37 See, most recently, UN Security Council Resolution 2703 (2023) of 30 October 2023.

resolutions on Western Sahara stresses the need to 'achieve a realistic, practicable, enduring and mutually acceptable political solution to the Western Sahara question based on compromise'. [38]

28. At the same time, recent UN Security Council resolutions reiterate that any political solution has to provide 'for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the [UN] Charter'. [39]

B. The relevance of the judgments in Council v Front Polisario and Western Sahara Campaign UK

29. The European Union and its Member States established with the Kingdom of Morocco a Euro-Mediterranean Partnership on the basis of an Association Agreement, concluded in 1996.

30. In the framework of that Association Agreement, the European Union and the Kingdom of Morocco concluded a number of agreements, including the 2012 Trade Liberalisation Agreement [40] and the 2006 Fisheries Partnership Agreement. [41]

31. Front Polisario introduced an annulment action against the 2012 Trade Liberalisation Agreement which resulted in the Court's judgment in *Council* v *Front Polisario*.

32. At first instance, the General Court found Front Polisario to hold standing to bring the action and annulled the Council decision approving the conclusion of the 2012 Trade Liberalisation Agreement on the basis that the Council had failed to verify that the production of goods originating in Western Sahara which were exported to the European Union had not been carried out in a manner detrimental to the population of that territory. [42]

33. On appeal, in the judgment in *Council* v *Front Polisario*, the Court of Justice did not address either the admissibility of Front Polisario's case or the substantive conclusion of the General Court. Instead, in interpreting the wording 'the Kingdom of Morocco', which denoted the territory to which the 2012 Trade Liberalisation Agreement applied, the Court of Justice concluded that that agreement did not apply to the territory of Western Sahara. [43] For that reason, Front Polisario's action was deemed inadmissible. [44]

34. In paragraph 106 of its judgment in *Council* v *Front Polisario*, the Court of Justice considered that 'the people of Western Sahara must be regarded as a "third party" within the meaning of the principle of the relative effect of treaties'. Therefore, the people of Western Sahara must give their 'consent' for the 2012 Trade Liberalisation Agreement to apply to Western Sahara, 'without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it'.

38 See, for example, UN Security Council Resolution 2703 (2023) of 30 October 2023, point 2. See also Allen, S. and Trinidad, J., *The Western Sahara question and international law. Recognition doctrine and self-determination*, Routledge, Oxford, 2024, p. 48 (presenting the evolving language in UN Security Council resolutions since 2018).

39 See, most recently, UN Security Council Resolution 2703 (2023) of 30 October 2023, point 4.

40 OJ 2012 L 241, p. 4; 'the 2012 Trade Liberalisation Agreement'.

41 OJ 2006 L 141, p. 4; 'the 2006 Fisheries Partnership Agreement'.

42 See, to that effect, judgment of 10 December 2015, *Front Polisario* v *Council* (T-512/12, EU:T:2015:953, paragraphs 114 and 241).

43 Judgment in *Council* v *Front Polisario*, paragraph 82 et seq.

44 Judgment in *Council* v *Front Polisario*, paragraph 133.

35. The judgment in *Western Sahara Campaign UK* followed similar reasoning. Therein, the Court considered that the 2006 Fisheries Partnership Agreement, also part of the structure created by the Association Agreement with Morocco,[45] does not cover the territory of Western Sahara or waters adjacent to it, because the term 'the Kingdom of Morocco' does not cover the territory of Western Sahara.[46] Accordingly, the Court concluded that it would be contrary to the right to self-determination and the principle of relative effect of the treaties to interpret that agreement as applying to Western Sahara.

C. The agreement at issue and the contested decision

36. After its judgment in *Council* v *Front Polisario*, 'the Council authorised the Commission to open negotiations with the Kingdom of Morocco with a view to establishing, in accordance with the judgment of the Court of Justice, a legal basis to grant the tariff preferences laid down in the Association Agreement to products originating in Western Sahara'.[47]

37. The contested decision thus explained the reasons for the conclusion of the new agreement in the following way:

'(4) Since the Association Agreement came into force, products from Western Sahara certified to be of Moroccan origin have been imported to the Union, benefiting from the tariff preferences laid down in its relevant provisions.

(5) However, in [the judgment in *Council* v *Front Polisario*], the Court of Justice specified that the Association Agreement covered the territory of the Kingdom of Morocco alone and not Western Sahara, which is a non-self-governing territory.

(6) It should be ensured that the trade flows developed over the years are not disrupted, while establishing appropriate guarantees for the protection of international law, including of human rights, and sustainable development in the territories concerned. On 29 May 2017, the Council authorised the Commission to open negotiations with the Kingdom of Morocco with a view to establishing, in accordance with the judgment of the Court of Justice, a legal basis to grant the tariff preferences laid down in the Association Agreement to products originating in Western Sahara. An agreement between the European Union and the Kingdom of Morocco is the only means of ensuring that the import of products originating in Western Sahara benefits from preferential origin, given that only the Moroccan authorities are able to ensure compliance with the rules necessary for the granting of such preferences.'[48]

38. The agreement at issue was concluded on 25 October 2018, in the form of an exchange of letters. It inserts into the Association Agreement a joint declaration, which extends the preferential tariff treatment to products originating in the territory of Western Sahara.

45 Judgment in *Western Sahara Campaign UK*, paragraphs 59 to 61.

46 Judgment in *Western Sahara Campaign UK*, paragraphs 64 and 69.

47 Contested decision, recital 6. See also Council, Outcome of the Council meeting, 3544th Council meeting, Competitiveness (Internal Market, Industry, Research and Space) (9716/17, 29 and 30 May 2017), p. 22.

48 Contested decision, recitals 4 to 6.

39. The joint declaration provides as follows:

'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.

2. Protocol 4 shall apply mutatis mutandis for the purposes of defining the originating status of the products referred to in paragraph 1, including with regard to proof of origin.

3. The customs authorities of the Member States of the European Union and of the Kingdom of Morocco shall be responsible for ensuring that Protocol 4 is applied to those products.' [49]

40. Both the European Union and the Kingdom of Morocco's letters forming part of the agreement at issue expressly note that the 'agreement is concluded 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'.

41. The letters further reiterate that 'both parties reaffirm their support for the [UN] process and back the efforts made by the Secretary-General to reach a definitive political settlement in line with the principles and objectives of the [UN Charter] and based on the Resolutions of the UN Security Council'.

42. The agreement at issue was approved on the part of the European Union by means of the contested decision.

43. In reaction to paragraph 106 of the *Council* v *Front Polisario*, the following explanation is provided in recitals 7 to 10 of the contested decision:

'(7) The Commission assessed the potential consequences of such an Agreement for sustainable development, particularly with regard to the advantages and disadvantages for the people concerned arising from the tariff preferences given to products from Western Sahara and the exploitation of the natural resources of the territories in question. The effects of tariff benefits on employment, human rights and the exploitation of natural resources are very difficult to measure as they are by nature indirect. Moreover, it is not easy to obtain objective information on this issue.

(8) Nonetheless, the assessment indicates that, overall, the advantages for the economy of Western Sahara arising from the granting of the tariff preferences laid down in the Association Agreement to products originating in Western Sahara, such as the powerful leverage effect it represents for economic growth and thus social development, outweigh the disadvantages raised in the consultation process, such as the extensive use of natural resources, especially underground water reserves, for which measures have been taken.

(9) It has been assessed that the extension of tariff preferences to products originating in Western Sahara will have a positive overall effect for the people concerned. It can be expected that this effect should continue and may even be enhanced in the future. The assessment indicates that extending the benefit of tariff preferences to Western Saharan products will promote the conditions for investment and foster substantial and rapid growth favourable to local jobs.

[49] Joint declaration to the Association Agreement (OJ 2019 L 34, p. 4). Footnote removed.

The existence in Western Sahara of economic and production activities that would benefit greatly from the tariff preferences laid down in the Association Agreement shows that failure to grant tariff preferences would significantly jeopardise exports from Western Sahara, especially those of fishery and agricultural products. It is assessed that by stimulating investment, the granting of tariff preferences should also have a positive impact on the development of Western Sahara's economy.

(10) Having regard to the considerations on consent in the ruling of the Court of Justice, the Commission, in liaison with the European External Action Service [('EEAS')], has taken all reasonable and feasible steps in the current context to adequately involve the people concerned in order to ascertain their consent to the agreement. Wide-ranging consultations were conducted and the majority of the social, economic and political stakeholders who participated in the consultations stated that they were in favour of extending the tariff preferences in the Association Agreement to Western Sahara. Those who rejected the idea felt essentially that such an Agreement should affirm Morocco's position on Western Sahara. However, the text of the Agreement does not imply that it recognises Morocco's sovereignty over Western Sahara. The Union will also continue to step up its efforts in support of the process, initiated and pursued through the United Nations, working towards a peaceful resolution of the dispute.'

D. The judgment under appeal

44. On 27 April 2019, Front Polisario brought an action requesting the annulment of the contested decision.

45. On 29 September 2021, the General Court handed down the judgment under appeal, by which it annulled the contested decision. [50]

46. In relation to the admissibility of the action, the General Court dismissed the Council's two main grounds of inadmissibility relating to Front Polisario's capacity to bring proceedings and its standing as regards the contested decision. [51]

47. Concerning the substance of the action, the General Court dismissed Front Polisario's first ground of annulment relating to the Council's alleged lack of capacity to adopt the contested decision. [52] Conversely, it upheld Front Polisario's third ground of annulment relating to the Council's obligation to comply with the requirements derived from the case-law relating to the right to self-determination and the principle of the relative effect of treaties. [53] The General Court did not examine the other grounds of annulment raised by Front Polisario.

[50] However, that court also decided to maintain the effects of the contested decision for a time not exceeding the period referred to in the first paragraph of Article 56 of the Statute of the Court of Justice of the European Union, or, where an appeal has been lodged within that period, until the Court of Justice has delivered its judgment. Judgment under appeal, paragraph 396.

[51] Judgment under appeal, paragraphs 79 to 114 and 133 to 238.

[52] Judgment under appeal, paragraphs 240 to 250.

[53] Judgment under appeal, paragraphs 251 to 396.

E. Procedure before the Court of Justice

48. By appeals lodged on 14 December 2021 and 16 December 2021, the Commission and the Council respectively request that the Court set aside the judgment under appeal in its entirety, rule itself on the issues raised, dismiss the action at first instance, and order Front Polisario to pay the costs. In the alternative, those institutions request that the Court uphold the effects of the contested decision for a period of 12 months from the date of delivery of its judgment.

49. That course of action is supported by the Confédération marocaine de l'agriculture et du développement rural, and the Belgian, Spanish, French, Hungarian, Portuguese and Slovak Governments.

50. A hearing was held on 23 and 24 October 2023 at which the Commission, the Council, Front Polisario, the Confédération marocaine de l'agriculture et du développement rural, and the Belgian, French, Spanish, and Hungarian Governments presented oral argument.

III. Analysis

A. On the interpretation of international law

51. Compared to the EU legal system or the legal systems of its Member States, international law is a less compact and, in terms of ascertaining the uniformity of the meaning of that system's rules, much more decentralised system.

52. Even if international law has its own system of legal sources,[54] and some generally accepted interpretative rules,[55] it lacks one final interpreter whose interpretations bind all the participants of the system.[56]

53. In that respect, in the interpretation of the content of the rules of customary international law that are part of the EU legal system, the EU institutions, including the EU Courts, are not limited by the different interpretations of the same rule by other subjects of international law.[57]

54 According to Article 38(1) of the Statute of the ICJ, the sources of international law are treaties and conventions, custom, general principles of law, and judicial decisions and teachings. See also, generally, Shaw, M. N., *International Law*, Cambridge University Press, Cambridge, 2006, p. 69 et seq.

55 Articles 31 to 33 of the Vienna Convention on the Law of Treaties, concluded in Vienna on 23 May 1969 (*United Nations Treaty Series*, Vol. 1155, p. 331) ('the VCLT') established rules for the interpretation of international treaties. Some of these rules might be understood as the codification of customary international law. Customary international law, on the other hand, requires the interpreter to first establish whether a certain rule represents custom, and then to interpret its meaning in a particular situation. That requires establishing the practice and the *opinio juris* of States. Through that exercise, custom can still acquire a different meaning in a system that lacks one authoritative interpreter. On the difference between coming to a *decision* that a certain rule constitutes a norm of customary international law and the subsequent *interpretation* of the content of that rule, see, Merkouris, P., 'Interpretation of Customary International Law: Delineating the States in Its Life Cycle', in Merkouris, P., Follesdal, A., Ulfstein, G., Westerman, P. (eds.), *The interpretation of customary international law in international courts: Methods of interpretation, normative interactions and the role of coherence*, Cambridge University Press, Cambridge, 2023, p. 136.

56 According to Article 38(1)(d) of the Statute of the ICJ, judicial decisions, including those of that court, are only a subsidiary means to determining the rules of international law.

57 For examples of patterns of difference between interpretations of international law, see Roberts, A., 'Patterns of difference and dominance', in Roberts, A., *Is international law international*?, Oxford University Press, Oxford, 2017, p. 232 et seq.

54. Nevertheless, in construing the meaning of international law for the purposes of the EU legal order, the Court should establish whether a certain level of consensus about the meaning of a particular rule was achieved at the international law level. That results, to my mind, from the European Union's commitment to contribute to the strict observance and the development of international law, as provided for in Article 3(5) TEU.

55. In the same way as the EU institutions are not bound by interpretations of international law by other subjects of that legal order, the interpretation which the Court attributes to a rule of international law binds only within the EU legal system. Nevertheless, when attributing the meaning to a rule of international law, it is important that the Court remains mindful of the fact that its interpretation has effects on the international law plane and contributes to the creation of custom and the construction of its meaning. [58]

56. The interpretation of international law within the EU legal system also raises the question of the relationship between the EU Courts and the EU political institutions when it comes to interpreting which obligations international law imposes on the European Union.

57. In the European Union's external policy, the EU political institutions enjoy a wide margin of discretion. [59] A decision to conclude an international agreement with another State, including the decision to potentially extend the application of that agreement to a third territory, is part of that discretion. The Court cannot question that choice.

58. However, where a policy decision over the engagement with a third State or territory is taken, not only is the Court empowered to review whether the European Union's external engagement conforms to the constitutional requirements imposed by the EU and FEU Treaties, but it is even required to do so. [60]

59. As the Court explained in its judgment in *Air Transport Association of America and Others*, '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.' [61]

60. In its constitutional task to ensure the rule of law in the European Union, the Court is therefore required to assess whether, by concluding an international agreement, the EU institutions breached the rights which rules of customary international law bestow on its subjects.

58 See, in that respect, Malenovský, J., 'Le juge et la coutume internationale : perspectives de l'Union européenne et de la Cour de justice', The Law and Practice of International Courts and Tribunals, Vol.12, 2013, p. 218 and Odermatt, J., 'The European Union's role in the making and confirmation of customary international law', in Lusa Bordin, F., Müller, A., and Pascual-Vives, F. (eds), *The European Union and Customary International Law*, Cambridge University Press, Cambridge, 2023, pp. 74 and 75.

59 See, in that regard, judgments of 21 December 2016, *Swiss International Air Lines* (C-272/15, EU:C:2016:993, paragraph 24) and of 9 June 2022, *Préfet du Gers and Institut national de la statistique et des études économiques* (C-673/20, EU:C:2022:449, paragraph 99) (in which the Court considered that, in the conduct of external relations, EU institutions enjoy a broad discretion in policy decisions, which necessarily implies policy choices).

60 I have thus considered that, even in the area of common foreign and security policy, in which the Court's jurisdiction is limited, its competence to control whether EU action conforms to fundamental rights cannot be excluded. See, to that effect, my Opinion in Joined Cases *KS and KD* v *Council and Others and Commission v KS and KD* (C-29/22 P and C-44/22 P, EU:C:2023:901, paragraphs 115 to 120). That case is still pending before the Court.

61 See judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 101) ('*Air Transport Association of America and Others*').

61. That requires that the Court interpret the content of the relevant rules of customary law. In a situation where there is uniform *opinio juris* on the *existence* of a legal obligation (such as the obligation to recognise the right to self-determination of a NSGT), but not on its precise *content*, the discretion of the EU political institutions in external relations requires that the Court defer to the interpretation chosen by those institutions.

B. The scope of the present appeals and the structure of this Opinion

62. The question before the Court in these appeals in essence concerns the following: has the contested decision authorised the conclusion of an agreement with the Kingdom of Morocco covering the territory of Western Sahara in breach of customary international law, more precisely, the right to self-determination and the principle of the relative effect of treaties, as interpreted by the Court *Council* v *Front Polisario* and *Western Sahara Campaign UK*?[62]

63. In answering that question, it is important to bear in mind that the question of *whether* the European Union may engage with the territory of Western Sahara is not part of the scope of this appeal;[63] that element, which the General Court dismissed at first instance, has not been cross-appealed.[64]

64. Accordingly, the question before the Court is limited to the findings of the General Court addressed in its analysis of the third plea in law introduced by Front Polisario. In that respect, the General Court found that the contested decision was contrary to the right to self-determination and the principle of the relative effects of treaties inasmuch as the Court has interpreted those rules in the judgment in *Council* v *Front Polisario*. Other aspects relating to those rules were raised separately in the original action, but the General Court did not address them, considering the action founded on the basis of the third plea.[65]

65. The present appeals do not, therefore, enable the Court to give an interpretation on the way in which the right to self-determination governs the relationship between the European Union and Morocco in respect of Western Sahara additionally to what was at issue in the judgment in *Council* v *Front Polisario*.

62 Against the background of arguments contesting the validity of the third plea in law raised by Front Polisario, the General Court considered that that party could rely on the judgment in *Council* v *Front Polisario* and on the interpretation therein of the right to self-determination and the principle of the relative effect of treaties to challenge the validity of the contested decision. See judgment under appeal, paragraph 297.

63 To my mind, there is also no merit in that question since there must be an avenue for the European Union to interact with certain territories in which it has a legitimate interest, without necessarily having to compromise the European Union's or its Member States' impartiality in relations to the status of those territories. That twin-pillared policy has been described by commentators as seeking to open 'a political and legal space' of separating engagement from recognition; see Fischer, S., 'The EU's non-recognition and engagement policy towards Abkhazia and South Ossetia', European Institute for Security Studies (1-2 December 2010), p. 3 and Coppieters, B., 'Engagement without recognition', in Vosioka, G., Doyle, J., Newman, E., 'Routledge Handbook of State Recognition' (1st ed, 2019, Routledge: London), p. 243-244 (describing how the EU's approach with disputed territories follows either the formula of 'non-recognition and engagement' or 'engagement without recognition'). For a practical example of that approach, as regards the conflict surrounding Abkhazia, see EU-Georgia Cooperation Council, 14th meeting of 12 December 2023 (UE-GE 4651/1/13), point 4.

64 See, to that end, judgment under appeal, paragraphs 187 to 189 and 240 to 250.

65 At first instance, Front Polisario put forward a total of 10 pleas in law in support of its action, with only the 1st and 3rd pleas forming the basis for the judgment under appeal. The 8 other pleas also raise other questions of international law, such as the respect for international humanitarian law (2nd plea in law); the right to self-determination (7th plea in law); the relative effect of treaties (8th plea of law); the law on international responsibility (10th plea in law) as well as questions of EU law, such as the protection of legitimate expectations and proportionality (5th and 6th plea in law). Given that the General Court has not dealt with those pleas in the judgment under appeal, they are excluded from the scope of the present appeals.

66. Nevertheless, as some of the issues raised by these appeals are closely connected to those issues that remain pending before the General Court, [66] I will briefly discuss them too.

67. My analysis is structured as follows. I shall commence by explaining why I consider Front Polisario to hold standing to bring the present proceedings (Section C). Moving to the substance of the case, I will then show that the General Court erred in law when it accepted Front Polisario's third plea in law as founded (Section D). For that purpose, I will first interpret the judgments in *Council* v *Front Polisario* and in *Western Sahara Campaign UK* to clarify precisely which elements of those judgments are relevant for the present set of appeals (Subsection D.1). Second, I will explain why the General Court's finding of the lack of consent in the sense of the relative effect of treaties is wrong and why, therefore, that court incorrectly considered the contested decision to be in breach of international law as interpreted in the judgment in *Council* v *Front Polisario* (Subsection D.2). Thereafter, I will analyse whether the Council's conclusion of the agreement at issue treats the territory of Western Sahara as a separate and distinct territory, in line with the Court's interpretation of the content of the right to self-determination in *Council* v *Front Polisario* as regards that territory (Subsection D.3) Finally, I will briefly highlight those obligations arising from the right to self-determination which remained unanswered in the judgment under appeal but which nonetheless bind the European Union in its engagement with the territory of Western Sahara (Section E), before I conclude on the consequences of my Opinion (Section IV).

C. Admissibility and the possibility to rely on customary international law before the EU Courts

1. Standing

68. To my mind, Front Polisario's right to bring the action for annulment in the present case can be derived from the legal status of the people of Western Sahara under the part of public international law which binds the European Union. It is that people who can claim to be directly and individually concerned by the contested decision.

69. The people of Western Sahara hold the right to self-determination, which was recognised by the Court as a principle of customary international law that creates binding obligations for the European Union. [67]

70. That right, as the General Court in essence explained, [68] exists even absent and prior to the act of its effective exercise. Its purpose is, among other, to enable that people to choose their political future.

[66] Those questions were also present, directly or indirectly, in the actions underlying the orders of 19 July 2018, *Front Polisario v Council* (T-180/14, not published, EU:T:2018:496) (relating to a protocol laying down fishing opportunities in the waters adjacent to Western Sahara); of 30 November 2018, *Front Polisario v Council* (T-275/18, not published, EU:T:2018:869) (relating to an aviation agreement with the Kingdom of Morocco); and order of 8 February 2019, *Front Polisario v Council* (T-376/18, not published, EU:T:2019:77) (relating to a Council decision authorising the opening of negotiations of a fisheries partnership agreement with the Kingdom of Morocco in the light of the judgment in *Western Sahara Campaign UK*).

[67] See *Council* v *Front Polisario*, paragraphs 88 to 89 and *Western Sahara Campaign UK*, paragraph 63. On these judgments, see further point 96 et seq of this Opinion.

[68] See, to that effect, judgment under appeal, paragraphs 295 and 360.

71. In that respect, as the people of Western Sahara hold rights under international law, that people also holds (at least a derivative type of) legal personality under that corpus of law. [69]

72. In its judgment in *Venezuela* v *Council (Whether a third State is affected)*, [70] the Court confirmed that entities which hold legal personality under international law can have standing in the EU Courts if they are directly and individually concerned by an act of the EU institutions. [71]

73. That brings me to the requirements for direct and individual concern, as arising from the fourth paragraph of Article 263 TFEU.

74. As a collective, and therefore as a self-determination unit, the people of Western Sahara are directly concerned by the contested decision. [72]

75. First, that decision concerns a territory in respect of which the people of Western Sahara hold the right to self-determination. It, therefore necessarily affects rights which that people enjoy in relation to that territory, including the right to enjoy its natural resources. The contested decision, thus, affects the legal status of the people of Western Sahara.

76. Second, the obligation to afford preferential treatment to products originating in Western Sahara binds the European Union without the need for any discretionary act additional to the contested decision. The contested decision, thus, also affects directly the legal status of the people of Western Sahara.

77. That people are also individually concerned by the contested decision.

78. They are the only people recognised as enjoying the right to self-determination in relation to the territory of Western Sahara. Therefore, that people are differentiated in that position from any other subject. [73]

69 See, for example, Weller, M., *Escaping the self-determination trap*, Nijhoff, Leiden, 2008, pp. 16 to 17, and note 15 ('Genuinely colonial self-determination entities enjoy legal personality even before administering the act of self-determination, they have a right to territorial unity, to be free from the use of force and repressive measures, they may struggle through the means of a national liberation movement, and arguably receive international support in their struggle. They can also unilaterally bring into application the law of international armed conflict, instead of the much more limited law of internal armed conflict which covers domestic conflicts') and Knoll, B, *The Legal Status of Territories Subject to Administration by International Organisations*, Cambridge University Press, Cambridge, 2009, p. 124) (considering that 'an entity is a legal subject to the extent that rules of the international legal system refer to it').

70 Judgment of 22 June 2021 (C-872/19 P, EU:C:2021:507).

71 Judgment of 22 June 2021, *Venezuela* v *Council (Whether a third State is affected)* (C-872/19 P, EU:C:2021:507, paragraph 34).

72 As stated by the General Court in paragraph 144 of the judgment under appeal, according to settled case-law, the condition that a natural or legal person must be directly concerned by the decision under appeal, as specified in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be satisfied. The first is that the contested EU measure must directly affect the legal situation of the individual. The second is that it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting solely from EU provisions without the application of other intermediate rules. See also judgment of 12 July 2022, *Nord Stream 2* v *Parliament and Council* (C-348/20 P, EU:C:2022:548, paragraph 43).

73 Accordingly, the strict condition for individual concern arising from the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17, p. 107) is satisfied.

79. However, unlike Venezuela, or any other State that might be recognised to have standing before the Court, the people of Western Sahara has no elected or otherwise recognised representative. [74]

80. With no elected or collectively recognised representative, how can that people defend their collective right to self-determination before the EU Courts? [75]

81. Front Polisario is not recognised as '*the*' representative of the people of Western Sahara by the UN [76] or the European Union. [77]

82. Front Polisario is a self-proclaimed liberation movement, [78] which came into being in order to fight for a particular type of future model of governance of the territory of Western Sahara: that of the *independence* of that territory from the Kingdom of Morocco as well as creation of a *sovereign* and self-standing Sahrawi State. [79]

83. It was, however, never elected by the people of Western Sahara for that role, nor can it be ascertained with any certainty that Front Polisario has the support of the (majority of that) people. [80]

74 A somewhat similar issue was avoided in the proceedings underlying the judgment of 22 June 2021, *Venezuela* v *Council (Whether a third State is affected)* (C-872/19 P, EU:C:2021:507), since, when that case was first brought before the General Court, the Bolivarian Republic of Venezuela found itself in the midst of a struggle of competing claims for representation of that country between Mr Nicolás Maduro and Mr Juan Guaidó, with the Member States split as to the question of who could act as the President of the Bolivarian Republic of Venezuela. However, the question of capacity to authorise legal proceedings on behalf of that republic did not need to be taken up by the Court since, in January 2021, the Council issued conclusions resolving that impasse in favour of Mr Nicolás Maduro. See Council of the European Union, Council Conclusions on Venezuela (25 January 2021, 5582/21).

75 At the hearing, the Commission took the position that none of the 60 organisations, NGOs, farmers' federations, local elected representatives, agricultural organisations, or other players involved in the consultations would have standing to bring an action against the contested decision.

76 In that respect, I can agree with the position of the Council and the Commission that the fact that UN General Assembly Resolution 34/37 of 21 November 1979, 'Question of Western Sahara', referred to Front Polisario as *the* representative of the people of Western Sahara is insufficient evidence, in itself, to establish the claim that that party indeed is recognised in that capacity by the UN and the international community.

77 Contrast the position of that movement with the role of the Palestinian Authority of the West Bank and the Gaza Strip, which, under the 'terms of the Israeli-Palestinian Interim Agreement of [2]8th September 1995 on the West Bank and Gaza Strip … may conclude international agreements for the benefit of the Palestinian Authority … in certain areas'. See Proposal for a Council Decision concerning the conclusion by the European Community of a Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community and the PLO for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip (presented by the Commission) (COM(97)51 final).

78 However, Front Polisario was never bestowed the label of 'people's liberation movement' by the UN or by the European Union and its Member States. On the status and powers of a 'people's liberation movement', see Crawford, J., *Brownlie's Principles of Public International Law*, 9th edition, Oxford University Press, 2019, p. 113, who explains that political entities recognised as liberation movements have a number of legal rights and duties, encompassing, among others, the capacity to conclude binding international agreements with other international legal persons and the right to participate in the proceedings of the UN as observer, this right being conferred expressly in various General Assembly resolutions.

79 See also, to that effect, judgment under appeal, paragraphs 6 and 104. Similarly, the preamble and Articles 1, 24, 32, 46, 144 and 146 of the 'constitution' of the SADR. Article 32 thereof notably explains that 'until the complete recovery of national sovereignty, the Frente POLISARIO shall be the political framework that shall unite and mobilise politically the Sahrawis to express their aspirations and legitimate rights to self-determination and independence and to defend their national unity and complete the building of their independent Sahrawi State'.

80 If one had to find a parallel with the organisation of a Western democratic society, Front Polisario would, at best, represent one of the political parties running for a mandate in a yet-to-be-established government. However, a yet-to-be-elected party would not be able to represent that government.

84. As I have explained in point 9 of this Opinion, the exercise of the right to self-determination involves three possible outcomes, the formation of an independent State being only one of those three outcomes. Recognising Front Polisario as holding the title of '*the*' representative of the people of Western Sahara would, therefore, not be in conformity with the neutral position of the European Union as to the outcome of the self-determination process. [81]

85. Nor is that type of recognition an option open to the Court, as it would run counter to the foreign policy decision of the European Union and the Member States not to recognise Front Polisario as holding any particular status. [82]

86. Nevertheless, even if not an exclusive representative, it cannot be denied that Front Polisario is an interlocutor in the UN process of self-determination of the territory of Western Sahara and that it may be perceived in that process as reflecting the interests and wishes of (at least) part of the people of Western Sahara.

87. Moreover, that subject holds 20% of the territory of Western Sahara and so exercises effective control over that territory and the people living therein. [83] Therefore, Front Polisario has an interest to defend the territorial integrity of the territory of Western Sahara, as guaranteed by the right to self-determination of the people of that territory. [84]

88. To my mind, it follows that, in so far as Front Polisario seeks to bring an action before the EU Courts to ensure that EU engagement with the territory of Western Sahara does not interfere with the rights accorded by customary international law to the people of Western Sahara, Front Polisario should be recognised as holding at least a *partial* representative status of that people. [85]

89. If that were not so, the people of Western Sahara, which, in their current state, are neither entirely ascertainable nor represented by a single or recognised representative, would be denied the possibility to enforce, before the EU Courts, those rights which they collectively derive from that part of public international law that also forms part of the law of the European Union. [86]

[81] The current position of the European Union appears to be that the political process on the issue of Western Sahara should aim to reach 'a just, realistic, pragmatic, lasting and mutually acceptable political solution …, based on "compromise"'; see joint declaration by the European Union and Morocco for the fourteenth meeting of the Association Council (27 June 2019), point 13, available at https://www.consilium.europa.eu/en/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/.

[82] See, by analogy, judgment of 21 December 2016, *Swiss International Air Lines* (C-272/15, EU:C:2016:993, paragraph 24) (in which the Court found that the conduct of foreign relations requires decisions of policy, for which the European Union must be able to freely decide what kind of treatment to accord to third States).

[83] See, on the consequences arising from effective control, the Advisory Opinion of 21 June 1971 *concerning the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)* (ICJ Reports 1971, p. 16, paragraph 118) (explaining that 'physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States').

[84] See, in that regard, UN General Assembly Resolution 1514 (XV), *Declaration on the granting of independence to colonial countries and peoples* (14 December 1960) (declaring that 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the [UN] Charter').

[85] However, that recognition should only be granted to the extent that it genuinely seeks to represent the interests of (part of) the people of Western Sahara. See, by analogy, judgment of 21 September 2023, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission* (C-478/21 P, EU:C:2023:685, paragraph 67) (conditioning the status of 'representative association' on the presence of general and collective interests of importers or exporters in a third State as well as on the absence of interference by a third State).

[86] See, by analogy, judgment of 22 June 2021, *Venezuela* v *Council (Whether a third State is affected)* (C-872/19 P, EU:C:2021:507, paragraph 34) (recognising the status of 'legal person' of a third State, for otherwise that State would have no avenue of protecting its interests where its rights have been infringed).

90. That type of outcome would not be compatible with the rule of law, a value enshrined in Article 2 TEU,[87] and forming one of the constitutional pillars of the European Union.[88]

91. It follows that I propose that the Court upholds the General Court's finding that the action at first instance is admissible, albeit with substituted reasoning.

2. Relying on customary international law before the EU Courts

92. In their appeals, the Commission and the Council, relying on *Air Transport Association of America and Others*, further claim that Front Polisario cannot rely on customary international law before the EU Courts in order to challenge the validity of the contested decision.

93. I do not agree. To my mind, the Court can exercise its power of judicial review in relation to the part of international law that binds the European Union to assess the compatibility of the contested decision to conclude the international agreement at issue. The people of Western Sahara are directly and individually concerned by that decision, which may interfere with their rights under the principles of customary international law.

94. By hearing the present case, the Court is not turning, as claimed, into an international tribunal. To the contrary, it is the Court's constitutional duty to ensure that, in the application of the Treaties, the EU institutions do not breach the law. By virtue of Article 3(5) TEU, that law includes customary international law and the principles embodied in the UN Charter. Furthermore, there exists no other court which can hear such a challenge.

95. To the extent that the principles of customary international law involved are sufficiently clear to allow the Court to assess whether the Council was prevented from concluding the international agreement at issue by adopting the contested decision, Front Polisario may rely on those rules of international law before the Court.

D. The General Court was wrong to find Front Polisario's third plea well founded

1. Interpreting the judgment in Council *v Front Polisario*

96. To recall, the scope of the present appeals solely concern the question of whether the contested decision breached the interpretation of the Court with regard to the right to self-determination and the principle of the relative effect of treaties, as interpreted by the Court in the judgment in *Council* v *Front Polisario*. It is, therefore, necessary to assess what precisely the Court sought to lay down in that judgment.

97. To conclude that the agreement at issue did not apply to the territory of Western Sahara, the Court reasoned as follows.

[87] See, in that regard, judgments of 16 February 2022, *Hungary* v *Parliament and Council* (C-156/21, EU:C:2022:97, paragraphs 127 and 128), and of 16 February 2022, *Poland* v *Parliament and Council* (C-157/21, EU:C:2022:98, paragraphs 192 and 193).

[88] See, to that effect, judgment of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 23).

98. It acknowledged that the territory of Western Sahara constitutes a NSGT within the meaning of Article 73 of the UN Charter.[89] It then observed that a NSGT enjoys the right to self-determination, which is 'a legally enforceable right *erga omnes* and one of the essential principles of international law'.[90] The Court, therefore, held that the right to self-determination forms part of the rules of public international law that are applicable to relations between the European Union and the Kingdom of Morocco, which the EU Courts must take into account.[91]

99. Under the UN Charter, a NSGT has a 'separate and distinct status'.[92] The Court therefore concluded that the term 'the Kingdom of Morocco' cannot be interpreted as including the territory of Western Sahara in the scope of application of the Association Agreement.[93]

100. The Court of Justice further held that an international agreement may bind a State in respect of another territory, but that such an intention must be apparent from that agreement, or otherwise established.[94] It however considered that it cannot be concluded, contrary to the findings of the General Court, that the Association Agreement can be interpreted as tacitly providing for its application to the territory of Western Sahara.[95]

101. Thereafter, the Court of Justice turned to the principle of the relative effect of treaties. It considered that that principle constitutes a general principle of international law, and is codified in Article 34 of the Vienna Convention on the Law of Treaties ('VCLT').[96] According to that principle, international treaties do not impose any obligations, or confer any rights, on third States without their consent.[97]

102. Finally, the Court held in paragraph 106 of its judgment in *Council* v *Front Polisario*, which is the object of discussion in the present case, that 'the people of Western Sahara must be regarded as a "third party" within the meaning of the principle of the relative effect of treaties'. Therefore, the people of Western Sahara must give their 'consent' for the 2012 Trade Liberalisation Agreement to apply to the territory of Western Sahara. That is so 'without it being necessary to determine whether such implementation is likely to harm it or, on the contrary, to benefit it'.[98]

103. Given that it was not proven that the people of Western Sahara had given their consent to be affected by the Association Agreement, the Court concluded that it would be contrary to the right to self-determination and the principle of the relative effect of treaties to interpret that agreement as applying to the territory of Western Sahara.[99]

89 Judgment in *Council* v *Front Polisario*, paragraph 93.

90 Judgment in *Council* v *Front Polisario*, paragraph 88 and the case-law cited. The Court referred to Advisory Opinion on Western Sahara, paragraphs 54 to 56 and the judgment of the ICJ of 30 June 1995 in East Timor (*Portugal* v *Australia*) (ICJ Reports 1995, p. 90, paragraph 29).

91 Judgment in *Council* v *Front Polisario*, paragraph 89.

92 Judgment in *Council* v *Front Polisario*, paragraph 90. In reaching to that conclusion, the Court relied on UN General Assembly Resolution 2625 (XXV) of 24 October 1970, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations'.

93 Judgment in *Council* v *Front Polisario*, paragraph 92.

94 Judgment in *Council* v *Front Polisario*, paragraph 98.

95 Judgment in *Council* v *Front Polisario*, paragraph 99. For criticism of the Court's analysis of the lack of intention of the European Union and the Kingdom of Morocco in relation to the 2012 Trade Liberalisation Agreement in the judgment in *Council* v *Front Polisario*, see Kassoti, E., 'The EU and Western Sahara: an assessment of recent developments', *European Law Review*, Vol. 43(5), p. 746 et seq., who considered that the intention of the parties to include Western Sahara was clear already in the circumstances of the case.

96 Vienna Convention on the Law of Treaties, concluded in Vienna on 23 May 1969 (*United Nations Treaty Series*, Vol. 1155, p. 331).

97 Judgment in *Council* v *Front Polisario*, paragraph 100.

98 Judgment in *Council* v *Front Polisario*, paragraph 106.

99 Judgment in *Council* v *Front Polisario*, paragraph 106. That is also how the Court summarised its findings in the judgment in *Western Sahara Campaign UK* (paragraph 63).

104. What rules can be extrapolated from those findings of the Court?

105. In relation to the right to self-determination, the Court clarified two issues. First, it held that the right to self-determination is a customary rule of international law that applies *erga omnes* and therefore binds the European Union. Second, the Court considered that the right to self-determination requires that Western Sahara be treated as a separate territory from the Kingdom of Morocco.

106. The Court did not discuss the content of the right to self-determination.[100] However, it did suggest that the people of Western Sahara, who enjoy a right to self-determination in relation to the NSGT of Western Sahara, must give their '*consent*' to an agreement that intends to apply to that territory.

107. Did the Court come to this conclusion on the basis of the right to self-determination? To my mind, no. It derived the requirement of consent from the rules governing the relative effect of treaties, and in particular by reference to Article 34 of the VCLT.

108. The European Union is not a party to the VCLT, and its rules cannot bind it. However, the Court understood Article 34 of the VCLT as an expression of the customary rule of international law,[101] which does bind the Union in its actions.[102]

109. Article 34 of the VCLT provides that a treaty does not create either obligations or rights for a third State without its consent. Even though that provision refers to the consent of 'States', the Court considered that same rule to apply in relation to NSGTs.[103]

110. While it may well be argued that that determination constitutes the Court's interpretation of the principle of relative effect of treaties, it cannot, in itself, be excluded from an international law perspective that Article 34 of the VCLT might also apply to a NSGT as a 'third party'.[104]

111. But that does not resolve the question of *how*, *if at all*, a NSGT, such as Western Sahara, could provide consent to be bound by an international agreement.

112. In the judgment in *Council* v *Front Polisario*, the Court did not need to discuss that question. It merely explained that as a matter of fact the people of Western Sahara did not give their consent to be bound by an international agreement between the European Union and the Kingdom of

100 See, to that effect, also Molnar, T., 'The Court of Justice of the EU and the Interpretation of Customary International Law: Close Encounters of a Third Kind?', in Merkouris, P., Follesdal, A., Ulfstein, G., Westerman, P. (eds), *The interpretation of customary international law in international courts: Methods of interpretation, normative interactions and the role of coherence*, Cambridge University Press, Cambridge, 2023, pp. 14 and 15 (considering that 'the EU Court refrained from genuinely interpreting the right to self-determination')..

101 See, to that effect, judgments of 25 February 2010, *Brita* (C-386/08, EU:C:2010:91, paragraphs 44 and 52), and judgment in *Council* v *Front Polisario*, paragraph 100 (deeming Article 34 of the VCLT to constitute a 'particular expression' of the principle of the relative effect of treaties). For an example, where the VCLT did not, according to the Court, reflect customary international law, see judgment of 16 June 1998, *Racke* (C-162/96, EU:C:1998:293, paragraph 59).

102 It follows from the case-law that customary international law binds the European Union. See, for instance, *Air Transport Association of America and Others*, paragraph 101 and the case-law cited.

103 Prior to the judgment in *Council* v *Front Polisario*, the Court had already considered that a 'third party', within the meaning of the principle of the relative effect of treaties, as consolidated in Article 34 of the VCLT, need not only concern a 'State'. Thus, in its judgment of 25 February 2010, *Brita* (C-386/08, EU:C:2010:91, paragraph 52), it considered that interpreting the EC-Israel Association Agreement (OJ 2000 L 147, p. 3) as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing an obligation on the Palestinian customs authorities without the consent of the Palestine Liberation Organisation.

104 For a different opinion see, Odermatt, J., 'International law as a challenge to EU acts: Front Polisario II', *Common Market Law Review*, Vol. 60(1), footnote 61 and the text at pp. 230 and 231.

Morocco. That enabled the Court to conclude that the Association Agreement did not extend to the territory of Western Sahara: neither have the parties expressly provided for it, nor has the third party (here, the people of Western Sahara) consented to that extension.

113. In that judgment, there was thus no need to assess *how* an agreement concluded with the Kingdom of Morocco could legally apply to the territory of Western Sahara for the simple reason that the Court found that it did not apply to Western Sahara at all. Consequently, the General Court rightly concluded that 'in [the judgments in *Front Polisario* v *Council* and in *Western Sahara Campaign UK*] the EU Courts did not rule on disputes relating to any agreements between the European Union and the Kingdom of Morocco that contained an explicit stipulation including Western Sahara within their territorial scope', which is the situation in the present case.

114. When viewed in that light, the requirement for consent, as expressed in paragraph 106 of the judgment in *Council* v *Front Polisario*, should not be understood as an instruction on the question of whether or how an agreement between the European Union and the Kingdom of Morocco could involve the territory of Western Sahara. Instead, that statement should be understood only as *one of the arguments* as to why the scope of the agreement at issue in that case could not include the territory of Western Sahara.

115. It is in that light that I will assess whether the General Court correctly interpreted the requirement for consent as reflected in the judgment in *Council* v *Front Polisario*.

2. The relative effect of treaties and the requirement of consent

(a) Findings of the General Court

116. It is uncontested in the present case that the intention of the European Union and the Kingdom of Morocco was to conclude a bilateral agreement that would apply to the territory of Western Sahara. [105]

117. The General Court commenced its substantive analysis of Front Polisario's third plea in law by assessing whether the Council had respected the requirement of consent as required by paragraph 106 of the judgment in *Council* v *Front Polisario*.

118. It explained that in the judgment in *Council* v *Front Polisario*, the Court did not specify the method by which that consent could be expressed. [106] Accordingly, the General Court turned to the VCLT in order to ascertain the methods by which consent may be expressed.

119. In relation to States, the VCLT deals with that question in Articles 35 and 36. Under those provisions, the consent to the application of the treaty that imposes obligations on a third State requires an express acceptance in writing. Conversely, consent is implied if a treaty only bestows rights on the third State.

[105] Therefore, the Court cannot conclude, as in the judgment in *Council* v *Front Polisario*, that the scope of the agreement at issue does not include the territory of Western Sahara.

[106] Judgment under appeal, paragraph 311.

120. Having regard to those provisions of the VCLT, the General Court inferred that, as the agreement at issue did not bestow rights, but rather imposed obligations on the people of Western Sahara, [107] consent would have to be given expressly. [108]

121. The General Court then assessed whether express consent was received from the people of Western Sahara, and concluded that the consultations carried out by the Commission and the EEAS could not be understood as having obtained the consent of that people. [109]

122. I can agree with that finding of the General Court.

123. There is a difference between the notion of the 'population' of a NSGT and the 'people' of that NSGT, the latter implying a political unit, with a right to self-determination, whereas the former implies the inhabitants of a territory. [110]

124. The Commission and the EEAS carried out consultations with the 'people concerned', which, as the General Court rightly observed, encompassed 'in essence, the inhabitants who are currently present in the territory of Western Sahara, irrespective of whether or not they belong to the people of that territory'. [111] Those consultations cannot, therefore, amount to obtaining the consent of the 'people' of the NSGT of Western Sahara.

125. The parties and interveners in the present appeals spent some ink arguing whether Articles 35 and 36 of the VCLT are at all applicable to a NSGT and binding on the European Union. There are reasons to conclude that those provisions do not codify rules of customary international law, [112] at least not where the principle of the relative effect of treaties is interpreted as applying to NSGTs. If that is indeed the current state of international law, those provisions of the VCLT cannot bind the European Union.

126. However, to my mind, the question of whether Articles 35 and 36 of the VCLT indeed prescribe the method of how consent should be given in the case of NSGT is irrelevant.

[107] The General Court held that the agreement at issue was only capable of creating rights for individuals, such as exporters of the products covered by that agreement, and not for the people of Western Sahara as the 'third party' to that agreement. See, judgment under appeal, paragraphs 321 and 322. Scholarship and the preparatory documents to the VCLT certainly consider that a distinction may be made between treaties that create *factual benefits* to natural or legal persons in third States and those that create *rights and obligations* for said third State. See, in this regard, Dahm, G., Delbrück, J., Wolfrum, R., *Völkerrecht / Der Staat und andere Völkerrechtssubjekte; Räume unter internationaler Verwaltung*, Band I/3 2nd edition, De Gruyter, Berlin, 2002, p. 617; Fizmaurice, M., 'Third Parties and the law of Treaties', in von Bogdandy, A. and Wolfrum, R. (eds), *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 104-105; and Waldock, H., Third Report on the Law of Treaties, *Yearbook of the International Law Commission*, Vol. 2, 1964, p. 21 (all of which distinguish between genuine treaties *in favour of* third parties (that is to say, those granting the third party their own rights) and treaties in favour of third parties *in the technical sense* (those that offer advantages to the third party or its subjects without participation in the treaty or conferring certain rights)).

[108] Judgment under appeal, paragraphs 323 to 326.

[109] Judgment under appeal, paragraph 384.

[110] See, in that regard, Wrange, P., 'Self-Determination, occupation and the authority to exploit natural resources: trajectories from four European judgments on Western Sahara', *Israel Law Review*, Vol. 52(1), 2019, p. 18.

[111] Judgment under appeal, paragraph 337.

[112] See, in relation to Article 35 of the VCLT, Laly-Chevalier, C. and Rezek, F., 'Article 35 – Convention de 1969', in Corten, O. and Klein, P. (eds), *Les conventions de Vienne sur le droit des traités – commentaire article par article*, Vol. II, Bruylant, Bruxelles, 2006, p. 1429, and Proells, A., 'Article 35 General rule regarding third States' in Dörr, O., Schmalenbach, K. (eds), *Vienna Convention on the law of Treaties: A commentary*, Springer, Berlin, 2018, p. 707. See also, in relation to Article 36 of the VCLT, d'Argent, P. in Corten, O. and Klein, P., ibid., pp. 1468 and 1469, and Proells, A. in Dörr, O., Schmalenbach, K., ibid., p. 720.

127. As I will explain, my position is that the people of Western Sahara, as a 'third party' within the meaning of Article 34 of the VCLT, cannot, in their current state of organisation, give the necessary consent on their own. That, however, does not mean that consent cannot be given *on their behalf*.

(b) The people of Western Sahara cannot give their 'consent' to be bound by the agreement at issue

128. It is clear how a State gives consent to be bound by an international agreement. However, it is far from clear how a NSGT may give such consent. [113]

129. When a State is a third party to which two other States want to extend the application of their agreement, that third State is presumed to be capable, under international law, of concluding that international agreement itself. Precisely for that reason, it must give its consent if it did not conclude the agreement itself, but agrees to be bound by an agreement of other States.

130. The position of 'a people', as custodians of the right to self-determination of a NSGT, is different. That people cannot conclude an international agreement before they have exercised their right to self-determination; that is, before they have attained some measure of self-governance.

131. In the particular case of the people of Western Sahara, there is no chosen or accepted representative that could consent in their name. Even if Front Polisario participates in the political negotiations on the resolution of the Western Sahara question, that role is not the same as that of an elected or recognised representative of the Sahrawi people to express their collective wishes. The latter role can be attributed only through the exercise of the right to self-determination by the Sahrawi people, which the international community remains unable to organise. [114]

132. The Sahrawi people cannot express their position without an elected or collectively recognised representative. Even if it were established clearly which individuals pertain to the Sahrawi people, it would be impossible to obtain that people's collective consent through consultations with every individual member of that group.

133. Once the Sahrawi people exercise their right to self-determination, they will acquire the capacity to give their consent to an international agreement binding on their territory, or, indeed to conclude such an agreement themselves.

134. Until that point in time, the Sahrawi people cannot give the consent to be bound by an international agreement.

135. As the Council and the Commission have explained, the very notion of not being self-governing implies that the people who have not yet exercised their right to self-determination do not have a means or a structure to express their wishes or decisions.

[113] See, in that respect, Odermatt, J., 'International law as a challenge to EU acts: Front Polisario II', *Common Market Law Review*, Vol. 60(1), p. 231, who explains that 'in the case of states or international organisations, 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'.

[114] See, in that regard, my discussion in points 79 to 88 of this Opinion.

136. That means either that somebody else is entitled to express their consent to be bound by an international agreement on their behalf, or that such consent cannot be expressed at all.

(c) Can the Kingdom of Morocco consent to the agreement at issue on behalf of the people of Western Sahara?

137. If, as I have suggested, the people of Western Sahara cannot give 'consent', within the meaning attributed to that concept by the Court in the judgment in *Council* v *Front Polisario*, either through consultations of the population living in the territory of Western Sahara, or through Front Polisario, who can approve the conclusion of an international agreement with the territory of Western Sahara in that people's name?

138. The appropriate reference framework within which that question should be answered is the law on decolonisation.

139. That framework is primarily contained in Chapter XI of the UN Charter, entitled 'Declaration Regarding Non-Self-Governing Territories', particularly Article 73. [115]

140. It is within that framework that the Court interpreted the meaning of the right to self-determination in the judgment in *Council* v *Front Polisario*. [116]

141. Chapter XI of the UN Charter is an expression of the international community's commitment to the right to self-determination in the process of decolonisation. [117]

142. Article 73 of the UN Charter governs the rules that regulate the situation of NSGTs before they can exercise their right to self-determination.

143. That provision first implies that territories whose peoples have not yet attained a full measure of self-governance are administered by a State different to that of those people. The provision addresses those States as 'Members of the [UN] which have or assume responsibilities for the administration' of NSGTs. I will refer to those States as 'administering powers'.

144. Before the people of a NSGT exercise their right to self-determination, which is the ultimate goal of Article 73 of the UN Charter, it is the administering power that concludes international agreements concerning those territories.

145. It follows that it is the administering power that is also entitled to give 'consent' for the application of an agreement concluded between two other States to the territory that power administers.

146. Western Sahara is in that respect a unique case. The UN list of all remaining NSGTs indicates the administering power of each territory; except in the case of Western Sahara. [118]

[115] According to Crawford, the usual, even if restrictive view is that Chapter XI was intended to apply only to 'territories, known as colonies at the time of the passing of the Charter'. The territory of Western Sahara fulfils that criterion. See also Crawford, J., *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, 2007, p. 607.

[116] Judgment in *Council* v *Front Polisario*, paragraphs 23, 93 and 105.

[117] As stated by Crawford, 'it has been largely through the medium of Chapter XI that Members have extended and elaborated the operation of the right to self-determination.' See Crawford, J., *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, 2007, p. 603.

[118] United Nations, 'List of Non-Self-Governing Territories by Region', available at https://www.un.org/dppa/decolonization/en/nsgt.

147. Article 73 of the UN Charter defines administering powers as 'Members of the United Nations which *have* or *assume* responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government'. [119]

148. The use of the words '*have … responsibilities*' appears to refer to States that controlled a NSGT at the moment when the UN Charter came into force.

149. In the case of Western Sahara, the colonial State that held that responsibility was the Kingdom of Spain. However, Spain unilaterally relinquished that responsibility. [120]

150. Article 73 of the UN Charter also refers to States that '*assume … responsibility*' over a NSGT.

151. In its appeal in the present case, the Council took the position that Article 73 of the UN Charter applies to the Kingdom of Morocco as the administering power, given that that State *assumed* responsibility over the territory of Western Sahara. Both the Council and the Commission confirmed that position at the hearing. According to the explanations of those institutions, the qualification of the Kingdom of Morocco as the 'assumed' administering power follows from the fact that the Kingdom of Morocco holds effective control over the majority of the territory of Western Sahara.

152. If the Kingdom of Morocco can be legally classified as the administering power of Western Sahara, it would be entitled under international law to conclude an international agreement on behalf of the territory of Western Sahara to bind that territory. It would also be empowered to consent to the application of an agreement concluded between third States to the territory of Western Sahara, provided that that agreement satisfies the conditions arising from Article 73 of the UN Charter (see points 180 to 190 of this Opinion).

153. There is scholarship opposing that possibility, claiming that the status of administering power is a legal status granted by the UN, which, in the absence of that type of recognition, cannot unilaterally be assumed. [121]

154. However, Article 73 of the UN Charter does not link the status of administering power to any type of formal procedure or recognition. Rather, its wording suggests that it relates to a certain type of factual situation.

155. Under international law, a State in de facto control of a territory has three possible legal classifications: sovereign, administrator or occupier. [122]

[119] Emphasis added.

[120] See point 17 of this Opinion. In his Opinion in *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:677, points 188 to 191), Advocate General Wathelet suggested that Spain could not legally relinquish its status as administering power, and that it therefore cannot be ruled out that that Member State remains the administering power of the territory of Western Sahara to date.

[121] See, for example, Chapaux, V., 'The sovereignty over natural resources: "the question of the EU-Morocco Fisheries Agreement"', in Arts, K. and Pinto Leite, P. (eds), *International Law and the Question of Western Sahara*, International Platform of Jurists for East Timor, University of Michigan, 2008, p. 241.

[122] Torres-Spelliscy, G., 'National Resources in Non-Self-Governing Territories', in Boukhars, A. and Rousselier, J. (eds), *Perspective on Western Sahara: Myths, Nationalisms and Geopolitics*, Rowman & Littlefield, Lanham, 2013, p. 241.

156. In relation to Western Sahara, the EU political institutions do not treat the Kingdom of Morocco as an occupying power, [123] or as a sovereign, [124] but rather as the administering power. That means that they accept the sovereignty of the Sahrawi people over the territory of Western Sahara, even though the Kingdom of Morocco currently holds control over that territory.

157. That position is not in contradiction with the European Union's assumed neutrality on the outcome of the UN-led process on Western Sahara since the treatment as administering power does not preclude any possible outcome of the exercise of the right to self-determination. [125]

158. That interpretation also does not seem to run counter the objective of the right to self-determination, which finds expression in Article 73 of the UN Charter, for as long as it does not prevent the people of a NSGT from exercising that right in the future.

159. It is, therefore, not contrary to international law to treat the Kingdom of Morocco as the administering power of Western Sahara and consequently as being capable of 'consenting', on behalf of the people of Western Sahara as a 'third party' within the meaning of the Court's interpretation of the relative effect of treaties, to an agreement impacting the territory of Western Sahara.

160. What is the effect of that conclusion for the Court's interpretation of the notion of 'administering power'?

161. In the exercise of external relations of the European Union, the EU political institutions have a wide margin of discretion. [126]

162. That extends to the interpretation of applicable norms in a situation, such as that at issue, where there is no clear position under international law as to whether a State can be treated as having assumed responsibility over a NSGT, within the meaning of Article 73 of the UN Charter, through means of effective jurisdictional control of that territory.

[123] Neither the European Union nor its Member States consider the Kingdom of Morocco as an occupying power. The same is true for the UN Security Council. In two resolutions, dating back to the 1970s, the UN General Assembly considered the Kingdom of Morocco's annexation of Western Sahara as an occupation of that territory. That differs notably from the situation relating to the State of Israel and the territory of the West Bank and the Gaza Strip, which the international community, including the European Union and its Member States, regard as a state of occupation. See, notably, Advisory Opinion of the ICJ of 9 July 2004 in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ Reports 2004, p. 136, paragraph 78). See also judgment of 12 November 2019, *Organisation juive européenne and Vignoble Psagot* (C-363/18, EU:C:2019:954, paragraphs 34, 35 and 48). The present situation also differs from the situation underlying the judgment in *East Timor (Portugal v. Australia)* (ICJ Reports 1995, p. 90), in which the Republic of Indonesia's presence in East Timor was regarded by the international community as an occupation. Additionally, Portugal held the status of an administering power of that territory. By contrast, many scholars consider that the status of the Kingdom of Morocco in Western Sahara is one of the occupier. See, in that respect, Opinion of Advocate General Wathelet in *Western Sahara Campaign* (C-266/16, EU:C:2018:1, footnote 223).

[124] That can be concluded from their choice to treat Western Sahara as a NSGT and the Sahrawi people as the subject that has a right to choose the future of that territory. Likewise, treating the Kingdom of Morocco as an administering power implies that it cannot enjoy the full measure of sovereignty, given its obligations under Article 73 of the UN Charter, including the obligation to pave the way for the Sahrawi people to exercise the choice on how to exercise their sovereignty.

[125] That position of neutrality is expressed in recital 3 of the contested decision: '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. It fully supports the efforts made by the United Nations Secretary-General and his personal envoy to help the parties reach a fair, lasting and mutually acceptable political solution that would ensure the self-determination of the people of Western Sahara under agreements aligned with the principles and objectives enshrined in the [UN] Charter, as set out in the Resolutions of the UN Security Council, in particular Resolutions 2152 (2014), 2218 (2015), 2385 (2016), 2351 (2017) and 2414 (2018).'

[126] See, inter alia, judgment of 21 December 2016, *Swiss International Air Lines* (C-272/15, EU:C:2016:993, paragraph 24).

163. Given the lack of clear rules in EU or international law which would prevent such a position, the decision by the EU political institutions to treat the Kingdom of Morocco as the ('de facto') administering power, within the meaning of Article 73 of the UN Charter, cannot be challenged before the Court. [127]

164. To that extent, the Court must accept the position of the Council and the Commission as a possible interpretation of international law.

165. It is true that the Kingdom of Morocco has not itself accepted the status of administering power in relation to the territory of Western Sahara. [128] Its position is that it enjoys sovereignty over that territory. [129]

166. Still, that does not prevent the European Union from unilaterally treating the Kingdom of Morocco as the ('de facto') administering power of the territory of Western Sahara in its economic engagement with the latter territory.

167. The Commission explained at the hearing that the European Union would simply do so through the use of 'without prejudice' clauses, recourse to which is an accepted (and practical) method of engaging with third States or territories. [130]

168. Nevertheless, the fact that the European Union and the Kingdom of Morocco agreed to disagree about the status of the Kingdom of Morocco in relation to the territory of Western Sahara when concluding the agreement at issue might, as I will discuss in Section E of this Opinion, impose additional requirements on the EU institutions necessary to satisfy the obligations arising under international law.

169. The foregoing discussion leads to the conclusion that, by adopting the contested decision, the Council did not breach the principle of the relative effect of treaties, as interpreted in the judgment in *Council* v *Front Polisario*. That institution obtained the consent of the people of Western Sahara as a third party to the agreement at issue through the Kingdom of Morocco, acting as the administering power of that territory.

[127] The wide margin of discretion which the EU institutions enjoy in external (commercial) relations in so far as that management involves complex political and economic assessments means that the Court can exercise its powers of review only in so far those institutions committed a manifest error. See, to that effect, judgment of 4 October 1983, *Fediol v Commission* (191/82, EU:C:1983:259, paragraph 30). That means that if there are no clear international rules against which the Court can conduct that review, the interpretation chosen by EU institutions cannot represent a manifest error.

[128] See also, in that respect, judgment in *Western Sahara Campaign UK*, paragraph 72 (in which the Court explained that 'the Kingdom of Morocco has categorically denied that it is an occupying power or an administrative power with respect to the territory of Western Sahara').

[129] I presume that it is also for that reason that the Kingdom of Morocco does not appear to transmit regular reports to the United Nations relating to the territory of Western Sahara, as would be required from an administering power under Article 73(e) of the UN Charter.

[130] See, for example, the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo *, of the other part (OJ 2016 L 71, p. 3; 'the EU-Kosovo Association Agreement') (that agreement, in relevant part specifying that it 'is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence'), the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (OJ 2008 L 289, p. 3), and the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (OJ 2016 L 250, p. 3), in which Annex IX to Protocol 1 and Annex VIII respectively list several non-self-governing territories 'without prejudice to the status of these countries and territories, or future changes in their status'.

3. Treating Morocco and Western Sahara as separate territories

170. The only obligation which the Court considered to be binding on the European Union on the basis of the right to self-determination in in *Council* v *Front Polisario* was to treat the territory of Western Sahara as distinct from the territory of the Kingdom of Morocco. [131]

171. That obligation is not undermined by regarding the Kingdom of Morocco as an administering power within the meaning of Article 73 of the UN Charter. Quite to the contrary, the unilateral attribution to the Kingdom of Morocco of the status of administering power, with all the related obligations flowing from that status, denies that State sovereignty over the territory of Western Sahara. [132]

172. In other words, the Kingdom of Morocco separately concluded with the European Union an international agreement relating to its own territory and then consented to its application to the separate territory of Western Sahara, which it currently administers.

173. As I have explained in my Opinion in *Confédération paysanne (Melons and tomatoes from Western Sahara)*, which is also being read today, the separate treatment of the territory of Western Sahara from that of the Kingdom of Morocco mandates that customs declarations and country of origin labels of the products originating in the territory of Western Sahara must indicate Western Sahara as their place of origin; to the exclusion of any indication of the origin in the Kingdom of Morocco. [133] That relates inter alia to products of Western Saharan origin which enjoy preferential treatment on the basis of the agreement at issue upon importation into the customs territory of the European Union.

174. It follows that, by adopting the contested decision, the Council did not breach the requirement to treat the territory of the Kingdom of Morocco and the territory of Western Sahara as two distinct territories, which is the requirement that results from the right to self-determination according to the Court's interpretation in the judgment in *Council* v *Front Polisario*.

4. Interim conclusion

175. The contested decision does not breach either the principle of the relative effect of treaties or that aspect of the right to self-determination that was at issue in the judgment in *Council* v *Front Polisario*.

176. Accordingly, I propose that the Court annul the judgment under appeal in so far as it upholds Front Polisario's third plea in law.

131 See, to that effect, judgment in *Council* v *Front Polisario*, paragraph 92.

132 As Crawford explains, 'to the extent that sovereignty implies the unfettered right to control or to dispose of the territory in question, the obligation in Article 73b, and the associated principle of self-determination, substantially limit the sovereignty of an Administering State'. See Crawford, J., *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, 2007, p. 615. The fact that the Kingdom of Morocco does not exercise the 'fullness' of its sovereign powers over the territory of Western Sahara was also one of the reasons why the Court, in its judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraph 95), concluded that the Association Agreement would not apply to that territory.

133 See my Opinion in C-399/22, C*onfédération paysanne (Melons and tomatoes from Western Sahara)*, point 138.

E. Other obligations binding the European Union on the basis of the right to self-determination of the Sahrawi people

177. Finding that the right to self-determination was not breached to the extent to which the Court had the opportunity to interpret it in its judgment in *Council* v *Front Polisario* does not necessarily lead to the conclusion that the EU institutions respected all obligations resulting from the right to self-determination when concluding the agreement at issue with the Kingdom of Morocco.

178. The Court has not yet had the opportunity to explain what other obligations are incumbent on the European Union as a result of Sahrawi people's right to self-determination. As that issue was not decided by the General Court, however, it does not form part of the scope of the present appeals, such that the Court cannot independently clarify that issue in this case.

179. That being said, I find it necessary to shortly mention two issues arising from the right to self-determination which are relevant in a scenario in which the Kingdom of Morocco is treated by the EU institutions as the ('de facto') administering power of the territory of Western Sahara.

180. *First*, Article 73 of the UN Charter imposes on administering powers an obligation often referred to as the 'obligation of sacred trust'. That provision states that 'the interests of the inhabitants of [a NSGT] are paramount' and that administering powers 'accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories'.

181. Before the Sahrawi people exercise their right to self-determination, the Kingdom of Morocco, as the ('de facto') administrator of their territory, must act exclusively to the benefit of the 'inhabitants of the territory' of Western Sahara. The Kingdom of Morocco's consent on behalf of the Sahrawi people in the sense of the relative effect of treaties must also respect that obligation.

182. Article 73 of the UN Charter in principle addresses the obligation of the 'sacred trust' to the administering power. It is clear, however, that the Court has no jurisdiction to sit in judgment of a foreign State's observance of public international law, including the principles of the UN Charter.

183. In spite of this, the right to self-determination embedded in Article 73 of the UN Charter might also impose obligations on those States (or international organisations) which engage with an administering power in relation to the NSGT it administers.

184. In the context of the present case, the Council and the Commission considered that the obligation of the 'sacred trust' binds also the European Union in its engagement with the ('de facto') administrating power of the NSGT of Western Sahara. Even if the European Union is not a party to the UN Charter, it binds it in its external engagements on the basis of Article 21 TEU.

185. One may therefore conclude that the EU institutions can enter into arrangements relating to Western Sahara with the Kingdom of Morocco as its administering power only if those arrangements benefit the 'inhabitants of that territory'.

186. That obligation has, to my mind, an additional importance resulting from the fact that Kingdom of Morocco considers itself as the sovereign State and not the administrator in relation to the territory of Western Sahara. It, consequently, does not consider itself subject to the 'sacred

trust' obligation ordinarily assumed by administering powers under Article 73 of the UN Charter. The EU institutions therefore must make sure that the agreed arrangements benefit the 'inhabitants of the territory' of Western Sahara, as required by Article 73 of the UN Charter.

187. That conclusion necessarily opens questions that were not discussed before the General Court: what is understood under the term 'inhabitants of the territory' in Article 73 of the UN Charter? Do the consultations carried out by the Commission and the EEAS satisfy the requirement that the EU institutions must verify that the agreement at issue is beneficial to the 'inhabitants of the territory'?

188. *Second*, the issue remains which obligations the EU institutions have in order to comply with the right to the Sahrawi people to the enjoyment of the natural resources of the NSGT of Western Sahara.

189. It may be debated whether a right to the enjoyment of natural resources is a self-standing right which emanates from the principle of State sovereignty, or whether it represents a component of the right to self-determination.[134] In both options, however, that right seems to form part of customary international law,[135] and therefore is binding on the European Union.

190. When it comes to the exploitation of natural resources of the NSGTs, it appears that a certain consensus, built around the 2002 letter of Hans Corell,[136] exists, according to which administering power can exploit natural resources, where resource exploitation activities are conducted for the benefit of the people of NSGT, or in consultation with their representatives.[137]

191. The agreement at issue does not in itself authorise the use of the natural resources of the territory of Western Sahara. However, it indirectly affects that right. Which obligations arise for the EU institutions in this context?

192. Could the EU institutions conclude that their obligation not to infringe the right of the Sahrawi people to the enjoyment of their natural resources was satisfied by the outcome of the consultations with the local population, in relation to which a majority of those who participated in consultations appraised the extension of preferential tariffs to products originating in the territory of Western Sahara as beneficial?

134 In relation to NSGT, the 50/33 UN General Assembly Resolution, for instance, 'reaffirms the inalienable right of the peoples of colonial and Non-Self-Governing Territories to self-determination and independence and to the enjoyment of the natural resources of their Territories, as well as their right to dispose of those resources in their best interests'. UN General Assembly Resolution 1803 (XVII), for instance, qualifies the right of permanent sovereignty over the wealth and natural resources as 'a basic constituent of the right to self-determination' (UN Doc. A/RES/1803 (XVII), 14 December 1962, preamble, paragraph 2.)

135 See, for example, Gilbert, J., *Natural Resources and Human Rights: An Appraisal*, Oxford University Press, Oxford, 2018, p. 12 and the literature cited.

136 Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council (S/2002/161).

137 Ibid., point 24. As rightly pointed out by the General Court, that letter is not a source of law, and in any case does not have a legally binding force. See judgment under appeal, paragraph 385. However, Corell's opinion gained important weight in scholarly literature, which often accepts it as the correct interpretation of international law. See, for example, Torres-Spelliscy, G., 'National Resources in Non-Self-Governing Territories', in Boukhars, A. and Rousselier, J. (eds), *Perspective on Western Sahara: Myths, Nationalisms and Geopolitics*, Rowman & Littlefield, Lanham, 2013, p. 235.

193. Even though the General Court discussed the adequacy of the consultations in its judgment, it did so in the context of determining whether they can amount to the people of Western Sahara having given their 'consent' to the agreement at issue, in the sense of relative effect of treaties. [138] Answering the same question in the context of the right to enjoyment of natural resources requires a new and different assessment.

194. The issues raised in the present section were not discussed in the proceedings before the General Court. That court, in my opinion, wrongly decided that the EU institutions did not abide by the requirement of consent following from the judgment in *Council* v *Front Polisario*. Those issues, however, seem to be covered by the remaining pleas of Front Polisario in its action for annulment. That is why I find it necessary to return this case to the General Court.

IV. Consequences

195. Under Article 61 of the Statute of the Court of Justice of the European Union, the Court may, where the state of proceedings so permits, give itself final judgment on the matter.

196. In the present case, that condition is not satisfied.

197. While I conclude that Front Polisario's third plea in law at first instance should be rejected as unfounded for the above reasons, as regards the other pleas in law not yet assessed by the General Court, the state of proceedings does not permit the Court of Justice to give final judgment on the matter.

198. I am therefore of the opinion that the case must be referred back to the General Court for judgment. [139]

V. Conclusion

199. In the light of the foregoing, I propose that the Court of Justice:

– dismiss the appeals in part as unfounded and find the action brought by the Front Populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) admissible;

– uphold the appeals in part, annul the judgment under appeal in so far as it upholds the third plea in law brought by the Front Polisario, and dismiss that plea;

– refer the case back to the General Court of the European Union for it to rule on the pleas in law on which it did not adjudicate; and

– reserve the costs.

[138] Judgment under appeal, paragraphs 328 to 384.

[139] See the second alternative in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union.