Reports of Cases

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

Joined Cases C-778/21 P and C-798/21 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-778/21 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-798/21 P)

(Appeal – EU-Morocco Association Agreement – Sustainable Fisheries Partnership Agreement – Scope of application – Judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118) – 'Consent' of the people of Western Sahara – Principle of the relative effect of treaties – Right to self-determination)

I. Introduction

1. Can the European Union conclude, with the Kingdom of Morocco, a fisheries partnership agreement that also covers the waters adjacent to the territory of Western Sahara? If so, what obligations does the European Union have in relation to the people of that territory?

2. Those questions arise in the context of the appeals to the judgment of 29 September 2021, *Front Polisario* v *Council* (T-344/19 and T-356/19, EU:T:2021:640),[2] in which the General Court concluded that the European Union did not respect the rules of customary international law that the Court of Justice, in its judgments in *Council v Front Polisario* and in *Western Sahara Campaign UK*, had interpreted to bind the European Union.[3] Accordingly, the General Court

1 Original language: English.

2 Judgment of 29 September 2021, *Front Polisario v Council* (T-344/19 and T-356/19, EU:T:2021:640) ('the judgment under appeal').

3 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*').

annulled[4] Decision (EU) 2019/441,[5] which approved the conclusion of the Sustainable Fisheries Partnership Agreement,[6] the Implementation Protocol[7] thereto and the Exchange of Letters[8]. The Council and the Commission are now appealing that judgment before the Court of Justice.

3. The present appeals must be read in the light of a set of parallel appeals questioning the validity of the Council decision approving amendments to the Association Agreement[9] with a view to extending tariff preferences to goods originating in the territory of Western Sahara as well as in the light of a preliminary reference seeking guidance on the correct country of origin labelling of products originating in the territory of Western Sahara. I deliver my Opinions in all of those cases today.[10]

4. As I also explain in my parallel Opinion of today in *Commission and Council v Front Polisario*, the continued struggle for self-determination of the people of Western Sahara constitutes a clear failure of the UN-led political process for which practical solutions are desperately needed.

II. Background to these proceedings

A. A short history of the Western Sahara question

5. In points 8 to 28 of my parallel Opinion in *Commission and Council v Front Polisario*, I explain in more detail the historical background to the Western Sahara question and the difficulties encountered by the people of that territory to exercise their right to self-determination.

6. What should be repeated or added for the purposes of the present proceedings is the following.

7. Western Sahara was colonised by the Kingdom of Spain in the 19th century.

8. In the context of the process of decolonisation, in 1963, that territory was added by the United Nations to the list of non-self-governing territories ('NSGT's).[11]

9. 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,[12] which Spain decided to bring about through a referendum. That referendum was never held.

4 See judgment under appeal, paragraphs 364 and 365.

5 Decision (EU) 2019/441 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement (OJ 2019 L 77, p. 4) ('contested decision').

6 Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (OJ 2019 L 77, p. 8) ('Sustainable Fisheries Partnership Agreement').

7 Protocol on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (OJ 2019 L 77, p. 18) ('Implementation Protocol').

8 Exchange of Letters between the European Union and the Kingdom of Morocco accompanying the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (OJ 2019 L 77, p. 53) ('Exchange of Letters').

9 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).

10 See my Opinion of 21 March 2024 in Joined Cases C-779/21 P and C-799/21 P *Commission and Council* v *Front Polisario* ('*Commission and Council v Front Polisario*') and my Opinion of 21 March 2024 in Case C-399/22 *Confédération paysanne (Melons and tomatoes from Western Sahara)*.

11 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'.

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

10. In 1969, the UN General Assembly passed Resolution 2554 (XXIV).[13] That resolution 'reaffirms the inalienable right of the peoples of dependent Territories to self-determination and independence and to the natural resources of their Territories, as well as their right to dispose of these resources in their best interest in the light of the eighth preambular paragraph of General Assembly resolution 1514 (XV)' and 'requests the administering Powers and States concerned whose companies and nationals are engaged in such activities to take immediate measures to put an end to all practices which exploit the Territories and peoples under colonial rule.'

11. The status of Western Sahara as NSGT and the right of its people to self-determination were confirmed by the International Court of Justice ('ICJ') in its Advisory Opinion on Western Sahara.[14]

12. The Kingdom of Morocco considers the territory of Western Sahara to form part of its sovereign territory, including the waters adjacent thereto.

13. In 1975, 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'),[15] by which the territory of Western Sahara was partitioned between the latter two States.[16] Soon after, in January 1976, the Moroccan army entered the territory of Western Sahara.

14. According to a 1975 US diplomatic cable from Secretary of State H. Kissinger, as part of the negotiations surrounding the Madrid Accords, in return for its withdrawal from that territory, Spain was to be secured 'fishing rights … in Saharan waters and 35 per cent Spanish participation in phosphate mines.'[17]

15. 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.[18]

13 UN General Assembly Resolution 2554 (XXIV) of 12 December 1969, *Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Southern Rhodesia and Namibia and other Territories under Portuguese domination and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa*.

14 Advisory Opinion on Western Sahara (ICJ Reports 1975, p. 12).

15 See United Nations Treaty Series, Vol. 988, p. 259.

16 The legal force of the Madrid Accords is contested; see, for example, Simon, S. 'Western Sahara', in Walter, C., von Ungern-Sternberg, A. and Abushov, K (eds.)., *Self-determination and secession in international law*, Oxford University Press, Oxford, 2014, p. 260 (questioning whether, despite its registration as a treaty with the UN Secretariat, the Madrid Accords could transfer sovereignty explicitly, 'since Spain had no right to dispose of a territory that belonged to the people of that territory'). See also Opinion of Advocate General Wathelet in *Western Sahara Campaign* (C-266/16, EU:C:2018:1, points 161 and 162) (explaining that the lack of consensus at the level of the UN General Assembly over how the Madrid Accords should have been understood led to the passing of two resolutions of differing content, one which makes no reference to that accord and continues to treat Spain as the 'administering power' and one which does not refer to an administrating power but to the 'interim administration').

17 See cable 1975STATE276309 of 21 November 1975 from Secretary of State H. Kissinger to the Permanent Mission of the United States of America to the United Nations, cited by Opinion of Advocate General Wathelet in *Western Sahara Campaign* (C-266/16, EU:C:2018:1, footnote 121). In his Opinion, Advocate General Wathelet also explains that 'the Spanish, Moroccan and Mauritanian delegations agreed to recognise fishing rights in the waters adjacent to Western Sahara in favour of 800 Spanish vessels for a period of 20 years on the same conditions as those existing on 14 November 1975'. Ibid, footnote 118.

18 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.'

16. In 1985, the European Economic Community undertook to assume responsibility for existing fisheries agreements concluded by Spain and Portugal with the Kingdom of Morocco, after their accession to the (then) Community. [19]

17. In 1988, 1992 and 2006, the European (Economic) Community entered into its own fisheries sector agreements with the Kingdom of Morocco. [20]

18. The scope of application of those agreements covered the 'territory of Morocco and the waters under Moroccan jurisdiction', [21] without specifically clarifying the boundary of the maritime areas covered.

19. A key component of all of those agreements was the payment of financial contributions to the Kingdom of Morocco, in part in return for the latter authorities issuing licences to EU fishing vessels. [22]

20. Separate protocols, valid for a period of four years respectively and forming an integral part of those agreements additionally laid down the fishing opportunities accorded to EU fishing vessels, their duration, and their conditions of use. [23]

21. The last protocol setting out the fishing opportunities and financial contributions (that is, the 2013 Implementation Protocol), [24] which accompanied the 2006 Fisheries Agreement, expired on 14 July 2018. [25]

22. The applicability to the waters adjacent to the territory of Western Sahara of the 2006 Fisheries Agreement and the 2013 Implementation Protocol was disrupted by the judgment of the Court in *Western Sahara Campaign UK*.

19 Council Decision 87/442/EEC of 13 August 1987 concerning the conclusion of an Agreement in the form of an Exchange of Letters on fisheries arrangements between the European Economic Community and the Kingdom of Morocco, applicable on a preliminary basis from 1 August to 31 December 1987 (OJ 1987 L 232, p. 18) and Agreement in the form of an Exchange of Letters on fisheries arrangements between the European Economic Community and the Kingdom of Morocco, applicable on a preliminary basis from 1 August to 31 December 1987 (OJ 1987 L 232, p. 19) (which states that, in the light of the accession of Spain and Portugal, and pending the conclusion of a Morocco-EEC fisheries agreement 'Morocco proposes to the Community that the fishing opportunities granted under the Morocco-Spain fisheries agreement of 1 August 1983 be extended until the end of December 1987'). See also Articles 354 and 355 of Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23).

20 See Agreement on relations in the sea fisheries sector between the European Economic Community and the Kingdom of Morocco (OJ 1988 L 99, p. 49) ('the 1988 Agreement'); Agreement on relations in the sea fisheries sector between the European Economic Community and the Kingdom of Morocco (OJ 1992 L 407, p. 3) ('the 1992 Agreement'); and Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco (OJ 2006 L 141, p. 4) ('the 2006 Fisheries Agreement').

21 See Article 1 of the 1988 Agreement; Article 1 of the 1992 Agreement; and Article 11 of the 2006 Fisheries Agreement.

22 See Articles 2(2) and 6 the 1988 Agreement, Articles 2(2) and 7 of the 1992 Agreement and Articles 6 and 7 of the 2006 Fisheries Agreement.

23 Articles 5 and 7 of the 1988 Agreement and Protocol No 1 setting out fishing opportunities accorded by Morocco and the compensation accorded by the Community for the period from 1 March 1988 to 29 February 1992 (OJ 1988 L 99, p. 61); Articles 7 and 9 of the 1992 Agreement and Protocol setting out fishing opportunities and the financial compensation and financial contributions accorded by the Community (OJ 1992 L 407, p. 15); and Articles 5 to 7 of the 2006 Agreement and Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ 2006 L 141, p. 9).

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

25 Contested decision, recital 2. See also, to that effect, judgment under appeal, paragraph 29.

B. The Sustainable Fisheries Partnership Agreement

1. Procedural background

23. In 2018, the Court decided that the 2006 Fisheries Agreement did not cover the territory of Western Sahara or the waters adjacent to it because the terms 'the territory of the Kingdom of Morocco' and the 'waters falling within its sovereignty or jurisdiction' could not relate to the NSGT of Western Sahara.[26] Similarly, as regards the 2013 Implementation Protocol, the Court concluded that the term 'Moroccan fishing zone' did not include the waters adjacent to the territory of Western Sahara.[27]

24. In that sense, the Court aligned the interpretation of those terms with that of similar terms at issue in its judgment in *Council v Front Polisario*. In that judgment, the Court had concluded that the concept of the 'territory of the Kingdom of Morocco' could not be interpreted as extending to the territory of Western Sahara.[28]

25. After the judgment of the Court in *Western Sahara Campaign UK*, by decision of 16 April 2018,[29] 'the Council authorised the Commission to begin negotiations with the Kingdom of Morocco with a view to amending the Agreement and agreeing on a new Implementation Protocol.'[30]

26. On 14 January 2019, the European Union and the Kingdom of Morocco signed the Sustainable Fisheries Partnership Agreement, the Implementation Protocol and the Exchange of Letters, which form part of that agreement.[31]

27. The Exchange of Letters notes, in relevant part, that the European Union and the Kingdom of Morocco 'reaffirm their support for the United Nations process and the Secretary-General's efforts to achieve a final political solution in accordance with the principles and objectives of the [UN Charter] and on the basis of Security Council resolutions'.

28. The Exchange of Letters also stipulates that 'the Fisheries Agreement is concluded without prejudice to the Parties' respective positions', which, for the European Union, means that 'references in the Fisheries Agreement to Moroccan laws and regulations are without prejudice to its position concerning the status of the non-self-governing territory of Western Sahara, whose adjacent waters are part of the fishing zone defined in point (h) of Article 1 of the Fisheries Agreement, and its right to self-determination' and, for the Kingdom of Morocco, entails that 'the Sahara region is an integral part of the national territory over which it exercises full sovereignty in the same manner as for the rest of the national territory.'

26 See, to that effect, *Western Sahara Campaign UK*, paragraphs 62 to 64, 69 and 73.

27 See *Western Sahara Campaign UK*, paragraph 79

28 See *Western Sahara Campaign UK*, paragraphs 61 and 62.

29 See Council document 9716/17 – Outcome of the Council meeting (3544th Council meeting, Competitiveness (Internal Market, Industry, Research and Space)), p. 22.

30 Contested decision, recital 6.

31 See Article 16 of the Sustainable Fisheries Partnership Agreement.

29. By the contested decision of 4 March 2019, the Council approved on behalf of the European Union the Sustainable Fisheries Partnership Agreement, the Implementation Protocol and the Exchange of the Letters. Recitals 3, 5 and 7 to 11 of that decision read as follows:

'(3) In its judgment in Case C-266/16 in reply to a request for a preliminary ruling on the validity and interpretation of the Agreement and of the Implementation Protocol thereto, the Court held that neither the Agreement nor the Implementation Protocol thereto apply to the waters adjacent to the territory of Western Sahara.

…

(5) It should be possible for Union fleets to continue the fishing activities they had pursued since the entry into force of the Agreement, and the scope of application of the Agreement should be defined so as to include the waters adjacent to the territory of Western Sahara. Furthermore, the continuation of the fisheries partnership is essential in order for that territory to continue to benefit from the sectoral support provided under the Agreement, in compliance with Union and international law, including human rights, and for the benefit of the people concerned.

…

(7) The objective of the Fisheries Agreement is to enable the Union and the Kingdom of Morocco to work together more closely on promoting a sustainable fisheries policy and sound exploitation of fishery resources in the fishing zone defined in the Fisheries Agreement and supporting the Kingdom of Morocco's efforts to develop the fisheries sector and a blue economy. It thereby contributes to achieving the objectives of the Union under Article 21 of the Treaty on European Union.

(8) The Commission assessed the potential impact of the Fisheries Agreement on sustainable development, in particular as regards the benefits for the people concerned and the exploitation of the natural resources of the territories concerned.

(9) In line with that evaluation, it is assessed that the Fisheries Agreement should be highly beneficial to the people concerned owing to the positive socioeconomic impact on those people, particularly in terms of employment and investment, and to its impact on the development of the fisheries sector and fish processing sector.

…

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

2. Scope of application

30. The area of application of the Sustainable Fisheries Partnership Agreement is laid down in its Article 14. Pursuant to that provision, 'this Agreement shall apply to the territories subject, on the one hand, to the Treaty on European Union and the Treaty on the Functioning of the European Union, and on the other hand, to the laws and regulations referred to in Article 6(1) of this Agreement'.

31. Article 6(1) of the same agreement in turn explains that 'Union vessels operating in the fishing zone shall comply with the Moroccan laws and regulations governing fishing activities in that zone, unless otherwise provided for in this Agreement'. [32]

32. The 'fishing zone' is defined in Article 1(h) of the Sustainable Fisheries Partnership Agreement as: 'the waters of the Eastern Central Atlantic Ocean between the parallels 35° 47' 18 " north and 20° 46' 13" north, including the adjacent waters of Western Sahara[[33]], covering all management areas; this definition shall not affect any negotiations on the delimitation of the sea areas of coastal States bordering the fishing zone or the rights of third countries in general'.

33. According to the General Court, the border between Western Sahara and the Kingdom of Morocco is at parallel 27°42'N (Pointe Stafford). [34]

34. Consequently, 'the geographical coordinates referred to [inter alia in Article 1(h) of the Sustainable Fisheries Partnership Agreement] include both the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco and the waters adjacent to Western Sahara'. [35]

3. Financial compensation

35. Under the Sustainable Fisheries Partnership Agreement, the European Union agrees to the payment of a financial contribution to the Kingdom of Morocco.

36. The total value of those contributions appears to be EUR 208 700 000 for the period of validity of the Implementation Protocol, [36] that is 18 July 2019 to 17 July 2023. [37]

37. That contribution is composed of '(a) financial compensation granted by the Union for access by Union vessels to the fishing zone; (b) fees to be paid by the owners of the Union vessels; (c) sectoral support granted by the Union towards the implementation of a sustainable fisheries policy and ocean governance, subject to annual and multiannual programming'. [38]

32 Article 2 of the Implementation Protocol links to that scope of application by stating that 'the purpose of this Protocol is to implement the provisions of the Fisheries Agreement, laying down in particular the conditions for access by Union vessels to the fishing zone defined in Article 1(h) thereof, and the implementing provisions of the Sustainable Fisheries Partnership [Agreement].'

33 Footnote 1 reads as follows: 'The Sahara region according to the Moroccan position'.

34 Judgment under appeal, paragraph 212.

35 Judgment under appeal, paragraph 111.

36 See Article 4 of the Implementation Protocol.

37 See Article 16 of the Implementation Protocol, read alongside Information on the entry into force of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the exchange of letters accompanying the Agreement (OJ 2019 L 195, p. 1).

38 Article 12(2)(c) of the Sustainable Fisheries Partnership Agreement.

38. For its part, the Kingdom of Morocco submits the financial contribution and shipowner fees 'to a fair geographical and social distribution of the socioeconomic benefits to ensure that the compensation benefits the relevant populations'. [39]

39. The sectoral support received from the European Union does not appear subject to that distributive obligation but 'shall contribute to developing and implementing sectoral policy as part of the national development strategy for the fisheries sector'. [40]

40. For that purpose, the Kingdom of Morocco must present to the Joint Committee set up by the Sustainable Fisheries Partnership Agreement [41] and composed of representatives of the Kingdom of Morocco and the European Union, [42] 'a method for ensuring the geographical and social distribution [of those funds] …. and a distribution key for the allocated amounts'. [43]

41. The various components of the financial contribution to be paid to the Moroccan authorities are allocated under the supervision of the Joint Committee. [44]

42. Finally, there is a reporting obligation on the Kingdom of Morocco, the authorities of which must issue an annual report, as well as a final report before the expiry of the Implementation Protocol. [45]

4. Fishing opportunities and their management

43. Fishing opportunities are regulated by the Implementation Protocol, which is renewed every four years.

44. As I have explained, the protocol signed at the occasion of conclusion of the Sustainable Fisheries Partnership Agreement expired on 17 July 2023. [46]

45. As of the date of writing of this Opinion, no new protocol has been negotiated between the European Union and the Kingdom of Morocco.

39 See Article 12(4) of the Sustainable Fisheries Partnership Agreement and Article 6(1) of the Implementation Protocol. See also judgment under appeal, paragraph 33.

40 See Article 7(1) of the Implementation Protocol. To be contrasted with recital 5 of the contested decision, which explains that 'continuation of the fisheries partnership is essential in order for [the territory of Western Sahara] to continue to benefit from the sectoral support provided under the Agreement, … for the benefit of the people concerned.'

41 See Article 13 of the Sustainable Fisheries Partnership Agreement. As paragraph 1 thereof indicates, that committee is made up of representatives of the European Union and the Kingdom of Morocco. See also judgment under appeal, paragraph 215.

42 See Article 13 of the Sustainable Fisheries Partnership Agreement and judgment under appeal, paragraph 314.

43 Article 6(2) of the Implementation Protocol. I can only presuppose that the 'method for ensuring the geographical and social distribution' as well as the 'distribution key' itself was presented by the Kingdom of Morocco to the Joint Committee because neither of those elements forms part of the court file, at first instance or upon appeal.

44 See Articles 4(2) and 6 to 8 of the Implementation Protocol. See also judgment under appeal, paragraph 314. Neither the court file at first instance nor that upon appeal contains any documents pertaining to the supervision or decision-making process of the Joint Committee. In the judgment under appeal, the General Court considered that distributive obligation to mean that 'the parties undertake to ensure that the relevant people, including those of Western Sahara, enjoy those benefits in a way that is proportionate to the fishing activities in the area defined by that agreement, which includes the waters adjacent to that territory, without providing for any exception to that principle' (judgment under appeal, paragraph 213).

45 Article 6(4) and (5) of the Implementation Protocol.

46 See Article 16 of the Implementation Protocol.

46. In order to engage in fishing activities in the zone covered by the Sustainable Fisheries Partnership Agreement, EU vessels must first obtain a fishing authorisation. [47]

47. That authorisation is obtained in return for the payment of the annual ship-owners fees described in point 37 of this Opinion.

48. Those authorisations are issued by the Sea Fisheries Department of the Ministry of Agriculture, Maritime Fisheries, Rural Development, Water and Forests of the Kingdom of Morocco. [48]

49. Under the Sustainable Fisheries Partnership Agreement, EU vessels operating in the 'fishing zone' may 'only catch the allowable catch surplus referred to in Article 62(2) and (3) of UNCLOS … identified … on the basis of available and relevant scientific advice and relevant information … on the total fishing effort exerted on the affected stocks by all fleets operating in the fishing zone'. [49]

50. At the hearing, the Council and the Commission explained that, in practice, this limit is determined by the Kingdom of Morocco after assessing the total fishing capacity of the local fish stocks, its domestic fishing efforts, and the remaining proportion that can be fished sustainably. [50]

51. The 2021 Annual Report of the Joint Committee [51] and the 2023 Final Evaluation [52] explain that all but two types of stocks in the 'fishing zone' were completely exploited or overexploited. [53] Only the stocks for large eyed dentex (*Dentex macrophtalmus*) and sardines (*S. pilchardus*) were considered 'not completely exploited'. [54]

C. The judgment under appeal

52. On 10 and 12 June 2019, Front Polisario brought actions requesting inter alia the annulment of the contested decision.

53. On 29 September 2021, the General Court handed down the judgment under appeal, by which it annulled the contested decision. [55]

47 See Article 5(1) of the Sustainable Fisheries Partnership Agreement and the annex to the Implementation Protocol. See also paragraph 209 of the judgment under appeal, in which the General Court explains that 'the Kingdom of Morocco [has] the task of determining the exact coordinates of those management areas and any areas within them where fishing is banned, since the abovementioned fishing datasheets set only the maximum limits for those management areas'.

48 See Article 1(j) of the Sustainable Fisheries Partnership Agreement, read alongside Article 1(6) and (9) of the Implementation Protocol.

49 Article 3(4) of the Sustainable Fisheries Partnership Agreement.

50 Those institutions also explained that about 20% of that surplus would be allocated to EU fishing vessels.

51 Rapport de la Réunion annuelle du Comité Scientifique Conjoint relatif à l'Accord de pêche signé entre le Royaume du Maroc et l'Union européenne 2021 (available at: https://oceans-and-fisheries.ec.europa.eu/system/files/2022-03/report-jsc-morocco-2021_fr.pdf ('the 2021 Annual Report')

52 European Commission, Directorate-General for Maritime Affairs and Fisheries, Defaux, V., Caillart, B., Guélé, M., Évaluation rétrospective et prospective du Protocole à l'accord de partenariat dans le domaine de la pêche durable entre l'Union européenne et le Royaume du Maroc – Rapport final (available at: https://data.europa.eu/doi/10.2771/785958 ('the 2023 Final Evaluation').

53 See 2021 Annual Report, pp. 15, 27 to 28, 37, 67, 91 to 93 and 2023 Final Evaluation, pp. 26 to 28 and 114 to 116.

54 See 2021 Annual Report, pp. 37, 86 and 90 and 2023 Final Evaluation, pp. 26 to 28 and 115 to 116.

55 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, or, where an appeal has been lodged within that period, until the Court of Justice has delivered its judgment. Judgment under appeal, paragraph 369.

54. As regards the admissibility of the action, the General Court dismissed the Commission's and the Council's two main pleas of inadmissibility relating to Front Polisario's capacity to bring proceedings and its standing in relation to the contested decision. [56]

55. 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. [57]

56. 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. [58] The General Court did not examine the other grounds of annulment raised by Front Polisario.

D. Procedure before the Court of Justice

57. By the 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 twelve months from the date of delivery of its judgment.

58. That course of action is supported by the Chambre des pêches maritimes de la Méditerranée and Others, and the Belgian, Spanish, French, Hungarian, Portuguese and Slovak Governments.

59. A hearing was held on 23 and 24 October 2023 at which the Commission, the Council, Front Polisario, the Chambre des pêches maritimes de la Méditerranée and Others, and the Belgian, French, Spanish, and Hungarian Governments presented oral argument.

III. Analysis

A. On the interpretation of international law

60. The present appeals challenge the validity of the decision of the European Union to conclude an international agreement in the light of the rules of international law that bind the European Union, more precisely in the light of two principles of customary international law – the right to self-determination and the principle of the relative effect of treaties. [59]

61. 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.

[56] Judgment under appeal, paragraphs 132 to 159 and 171 to 268.

[57] Judgment under appeal, paragraphs 270 to 274.

[58] Judgment under appeal, paragraphs 276 to 396.

[59] In its judgments in *Council v Front Polisario* and *Western Sahara Campaign UK*, the Court considered the right to self-determination to be a customary principle expressed in Article 1 of the UN Charter, and the principle of the relative effect of treaties to be a general principle of international law codified in 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'), both rules binding on the European Union. See, to that effect, *Council v Front Polisario*, paragraph 88 and *Western Sahara Campaign UK*, paragraph 63..

62. Even if international law has its own system of legal sources,[60] and some generally accepted interpretative rules,[61] it lacks one final interpreter whose interpretations bind all the participants of the system.[62]

63. 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.[63]

64. 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.

65. 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.[64]

66. 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.

67. In the European Union's external policy, the EU political institutions enjoy a wide margin of discretion.[65] 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.

60 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.

61 Articles 31 to 33 of 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.

62 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.

63 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.

64 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.

65 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).

68. 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. [66]

69. As the Court explained in its judgment in *Air Transport America*, '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.' [67]

70. 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.

71. 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.

72. The foregoing features of international law will guide my analysis in the present appeals.

B. Admissibility

1. Interest

73. As explained in points 36 and 44 of this Opinion, the Implementation Protocol, which governs the conditions for access to fishing zones adjacent to the territory of Western Sahara, expired on 17 July 2023. [68]

74. Without a valid protocol, the Sustainable Fisheries Partnership Agreement does not allow EU vessels to access the 'fishing zone'.

75. That was also confirmed by the Commission at the hearing.

76. Does that mean that Front Polisario has lost its interest to continue these proceedings? [69]

77. To my mind, no.

66 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.

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

68 That is to say four years after the date of entry-into-force of the Implementation Protocol, which was 18 July 2019; see Information on the entry into force of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the exchange of letters accompanying the Agreement (OJ 2019 L 195, p. 1).

69 It is settled case-law that the purpose of an action must continue until final judgment has been given by the Court, failing which there will be no need to adjudicate, thus presupposing that an action at issue must be liable, if successful, to procure an advantage for the party bringing it) (see, to that effect, judgment of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 15 and the case-law cited).

78. Front Polisario is claiming a supposed invalidity of conduct of the European Union arising from the conclusion of the Sustainable Fisheries Partnership Agreement with the Kingdom of Morocco.

79. By reason of its challenge of the contested decision, its plea of illegality extends to the entirety of the 'package' agreed upon with the Kingdom of Morocco – the Fisheries Partnership Agreement, the Implementation Protocol, and the Exchange of Letters – and not just to the practical effects thereof.

80. Accordingly, the present appeals have the potential of resulting in the requirement, on the European Union, to renegotiate certain parts of that 'package', including fishing access rights for the EU fishing fleet as regards the waters adjacent to the territory of Western Sahara, part of which Front Polisario controls and claims to represent.

81. The expiry of the Implementation Protocol accordingly does not affect Front Polisario's continued interest in the present case.

82. In any event, it is clear that, from a constitutional perspective, the underlying direct actions have the potential of recognising an illegality of action on the part of the European Union on the international stage,[70] and of preventing it from re-occuring in the future.[71]

2. Standing and the possibility to rely on customary international law before the EU Courts

83. As I conclude in my parallel Opinion in *Commission and Council* v *Front Polisario*, I generally agree with the conclusion of the General Court that Front Polisario has legal capacity and standing to challenge the contested decision.[72]

84. The same argumentation can be applied to the present appeals. I therefore refer to my arguments offered in that Opinion and propose to the Court to address the substance of the present appeals.

85. Furthermore, in the same way as in my parallel Opinion, I am of the view that Front Polisario, in principle, may rely on the rules of customary international law before the EU Courts. Once the conditions of standing are fulfilled, applicants bringing annulment actions under the fourth paragraph of Article 263 TFEU may rely on those rules of international law that are sufficiently clear to allow the EU Courts to review the validity of acts of the EU institutions. Therefore, in the present case, the Court is not precluded from exercising its power of judicial review regarding the compatibility of the contested decision with the principles of customary international law relied upon, to the extent that it can interpret their content to a sufficient level of clarity.

70 See, to that effect, judgment of 28 May 2013, *Abdulrahim v Council and Commission* (C-239/12 P, EU:C:2013:331, paragraphs 78 and 79 and the case-law cited) (in which the Court recalled that there is a continued interest to act even where an act has ceased to exist where the action may lead to the recognition of an alleged illegal act by the EU institutions).

71 See, for example, judgments of 6 March 1979, *Simmenthal* v *Commission* (92/78, EU:C:1979:53, paragraph 32); of 24 June 1986, *AKZO Chemie and AKZO Chemie UK* v *Commission* (53/85, EU:C:1986:256, paragraph 21); and of 7 June 2007, *Wunenburger* v *Commission* (C-362/05 P, EU:C:2007:322, paragraph 50).

72 See my Opinion in *Commission and Council v Front Polisario*, points 68 to 91.

C. Substance

86. As I also explain in my parallel Opinion in *Commission and Council v Front Polisario*, also delivered today,[73] it is important to start my analysis of the present direct actions by emphasising the limited scope of the present appeals.

87. That is so because, in the judgment under appeal, the General Court examined only the first and the third pleas in law raised by Front Polisario, rejecting the first plea in law and finding the third plea in law to be well-founded.

88. Therefore, even if there may be other issues relating to the right to self-determination that may be relevant in the present case, the Court is limited in its jurisdiction to addressing only those issues that were the subject of the judgments in *Council* v *Front Polisario* and in *Western Sahara Campaign UK*.[74]

89. For that reason, I must first discern what content the Court attributed, in those judgments, to the right to self-determination and the principle of the relative effect of treaties (Section C.1). Second, while the reasoning in the judgment under appeal is substantively identical to that at issue in *Commission and Council v Front Polisario* (C-779/21 P and C-799/21 P), I consider that the applicable rules of international law in the present appeals differ from those at issue in the parallel sets of appeals, not least as regards the way the respective agreements at issue are structured (Section C.2). Third, for that reason, I will conclude that the General Court erred by annulling the Sustainable Fisheries Partnership Agreement on the basis of the same reasoning as the one underlying the appeals in *Commission and Council v Front Polisario* (C-779/21 P and C-799/21 P) (Section C.3). Fourth, and despite that conclusion, I will propose to the Court to uphold the judgment under appeal, and thereby the annulment of the contested decision, albeit on different reasoning (Section C.4). Finally, I will explain that, while outside the scope of the present appeals, the failure to treat the territory of Western Sahara and the waters adjacent thereto as separate and distinct from that of the territory of the Kingdom of Morocco also has consequences for the right of the people of Western Sahara to benefit from the natural resources of the waters adjacent to the territory of Western Sahara (Section C.5).

1. Interpreting the judgments in Council *v Front Polisario and* Western Sahara Campaign UK

90. In points 96 to 115 of my parallel Opinion in *Commission and Council* v *Front Polisario*, I analyse in detail the judgment of the Court in *Council* v *Front Polisario*.

91. My main findings arising from that assessment are the following.

[73] See my Opinion in *Commission and Council v Front Polisario*, point 64.

[74] 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 in law also raise questions of international law, such as the respect for international humanitarian law (2nd plea in law); the right to self-determination (8thplea in law); the relative effect of treaties (9th plea of law); the law on international responsibility (10th plea in law) as well as questions of EU law, such as legitimate expectations and proportionality (4th, 5th, 6th and 7th pleas in law). See judgment under appeal, paragraph 269.

92. The judgment in *Council* v *Front Polisario* arose from a direct action against the Council decision approving the conclusion of the 2012 Trade Liberalisation Agreement,[75] an agreement which grants preferential tariff treatment to goods originating in 'the territory of Morocco'.

93. In that judgment, the Court interpreted that agreement as not extending to the territory of Western Sahara, as the term 'the territory of Morocco' could not be interpreted as including the territory of Western Sahara.

94. The Court arrived at that conclusion by interpreting the right to self-determination and the principle of the relative effect of treaties, which it found to be binding on the European Union when engaging with the territory of Western Sahara through the intermediary of the Kingdom of Morocco.

95. The Court interpreted the right to self-determination as including an obligation for the European Union to treat the territory of Western Sahara as 'separate and distinct' from the territory of the Kingdom of Morocco. That requirement followed from the fact that, under international law, Western Sahara is considered a NSGT.

96. The Court did not have to, and therefore did not, interpret any other possible obligations for the European Union resulting from the right to self-determination of the people of Western Sahara.[76]

97. The Court also concluded that the separate and distinct status of the territory of Western Sahara would trigger the principle of the relative effect of treaties if the European Union and the Kingdom of Morocco sought to apply an agreement concluded between themselves to the territory Western Sahara.

98. According to the Court's interpretation of the principle of the relative effect of treaties, where a third party is affected by the application of an international agreement between two parties, that third party needs to consent to the application of said agreement, irrespective of whether the resulting application is likely to harm that third party or to benefit it.

99. Implying that the principle of the relative effect of treaties would also be applicable when the third party is a NSGT and not a State, the Court concluded that the people of Western Sahara did not consent to the extension of the application of the 2012 Trade Liberalisation Agreement to their territory.

100. In point 114 of my Opinion in *Commission and Council* v *Front Polisario*, I propose that the requirement of consent, as arising from paragraph 106 of the judgment in *Council* v *Front Polisario*, should not be understood as an instruction on whether or how an agreement between

75 Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2012 L 241, p. 4).

76 Accordingly, in its judgments in *Council* v *Front Polisario* and in *Western Sahara Campaign UK*, the Court did not exhaustively interpret the scope of the right to self-determination of the people of Western Sahara. Therefore, it cannot be excluded that that right may also entail additional obligations on the Council as regards, for example, the exhaustion, by EU law subjects, of the natural resources of that territory. See also, in that respect, 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').

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 be interpreted to include the territory of Western Sahara.[77]

101. The judgment in *Western Sahara Campaign UK* was handed down over a year after the judgment in *Council* v *Front Polisario*. That case arrived at the Court as a preliminary reference on the interpretation and the validity of the 2006 Fisheries Agreement and the 2013 Implementation Protocol.

102. In its judgment, the Court concluded that the expressions 'the territory of Morocco and the waters under Moroccan jurisdiction', 'Moroccan fishing zone' and 'waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco'[78] could not be interpreted as including the waters adjacent to the territory of Western Sahara.[79]

103. To arrive at that conclusion, in *Western Sahara Campaign UK*, the Court was guided by its earlier judgment in *Council* v *Front Polisario*.

104. First, the Court explained that the 2006 Fisheries Agreement constituted part of the policy of the European Union to establish closer relations with the Kingdom of Morocco under the umbrella of the Association Agreement.[80] The expression 'territory of Kingdom of Morocco' should therefore be construed in the same way in the 2006 Fisheries Agreement as it was interpreted in the Association Agreement in *Council* v *Front Polisario*.[81]

105. The Court then referred to the part of the judgment in *Council* v *Front* Polisario in which it found that interpreting the expression 'territory of the Kingdom of Morocco' in the Association Agreement as including the territory of Western Sahara would run counter 'the principle of self-determination, stated in Article 1 of the [UN Charter], and the principle of the relative effect of treaties, of which Article 34 of the [VCLT] is a specific expression.'[82]

106. On that basis, the Court concluded that the 2006 Fisheries Agreement and the 2013 Implementation Protocol could not be construed as covering the territory of Western Sahara.

77 In the context of my Opinion in *Commission and Council* v *Front Polisario*, I propose that consent cannot be given by the people of Western Sahara, given that that that 'people' has not yet exercised its right to self-determination, meaning also that the people of Western Sahara have no representative which could consent on their behalf. Thus, I find that, in the case of NSGTs, consent is given by the administering power of that territory. In the present case, I consider that there is nothing in international law to prevent the EU institutions' proposed interpretation that the Kingdom of Morocco should be considered, under EU law, as the ('de facto') administrator of the territory of Western Sahara (see point 137 et seq. of my Opinion in *Commission and Council v Front Polisario*).

78 Those were the three ways in which the territorial scope of the 2006 Fisheries Agreement was defined. See *Western Sahara Campaign UK*, paragraph 57.

79 The Court commenced its analysis by explaining that the question of validity of the 2006 Fisheries Agreement and the 2013 Implementation Protocol did not arise if the agreement at issue in that case did not apply to the waters adjacent to the territory of Western Sahara (see *Western Sahara Campaign UK*, paragraphs 54 and 55). It therefore first interpreted the scope of 2006 Fisheries Agreement and the 2013 Implementation Protocol and found that those acts did not apply to the waters adjacent to the territory of Western Sahara. For that reason, the Court found there to be no reason to affect the validity of the Council decision approving them (see judgment in *Western Sahara Campaign UK*, operative part).

80 See *Western Sahara Campaign UK*, paragraph 59.

81 See *Western Sahara Campaign UK*, paragraph 61.

82 See *Western Sahara Campaign UK*, paragraph 63.

107. The Court subsequently turned to interpreting the concept of 'waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco', as it appeared both in the 2006 Fisheries Agreement and the 2013 Implementation Protocol.

108. For the purposes of that exercise, the Court made reference to UNCLOS, considering that convention to be 'binding on the European Union and which is explicitly referred to in … the [2006 Fisheries Agreement]' [83]

109. Drawing inferences for the interpretation of the expression 'waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco' from UNCLOS, the Court concluded that that expression could not be interpreted as including the waters adjacent to the territory of Western Sahara: the Kingdom of Morocco could only have sovereignty or jurisdiction over the waters adjacent to its territory, and the territory of Western Sahara is not covered by the concept 'territory of the Kingdom of Morocco'. [84]

110. Next, the Court examined whether there would be room to conclude that the intention of the European Union and the Kingdom of Morocco had been to subsume the waters adjacent to the territory of Western Sahara within the expressions 'waters falling within the sovereignty … of the Kingdom of Morocco' and 'waters falling within the … jurisdiction of the Kingdom of Morocco', as they appear in the 2006 Fisheries Agreement.

111. It concluded that such an intention could not be implied from the possible treatment of the Kingdom of Morocco as 'a "de facto administering power" or as an occupying power of Western Sahara …, since 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'. [85] Therefore, the Court was not able to find that a tacit intention of the parties to that effect existed. [86]

112. Finally, the Court reasoned that it would not be necessary to examine whether it would be compatible with the rules of international law binding on the European Union to include the waters adjacent to the territory of Western Sahara within the scope of the 2006 Fisheries Agreement and the 2013 Implementation Protocol if the Kingdom of Morocco were characterised as either an administering or occupying power since that agreement and protocol could not be interpreted, in any event, as applying to the waters adjacent to the territory of Western Sahara. [87]

113. In its judgment in *Western Sahara Campaign UK*, the Court did not further examine, or even make reference to the need for 'consent' of the people of Western Sahara under the principle of the relative effect of treaties.

83 *Western Sahara Campaign UK*, paragraph 58.

84 *Western Sahara Campaign UK*, paragraphs 67 to 69.

85 *Western Sahara Campaign UK*, paragraph 72.

86 *Western Sahara Campaign UK*, paragraphs 70 to 72.

87 *Western Sahara Campaign UK*, paragraph 72.

2. Differences between the relevant legal framework applying to the Trade Preferences and Sustainable Fisheries Partnership Agreements

114. The Sustainable Fisheries Partnership Agreement differs in important aspects from the agreement at issue in the parallel appeals in *Commission and Council* v *Front Polisario* (C-779/21 P and C-799/21 P).

115. At issue in those appeals is an agreement concluded between the European Union and the Kingdom of Morocco *to extend* trade preferences accorded to goods originating in the Kingdom of Morocco also to goods originating in the territory of Western Sahara. [88]

116. The Trade Preferences Agreement at issue in the parallel appeals thus clearly extends the application of an agreement between two parties to a third party: it expressly extends the treatment accorded under the 2012 Trade Liberalisation Agreement between the European Union and the Kingdom of Morocco – which, as the Court held, did not apply to the territory of Western Sahara – to goods originating in the territory of Western Sahara.

117. In the circumstances surrounding the appeals in *Commission and Council v Front Polisario* (C-779/21 P and C-799/21 P), two issues are therefore clear.

118. First, the applicable legal framework is the one governing the relative effect of treaties.

119. Second, as interpreted by the Court, the Trade Preferences Agreement clearly distinguishes between the territory of Western Sahara and the territories of the Kingdom of Morocco and that of the European Union.

120. By contrast, those premises do not hold true for the Sustainable Fisheries Partnership Agreement or the Implementation Protocol.

121. First, the Sustainable Fisheries Partnership Agreement does not extend a regime agreed to be applicable to the territory of the Kingdom of Morocco to the territory of Western Sahara.

122. Instead, the Sustainable Fisheries Partnership Agreement and its Implementation Protocol are set up to constitute a new legal framework that entirely replaces the 2006 Fisheries Agreement and the 2013 Implementation Protocol, with the purpose of regulating fisheries rights in the 'fishing zone' covered by that agreement.

123. The consequence of that difference is that the principle of the relative effect of treaties is not applicable to the Sustainable Fisheries Partnership Agreement or the Implementation Protocol.

124. Second, the Sustainable Fisheries Partnership Agreement and the Implementation Protocol do not clearly distinguish the territory of Western Sahara from the territory of the Kingdom of Morocco.

[88] See 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. 4) ('the Trade Preferences Agreement').

125. As I explain in points 31 to 33 of this Opinion, the Sustainable Fisheries Partnership Agreement and the Implementation Protocol apply to the 'fishing zone', an area that is defined by its geographical coordinates and includes the waters adjacent to the territory of Western Sahara.

126. The consequence of that difference is that the appeals at issue in the present case require the EU Courts to assess whether the Sustainable Fisheries Partnership Agreement, the Implementation Protocol and the Exchange of Letters abide by the requirement, arising from the judgments in *Council* v *Front Polisario* and in *Western Sahara Campaign UK* and resulting from the right to self-determination, to treat the territory of Western Sahara as separate and distinct from the territory of the Kingdom Morocco.

3. The General Court's application of the judgments in Council v Front Polisario *and in* Western Sahara Campaign UK

127. It is clear from the judgment under appeal that the General Court annulled the contested decision by relying on paragraph 106 of the judgment in *Council* v *Front Polisario*.[89]

128. Interpreting that paragraph as requiring the Council to obtain the 'consent' of the people of Western Sahara, in the judgment under appeal, the General Court, in essence, concluded that the consultations conducted by the Council and the EEAS could not be considered as satisfying that obligation.[90]

129. Accordingly, and on the basis of essentially the same line of argumentation as that put forward in the judgment under appeal in *Commission and Council v Front Polisario* (C-779/21 P and C-799/21 P), the General Court annulled the contested decision.

130. I am of the view that the General Court erred in that conclusion.

131. The requirement of 'consent', which the General Court found to be missing in the present case, was extrapolated by the Court in *Council* v *Front Polisario* as deriving from the principle of the relative effect of treaties.

132. However, as I explain in point 123 of this Opinion, a validity review of the Sustainable Fisheries Partnership Agreement against the judgments in *Council* v *Front Polisario* and in *Western Sahara Campaign UK* does not require the application of the principle of the relative effect of treaties.[91]

133. By that agreement the parties did not try to extend the regime agreed between the European Union and the Kingdom of Morocco to the territory of a third party.

[89] Judgment under appeal, paragraphs 150, 201 to 202, 237, 304, 311, 319, 322, 328, 342, 353, 363 and 364.

[90] Judgment under appeal, paragraph 364.

[91] As I also explain in point 118 of this Opinion, the principle of the relative effect of treaties is applicable to the Trade Preferences Agreement by reason of the fact that that agreement seeks to extend the application of an existing agreement between the European Union and the Kingdom of Morocco to the territory of Western Sahara. That is why in my Opinion in *Commission and Council* v *Front Polisario* I analyse how the General Court applied the requirement for 'consent', and conclude that it erred by considering that consent may be given by the 'people' of Western Sahara. For as long as the 'people' has not exercised the right to self-determination, that people lacks a legal representative which can consent in their name. Until that right is exercised, it is therefore for the administering power to consent on behalf of the people of a NSGT (see, in that respect, my Opinion in *Commission and Council* v *Front Polisario*, points 133 to 134 and 169).

134. Instead, the Sustainable Fisheries Partnership Agreement was concluded to determine directly the regime of fishing in a set geographical area, the 'fishing zone', which extends to the waters adjacent to the territory of a third party, Western Sahara.

135. Accordingly, the Council was not required to obtain the consent of the people of Western Sahara.[92]

136. Therefore, I propose that the Court find that the General Court erred in its interpretation and application of paragraph 106 of the judgment in *Council* v *Front Polisario* given that the review of the Sustainable Fisheries Partnership Agreement and the Implementation Protocol did not require the application of the principle of the relative effect of treaties and the requirement of consent, which results from that principle.

4. Respecting the right to treat the two territories as distinct and separate

137. In the contested decision,[93] the Council expresses its intention to treat the Kingdom of Morocco not as a sovereign of the territory of Western Sahara, but as that territory's administering power.

138. The same follows from the Exchange of Letters,[94] in which the European Union repeats its position that Western Sahara is a NSGT, and that the people of that territory enjoy the right to self-determination.

139. As I explain in my Opinion in *Commission and Council* v *Front Polisario*, the Court cannot review the policy decision to engage with the territory of Western Sahara through its administrator, the Kingdom of Morocco.

140. However, where the European Union chooses to engage with the territory of Western Sahara in that manner, the Court's constitutional review obligation mandates that it controls that that engagement respects the status of that territory and the rights of its people.

141. For the purposes of the Court's jurisdiction in the present appeals, that means that it must control whether the way the European Union chose to engage with the territory of Western Sahara through the Kingdom of Morocco respects the right to self-determination of the people of Western Sahara, as interpreted by the Court in *Council* v *Front Polisario* and in *Western Sahara Campaign UK*.

92 I do not exclude, however, that a consultation exercise of the local population may arise from the right to self-determination and the correlative right to the enjoyment of the natural resources of a NSGT. 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. See also 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, pp. 3 to 30. According to both authors, the application of the law relating to NSGTs and the law regulating the rights and obligations of occupying powers reserve to the indigenous population of the area at issue the right to enjoy their natural resources.

93 See recital 4 of the contested decision.

94 Point 2 of the European Union letter included in the Exchange of Letters as part of the Sustainable Fisheries Partnership Agreement contains the following statement: 'The [Sustainable Fisheries Partnership Agreement] is concluded without prejudice to the Parties' respective positions: — for the European Union, references in the [Sustainable Fisheries Partnership Agreement] to Moroccan laws and regulations are without prejudice to its position concerning the status of the non-self-governing territory of Western Sahara, whose adjacent waters are part of the fishing zone defined in point (h) of Article 1 of the [Sustainable Fisheries Partnership Agreement], and its right to self-determination'.

142. As I have explained in point 95 of this Opinion, based on the interpretation that the Court gave in those judgments, the scope of that right includes the obligation to treat the territory of Western Sahara as 'separate and distinct' from the territory of the Kingdom of Morocco.

143. The Sustainable Fisheries Partnership Agreement does not satisfy that requirement.

144. In its scope of application, the Sustainable Fisheries Partnership Agreement does not sufficiently respect the 'separate and distinct' character of the territory of Western Sahara and the waters adjacent thereto.

145. As I have explained in points 31 to 33 of this Opinion, the scope of application of the Sustainable Fisheries Partnership Agreement is established by reference to a single 'fishing zone', defined as covering essentially the entirety of the waters adjacent to the Kingdom of Morocco and those of the territory of Western Sahara.

146. It is clear not only from the definition of that zone and from both the contested decision [95] and the Exchange of Letters [96] that the area covered thereby includes the waters adjacent to the territory of Western Sahara.

147. However, the definition of the 'fishing zone' does not distinguish between the waters adjacent to the territory of the Kingdom of Morocco and the waters adjacent to the territory of Western Sahara.

148. Such a distinction need not necessarily be made in two separate agreements. It could, for example, have been achieved through the delineation of the territorial boundaries of those territories by reference to their respective geographic coordinates.

149. However, it should at least be clear from the agreement concluded by the European Union with the Kingdom of Morocco which part of the European Union's fishing rights relate to the waters adjacent to the Kingdom of Morocco and which relate to the waters adjacent to the territory of Western Sahara.

150. Only in that situation is it clearly ascertainable that the European Union sought to treat the Kingdom of Morocco as the sovereign in relation to its own territory and as the ('de facto') administering authority in relation to the territory of Western Sahara.

151. The above conclusion is not affected by the expression of the European Union's political position, contained in the Exchange of Letters, as regards the treatment of the territory of Western Sahara.

152. I do not exclude that, in certain circumstances, taking account of that type of statement could 'tilt' the Court's conclusion in favour of the validity of an act linked to the European Union's engagement with a third State or territory. [97]

95 See recital 5 of the contested decision.

96 See point 2 of the European Union letter to the Exchange of Letters.

97 See, by analogy, judgment of 17 January 2023, *Spain v Commission* (C-632/20 P, EU:C:2023:28, paragraph 52) in which the Court supported its reasoning by reference to a similar 'without prejudge' clause as regards the participation of the National Regulatory Authority of Kosovo in the work of the Body of European Regulators for Electronic Communications.

153. However, in itself, an expression of the political position of the European Union cannot 'cure' the failure to treat the territory of Western Sahara as separate and distinct from the territory of the Kingdom of Morocco in the Sustainable Fisheries Partnership Agreement and the Implementation Protocol.

154. Therefore, by approving the conclusion of the Sustainable Fisheries Partnership Agreement and the Implementation Protocol with the Kingdom of Morocco, the Council did not respect part of the right to self-determination of the people of Western Sahara, as interpreted by the Court in its judgments in *Council* v *Front Polisario* and *Western Sahara Campaign UK*.

5. Respecting the right to the enjoyment of natural resources

155. The failure to treat as separate and distinct the waters adjacent to the territory of Western Sahara and those adjacent to the territory of the Kingdom of Morocco in the Sustainable Fisheries Partnership Agreement and the Implementation Protocol also has consequences for the right of the people of Western Sahara to benefit from the natural resources of the waters adjacent to the territory of Western Sahara.

156. The right to self-determination, which binds the European Union in its relations with the Kingdom of Morocco as regards the territory of Western Sahara, entails the right of the people of Western Sahara to their enjoyment of the natural resources of the NSGT of Western Sahara, including its adjacent waters. [98]

157. However, in its judgments in *Council v Front Polisario* and *Western Sahara Campaign UK*, the Court did not discuss that aspect of the right to self-determination. It is therefore excluded from the scope of the present appeals.

158. Nevertheless, the obligation on the European Union to ensure that the people of Western Sahara benefit from an agreement enabling fishing opportunities in the waters adjacent to the territory of the NSGT of Western Sahara follows independently from its membership to UNCLOS. [99]

159. In this regard, I observe that paragraph 1(a) of Resolution III, contained in Annex I of the Final Act of the Third UN Conference on the Law of the Sea, and thus constituting an integral part of UNCLOS, states that 'in the case of a territory whose people have not attained full independence or other self-governing status recognised by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the [UNCLOS] shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.'

98 See my Opinion in Joined Cases C-779/21 P and C-799/21 P *Commission and Council v Front Polisario*, points 190 to 192. See also, generally, 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. 3 and Kassoti, E., 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement', *European Papers*, Vol. 4(1), 2019, pp. 313 to 316. Similarly, New York City Bar Association, 'Report on legal issues involved in the Western Sahara dispute: use of natural resources', Committee on United Nations, 2011, pp. 27 to 30.

99 The European Union (then, European Community) approved the United Nations Convention on the Law of the Sea ('UNCLOS') in 1998. See Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1).

160. Accordingly, by virtue of the European Union's international obligations to that convention, the Sustainable Fisheries Partnership Agreement and the Implementation Protocol, insofar as those EU acts result in access to those waters, must be implemented for the benefit of the people of Western Sahara with a view to promoting their well-being and development. [100]

161. In the present case, it is true that the Sustainable Fisheries Partnership Agreement and the Implementation Protocol lay down the requirement for a 'fair geographical and social distribution' of the socioeconomic benefits arising from the financial compensation paid by the European Union to the Kingdom of Morocco.

162. However, as the General Court essentially explains in paragraph 316 of the judgment under appeal, without substantively being challenged in that finding, it does not arise from the provisions of the Sustainable Fisheries Partnership Agreement, the Implementation Protocol, or the Exchange of Letters how 'the principle of fair geographical and social distribution of the financial contribution is implemented differently on the territory of Western Sahara and on the territory of Morocco'.

163. To my mind, to ensure that the people of Western Sahara are not deprived of the legitimate rights over their own natural resources would require, inter alia, that only the population of the territory of Western Sahara benefits from the proceeds arising from the exploitation of their natural resources.

164. I do not exclude that the uncertainty surrounding the European Union's satisfaction of that requirement could have been dispelled through the presentation, by the EU institutions, of the 'method' and/or the 'distribution key' that the Kingdom of Morocco was supposed to present to the Joint Committee, as required by the Implementation Protocol (see point 40 of this Opinion).

165. However, no information to that effect is contained in the court file. [101]

166. Similarly, it may well be possible, even absent such a method and distribution key, that sufficient evidence of strict supervision by the Joint Committee (see point 41 of this Opinion) concerning the allocation of the financial compensation paid by the European Union in return for the access to and exploitation of the waters adjacent to the territory of Western Sahara could satisfy the European Union's obligations to respect the sustainable exploitation of the natural resources of the waters adjacent to Western Sahara. [102]

[100] See, to that effect, also the 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), paragraph 22. Similarly, Kenny, J. K., 'Resolution III of the 1982 Convention on the Law of the Sea and the Timor Gap Treaty', *Washington International Law Review*, Vol. 2(1), 1993, p. 147 (indicating that the preparatory documents to Resolution III 'elucidate the basic principle behind the resolution: non-self-governing peoples should benefit from the resources of their territories').

[101] Nor have I been able to obtain that information from the Council's register of documents. The only information that is publicly available is that contained in the 2023 Final Evaluation, a report commissioned by the Commission that does not form part of the case file, that appears to explain that a distribution key was presented to the Joint Committee, and that the resulting distribution made financial compensation for access by the EU fleet dependent on 'the geographical distribution of the catch' (see 2023 Final Evaluation, p. 38). In support of that finding, the 2023 Final Evaluation concludes that that 95% of access revenues and 99% of access fees were distributed to the territory of Western Sahara (see p. 38), which 'the Joint Committee considers to be fair' (see 2023 Final Evaluation, p. v, point 33). I do not exclude that a substantiation of those figures by the EU institutions would put to rest my doubts as regards the adequacy of compensation arising from the exploitation of the natural resources of the people of Western Sahara; however, absent further information and discussion before the Court on that issue, I am unable to conclude as to whether the 2023 Final Evaluation report's conclusion is warranted.

[102] As such, I agree, in principle, with the Commission's statement that compromise language leading to the same result as would be required by Resolution 2554 (XXIV) and paragraph 1(a) of Resolution III could be acceptable from the point of view of the European Union's obligations to respect the legitimate rights of the people of Western Sahara over their natural resources.

167. However, again, there is no information in the court file as to whether that committee carried out any type of supervision, and if so how it supervised the necessary distribution of the financial compensation.

168. For the foregoing reasons, I am of the opinion that the Sustainable Fisheries Partnership Agreement and the Implementing Protocol do not fulfil the requirement to treat the territory of Western Sahara as 'separate and distinct' from that of the Kingdom Morocco.

169. As that obligation results from the judgments in *Council* v *Front Polisario* and *Western Sahara Campaign UK*, the third plea of Front Polisario, introduced at first instance should be accepted and the contested decision annulled on that ground.

170. I therefore propose to the Court to reject the Council's and the Commission's appeals and to uphold the judgment under appeal, albeit based on different reasoning.

IV. Consequences

171. As provided for in the second paragraph of Article 264 TFEU, the Court shall, if it considers this necessary, state which specific effects of the act in question must be regarded as definitive.

172. Given that the Implementation Protocol expired in July 2023, no fishing activities by EU vessels can currently be conducted in the waters adjacent to the territory of Western Sahara. That was also confirmed at the hearing.

173. That being said, as the General Court explained, the 'annulment of the contested decision with immediate effect could have serious consequences on the European Union's external action and jeopardise legal certainty in respect of the international commitments to which it has agreed and which are binding on the institutions and the Member States.' [103]

174. Furthermore, I do not exclude that an immediate annulment of the contested decision could have serious repercussions on a large number of legal relations entered into in good faith.

175. Should the Court consequently choose to follow my conclusion, I suggest to maintain the effect of the contested decision, for a reasonable period, which may not exceed two years from the date of delivery of the judgment in the present case, in order to conclude with the Kingdom of Morocco the necessary amendments to the Sustainable Fisheries Partnership Agreement.

V. Conclusion

176. In the light of the foregoing, I propose that the Court of Justice reject the appeals of the Council and the Commission.

[103] Judgment under appeal, paragraph 368.