Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

4 October 2024*

(Appeals – External action – International agreements – 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 – Agreement on the amendment of Protocols 1 and 4 to that agreement – Concluding act – Allegations of infringements of international law resulting from the applicability of that second agreement to the territory of Western Sahara – Action for annulment – Admissibility – Capacity to be a party to legal proceedings – *Locus standi* – Condition that an applicant must, in certain cases, be directly and individually concerned by the measure in question – Principle of the relative effect of treaties – Principle of self-determination – Non-self-governing territories – Article 73 of the Charter of the United Nations – Discretion of the Council of the European Union – Customary international law – General principles of EU law – Consent of the people of a non-self-governing territory which holds a right to self-determination as a third party to an international agreement)

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

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 14 December 2021 and 16 December 2021 respectively,

European Commission, represented initially by A. Bouquet, F. Castillo de la Torre, F. Clotuche-Duvieusart and B. Eggers, acting as Agents, and subsequently by A. Bouquet, D. Calleja Crespo, F. Clotuche-Duvieusart and B. Eggers, acting as Agents,

appellant in Case C-779/21 P,

supported by:

Kingdom of Spain, represented by L. Aguilera Ruiz and A. Gavela Llopis, acting as Agents,

intervener in the appeal,

the other parties to the proceedings being:

Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario), represented by G. Devers, avocat,

applicant at first instance,

* Language of the case: French.

Council of the European Union,

defendant at first instance,

French Republic, represented initially by J.-L. Carré, A.-L. Desjonquères and T. Stéhelin, acting as Agents, and subsequently by G. Bain, B. Herbaut, T. Stéhelin and B. Travard, acting as Agents,

Confédération marocaine de l'agriculture et du développement rural (Comader), represented by N. Angelet, G. Forwood and A. Hublet, avocats, and by N. Forwood, Barrister-at-Law,

interveners at first instance,

and

Council of the European Union, represented initially by F. Naert and V. Piessevaux, acting as Agents, and subsequently by F. Naert, A. Nowak-Salles and V. Piessevaux, acting as Agents,

appellant in Case C-799/21 P,

supported by:

Kingdom of Belgium, represented initially by J.-C. Halleux, C. Pochet and M. Van Regemorter, acting as Agents, and subsequently by C. Pochet and M. Van Regemorter, acting as Agents,

Kingdom of Spain, represented by L. Aguilera Ruiz and A. Gavela Llopis, acting as Agents,

Hungary, represented by M.Z. Fehér and K. Szíjjártó, acting as Agents,

Portuguese Republic, represented by P. Barros da Costa and A. Pimenta, acting as Agents,

Slovak Republic, represented initially by B. Ricziová, acting as Agent, and subsequently by S. Ondrášiková, acting as Agent,

interveners in the appeal,

the other parties to the proceedings being:

Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario), represented by G. Devers, avocat,

applicant at first instance,

French Republic, represented initially by J.-L. Carré, A.-L. Desjonquères, and T. Stéhelin, acting as Agents, and subsequently by G. Bain, B. Herbaut, T. Stéhelin and B. Travard, acting as Agents,

European Commission, represented initially by A. Bouquet, F. Castillo de la Torre, F. Clotuche-Duvieusart and B. Eggers, acting as Agents, and subsequently by A. Bouquet, D. Calleja Crespo, F. Clotuche-Duvieusart and B. Eggers, acting as Agents,

Confédération marocaine de l'agriculture et du développement rural (Comader), represented by N. Angelet, G. Forwood and A. Hublet, avocats, and by N. Forwood, Barrister-at-Law,

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, C. Lycourgos, E. Regan, Z. Csehi and O. Spineanu-Matei, Presidents of Chambers, S. Rodin, I. Jarukaitis, A. Kumin, N. Jääskinen (Rapporteur), M.L. Arastey Sahún and M. Gavalec, Judges,

Advocate General: T. Ćapeta,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 23 and 24 October 2023,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2024,

gives the following

Judgment

1 By their respective appeals, the European Commission (Case C-779/21 P) and the Council of the European Union (Case C-799/21 P) seek the setting aside of the judgment of the General Court of the European Union of 29 September 2021, *Front Polisario* v *Council* (T-279/19, EU:T:2021:639) ('the judgment under appeal'), by which that court annulled Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2019 L 34, p. 1) ('the decision at issue').

2 In Case C-799/21 P, the Council also seeks, in the alternative, to have the effects of the decision at issue maintained for a period of 12 months from the date of delivery of the forthcoming judgment.

Legal context

International law

The Charter of the United Nations

3 Article 1 of the Charter of the United Nations, signed in San Francisco on 26 June 1945 ('the Charter of the United Nations'), states:

'The Purposes of the United Nations are:

…

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

…'

4 Chapter XI of the Charter of the United Nations, entitled 'Declaration Regarding Non-Self-Governing Territories', includes Article 73 thereof, which provides:

'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 recognise the principle that the interests of the inhabitants of these territories are paramount, and 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 …

…'

The Vienna Convention

5 Under the last paragraph of the preamble to the Vienna Convention on the Law of Treaties, concluded in Vienna on 23 May 1969 (*United Nations Treaty Series*, Vol. 1155, p. 331) ('the Vienna Convention'), the parties to the convention '[affirm] that the rules of customary international law will continue to govern questions not regulated by the provisions of [that convention]'.

6 Article 3 of that convention, entitled 'International agreements not within the scope of the present Convention', states:

'The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

…

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

…’

7 Article 29 of the Vienna Convention, entitled ‘Territorial scope of treaties’, stipulates:

‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.’

8 Article 34 of that convention, entitled ‘General rule regarding third States’, provides:

‘A treaty does not create either obligations or rights for a third State without its consent.’

9 Article 35 of the Vienna Convention, entitled ‘Treaties providing for obligations for third States’, is worded as follows:

‘An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.’

10 Under Article 36 of that convention, entitled ‘Treaties providing for rights for third States’:

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

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.’

The Association Agreement

11 On 1 March 2000, 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, signed in Brussels on 26 February 1996 (OJ 2000 L 70, p. 2) (‘the Association Agreement’), entered into force.

12 Article 1(1) and (2) of the Association Agreement stipulates:

‘1. An association is hereby established between the [European Community and the European Coal and Steel Community] and its Member States, of the one part, and Morocco, of the other part.

2. The aims of this Agreement are to:

– provide an appropriate framework for political dialogue between the Parties, allowing the development of close relations in all areas they consider relevant to such dialogue,

– establish the conditions for the gradual liberalisation of trade in goods, services and capital,

– promote trade and the expansion of harmonious economic and social relations between the Parties, notably through dialogue and cooperation, so as to foster the development and prosperity of Morocco and its people,

– encourage integration of the Maghreb countries by promoting trade and cooperation between Morocco and other countries of the region,

– promote economic, social, cultural and financial cooperation.'

13 Article 16 of that agreement states:

'The [European Community and the European Coal and Steel Community] and Morocco shall gradually implement greater liberalisation of their reciprocal trade in agricultural and fishery products.'

14 Article 94 of the Association Agreement provides:

'This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Coal And Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand[,] to the territory of the Kingdom of Morocco.'

Background to the dispute

15 For the purposes of the present proceedings, the background to the dispute, as set out in, in particular, paragraphs 1 to 53 of the judgment under appeal, can be summarised as follows.

The international context

16 Western Sahara is a territory situated in the north-west of the continent of Africa. It was colonised by the Kingdom of Spain at the end of the 19th century, before becoming a Spanish province. In 1963, it was entered by the United Nations in the 'Preliminary list of territories to which the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV) [of the United Nations General Assembly]) applies' as a non-self-governing territory administered by the Kingdom of Spain within the meaning of Article 73 of the Charter of the United Nations. To this day, it remains on the list of non-self-governing territories compiled by the United Nations Secretary-General on the basis of information transmitted under Article 73(e) of that charter.

17 On 20 December 1966, at its 1500th plenary session, the United Nations General Assembly adopted Resolution 2229 (XXI) on the Question of Ifni and Spanish Sahara, in which it '[reaffirmed] the inalienable right of the [people] of … Spanish Sahara to self-determination in accordance with Resolution 1514 (XV) [of the United Nations General Assembly]' and requested the Kingdom of Spain, as the administering power, 'to determine at the earliest possible date … the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination'.

18 On 24 October 1970, at its 1883rd plenary session, the United Nations General Assembly adopted Resolution 2625 (XXV), by which it approved the 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', the text of which was annexed to that resolution. In particular, that declaration 'solemnly proclaims … the principle of equal rights and self-determination of peoples'.

19 The Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario) is an organisation that was created in Western Sahara on 10 May 1973. In Article 1 of its articles of association it defines itself as a 'national liberation movement' whose members 'fight for full independence and for recovery of the sovereignty of the Sahrawi people throughout the entire territory of the Sahrawi Arab Democratic Republic'.

20 On 20 August 1974, the Kingdom of Spain sent the United Nations Secretary-General a letter announcing its decision to hold, under the auspices of the United Nations, a referendum intended to enable the people of Western Sahara to exercise its right to self-determination.

21 On 16 October 1975, the International Court of Justice (ICJ), in its capacity as the principal judicial organ of the United Nations and following a request submitted by the United Nations General Assembly in the context of its work relating to the decolonisation of Western Sahara, delivered an advisory opinion on 'Western Sahara' (ICJ Reports 1975, p. 12) ('the Advisory Opinion on Western Sahara'). In paragraph 162 of that opinion, the ICJ considered the following:

'The materials and information presented to [the ICJ] 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. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by [the ICJ], and the territory of Western Sahara. On the other hand, [the ICJ's] conclusion is 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 ICJ] has not found legal ties of such a nature as might affect the application of Resolution 1514 (XV) [of the United Nations General Assembly] in the decolonisation of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory. …'

22 In paragraph 163 of the Advisory Opinion on Western Sahara, the ICJ indicated, in particular:

'[The ICJ is of the opinion], with regard to Question I, … that Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain was not a territory belonging to no-one (*terra nullius*); with regard to Question II, … that there were legal ties between this territory and the Kingdom of Morocco of the kinds indicated in paragraph 162 of this Opinion [and] that there were legal ties between this territory and the Mauritanian entity of the kinds indicated in paragraph 162 of this Opinion.'

23 In a speech delivered on the day of publication of the Advisory Opinion on Western Sahara, the King of Morocco stated that 'the whole world [had] recognised that [Western] Sahara belonged' to the Kingdom of Morocco and that it only remained for the Kingdom 'to peacefully occupy that territory'; he called, to that end, for the organisation of a march.

24 On 6 November 1975, at its 1854th session, the United Nations Security Council adopted Resolution 380 (1975) on Western Sahara, in which it '[deplored] the holding of the [announced] march' and '[called] upon [the Kingdom of Morocco] immediately to withdraw from the Territory of Western Sahara all the participants in [that] march'.

25 On 26 February 1976, the Kingdom of Spain informed the United Nations Secretary-General that it was putting an end to its presence in Western Sahara as of that date, declaring that it considered itself absolved of all international responsibility for the administration of that territory.

26 In the meantime, an armed conflict had broken out in that region between the Kingdom of Morocco and the Islamic Republic of Mauritania, on the one hand, and Front Polisario, on the other. In that context, part of the population of Western Sahara, mostly members of the Sahrawi people, fled that territory and found refuge in camps located in Algerian territory, close to the border with Western Sahara.

27 The day after the Kingdom of Spain's presence in Western Sahara came to an end, Front Polisario declared the establishment of the Sahrawi Arab Democratic Republic (SADR). To this day, neither the European Union nor any of its Member States recognises the SADR.

28 On 14 April 1976, the Kingdom of Morocco concluded a treaty with the Islamic Republic of Mauritania partitioning the territory of Western Sahara and annexed the part of that territory which had been apportioned to it by that treaty. On 10 August 1979, the Islamic Republic of Mauritania concluded a peace agreement with Front Polisario by which the former renounced all territorial claims to Western Sahara. Following the conclusion of that agreement, the Kingdom of Morocco took control of the territory evacuated by the Mauritanian forces.

29 On 21 November 1979, at its 75th plenary session, the United Nations General Assembly adopted Resolution 34/37 on the Question of Western Sahara, in which it '[reaffirmed] the inalienable right of the people of Western Sahara to self-determination and independence, in accordance with the Charter of the United Nations … and the objectives of Resolution 1514 (XV)', 'deeply [deplored] the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco', '[urged] Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara' and '[recommended] to that end that [Front Polisario], the representative of the people of Western Sahara, participate fully in the search for a just, lasting and definitive solution of the question of Western Sahara, in accordance with the resolutions and declarations of the United Nations'. That resolution was followed by Resolution 35/19, adopted by the United Nations General Assembly at its 56th plenary session, which took place on 11 November 1980. In paragraph 10 of that resolution, the United Nations General Assembly '[urged] … Morocco and [Front Polisario], [the] representative of the people of Western Sahara, to enter into direct negotiations with a view to arriving at a definitive settlement of the question of Western Sahara'.

30 The conflict between the Kingdom of Morocco and Front Polisario continued until 30 August 1988, when the parties gave their approval in principle to settlement proposals made primarily by the United Nations Secretary-General which provided in particular for the proclamation of a ceasefire and the holding of a referendum on self-determination under the supervision of the United Nations. However, as no political solution was found, hostilities resumed in 2020.

31 In order, inter alia, to monitor the ceasefire and to help with the holding of the referendum, the United Nations Security Council established, in April 1991, the United Nations Mission for the Referendum in Western Sahara (Minurso), the mandate of which has been renewed every year and which still exists to this day. The resolutions of the United Nations Security Council have regularly reaffirmed that any political solution must permit 'the self-determination of the people of Western Sahara under agreements aligned with the principles and objectives enshrined in [the Charter of the United Nations]' (see, most recently, paragraph 4 of Resolution 2703 (2023) of the United Nations Security Council of 30 October 2023).

32 To date, a referendum has still not been held and the Kingdom of Morocco controls most of the territory of Western Sahara; a fortified sand wall guarded by the Kingdom of Morocco's army separates it from the rest of the territory of Western Sahara, which is controlled by Front Polisario.

The Association Agreement and the Liberalisation Agreement and their legal consequences

33 Following the entry into force of the Association Agreement on 1 March 2000, several protocols to that agreement have been concluded and amended. Thus, on 13 December 2010, an agreement was signed in Brussels 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) ('the Liberalisation Agreement'). That agreement was approved on behalf of the European Union by Council Decision 2012/497/EU of 8 March 2012 on the conclusion of the Liberalisation Agreement (OJ 2012 L 241, p. 2).

34 On 19 November 2012, Front Polisario brought an action before the General Court seeking the annulment of that decision, alleging, inter alia, a certain number of failures by the Council to fulfil its obligations under international law, on the ground that the latter had approved, by that decision, the application of the Liberalisation Agreement to the territory of Western Sahara. By judgment of 10 December 2015, *Front Polisario* v *Council* (T-512/12, EU:T:2015:953), the General Court annulled Decision 2012/497 in so far as it approved the application of the Liberalisation Agreement to Western Sahara, on the ground that, by not verifying whether the production of products originating in Western Sahara and exported to the European Union had been carried out in a manner detrimental to the population of that territory and whether it entailed infringements of fundamental rights of the persons concerned, the Council had failed to fulfil its obligation to examine, before adopting that decision, all the elements of the case.

35 Hearing an appeal brought by the Council on 19 February 2016, the Court of Justice, by judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), set aside the judgment of the General Court of 10 December 2015, *Front Polisario* v *Council* (T-512/12, EU:T:2015:953), and dismissed Front Polisario's action before the General Court as inadmissible. In that regard, the Court of Justice upheld the second ground of the appeal, alleging that the General Court had erred in law in its analysis of Front Polisario's *locus standi*, and, in particular, the complaint that the General Court had incorrectly held that the Liberalisation Agreement applied to Western Sahara. The Court of Justice held, inter alia, that, in accordance with the principle of self-determination, applicable to relations between the European Union and the Kingdom of Morocco, and with the right to self-determination which the people of Western Sahara, which is a non-self-governing territory within the meaning of Article 73 of the Charter of the United Nations, derives from that principle, that territory enjoyed a separate and distinct

status in relation to that of any State, including the Kingdom of Morocco. The Court of Justice concluded from this that the words 'territory of the Kingdom of Morocco' used in Article 94 of the Association Agreement could not be interpreted in such a way as to include Western Sahara in the territorial scope of that agreement.

36 In order to reach that conclusion, the Court of Justice also relied, in its judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), on the fact that the people of Western Sahara had to be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties. It held that the consent of such a third party was required in order for the implementation of the Association Agreement to be capable of affecting that third party in the event of the territory of Western Sahara being included in the scope of that agreement, without it being necessary to determine whether such implementation would be likely to harm it or, on the contrary, to benefit it. The Court of Justice observed that the judgment of the General Court of 10 December 2015, *Front Polisario* v *Council* (T-512/12, EU:T:2015:953), did not show that the people of Western Sahara had expressed any such consent with regard to the Association Agreement.

The agreement at issue and the decision at issue

37 Following the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), the Council, by decision of 29 May 2017, authorised the Commission to open negotiations, on behalf of the European Union, with the Kingdom of Morocco with a view to concluding an international agreement amending Protocol 1 (relating to the arrangements applying to imports into the European Union of agricultural products, processed agricultural products, fish and fishery products originating in Morocco) and Protocol 4 (relating to the definition of 'originating products' and methods of administrative cooperation) to the Association Agreement. In the context of the authorisation granted to the Commission to open negotiations, the Council requested the Commission, first, to ensure that the populations concerned by the envisaged international agreement were appropriately involved and, second, to assess the potential impact of that agreement on the sustainable development of Western Sahara, in particular the benefits for local populations and the impact of the exploitation of natural resources on the territories concerned.

38 After the Commission had referred to its consultations and its analysis in its report of 11 June 2018 on the benefits for the population of Western Sahara of the extension of tariff preferences to products originating in Western Sahara and on the consultation of that population regarding that extension, on 25 October 2018 an agreement was signed in Brussels 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').

39 The third to ninth paragraphs of each of the two letters the exchange of which gave rise to the agreement at issue are worded as follows:

'This 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.

Both parties reaffirm their support for the United Nations process and back the efforts made by the [United Nations] Secretary-General to reach a definitive political settlement in line with the principles and objectives of the Charter of the United Nations and based on the Resolutions of the [United Nations] Security Council.

The European Union and the Kingdom of Morocco agreed to insert the joint declaration below, after Protocol 4 …

"Joint declaration concerning the application of Protocols 1 and 4 to [the Association Agreement]

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."

The European Union and the Kingdom of Morocco reaffirm their commitment to applying the protocols in accordance with the provisions of the Association Agreement concerning respect for fundamental freedoms and human rights.

The insertion of the joint declaration is based on the long-standing special partnership between the European Union and the Kingdom of Morocco, as notably embodied in the advanced status awarded to the Kingdom of Morocco, and on the parties' shared desire to deepen and expand the partnership.

In this spirit of partnership and in order to allow the parties to assess the impact of the Agreement, particularly on sustainable development and with regard to the advantages for the people concerned and the exploitation of the natural resources of the territories in question, the European Union and the Kingdom of Morocco have agreed to exchange information at least once a year by means of the Association Committee.

The specific arrangements for this evaluation exercise will be determined at a later date before being adopted by the Association Committee at the latest two months after the entry into force of this Agreement.'

40 On 28 January 2019, the Council adopted the decision at issue.

41 Recitals 3 to 10 of the decision at issue state:

'(3) 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. …

(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 its judgment [of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973)], 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 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973)], 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.

(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. …

(8) … 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 …

(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. …

(10) Having regard to the considerations on consent in the [judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973)], 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.'

42 The first paragraph of Article 1 of the decision at issue provides that the agreement at issue is approved on behalf of the Union. That agreement entered into force on 19 July 2019 (OJ 2019 L 197, p. 1).

The proceedings before the General Court and the judgment under appeal

43 By application registered with the Registry of the General Court on 27 April 2019, Front Polisario brought an action seeking the annulment of the decision at issue.

44 By the judgment under appeal, the General Court annulled the decision at issue and ruled that the effects of that decision would be maintained for a period that could not exceed the period referred to in the first paragraph of Article 56 of the Statute of the Court of Justice of the European Union or, if an appeal were brought within that period, until the delivery of the judgment of the Court of Justice on that appeal.

45 In the first place, the General Court examined the two pleas of inadmissibility primarily raised by the Council, supported by the French Republic, the Commission and the Confédération marocaine de l'agriculture et du développement rural (Comader) in respect of the action, alleging that Front Polisario (i) lacked capacity to be a party to legal proceedings before the Courts of the European Union and (ii) had no *locus standi* with regard to the decision at issue. The General Court rejected those two pleas of inadmissibility in paragraphs 79 to 114 and paragraphs 133 to 238 of the judgment under appeal, respectively.

46 In the second place, having rejected the first plea for annulment relied on by Front Polisario in support of its head of claim, alleging that the Council lacked competence to adopt the decision at issue, the General Court examined, in paragraphs 251 to 391 of the judgment under appeal, the third plea for annulment, alleging, in essence, that the Council had failed to fulfil its obligation to comply with the requirements derived by the Court of Justice from the principle of self-determination and from the principle of the relative effect of treaties, as specified in the judgments of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), and of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118). In paragraph 391 of the judgment under appeal, the General Court concluded that, in adopting the decision at issue, the Council had not taken sufficient account of all the relevant factors concerning the situation in Western Sahara and had wrongly taken the view that it had a margin of appreciation to decide whether it was necessary to comply with the requirement that the people of that territory had to express its consent to the application of the agreement at issue, as a third party to that agreement, in accordance with the Court of Justice's interpretation of the principle of the relative effect of treaties in relation to the principle of self-determination.

The proceedings before the Court of Justice and the forms of order sought

47 By decision of the President of the Court of 15 February 2022, Cases C-779/21 P and C-799/21 P were joined for the purposes of the written and oral parts of the procedure and of the judgment.

48 By decision of the President of the Court of 27 May 2022, the Kingdom of Spain was granted leave to intervene in Case C-779/21 P in support of the form of order sought by the Commission.

49 By decisions of the President of the Court of 27 May 2022, the Kingdom of Spain, Hungary, the Portuguese Republic and the Slovak Republic were granted leave to intervene in Case C-799/21 P in support of the form of order sought by the Council.

50 By decision of the President of the Court of 13 June 2022, the Kingdom of Belgium was also granted leave to intervene in Case C-799/21 P in support of the form of order sought by the Council. However, that Member State did not subsequently participate in the written part of the procedure.

51 By its appeal, the Commission (Case C-779/21 P) claims that the Court should:

– set aside the judgment under appeal;

– dismiss the action brought by Front Polisario at first instance or, if the Court of Justice considers that the state of the proceedings does not permit it to give final judgment in the matter, refer the case back to the General Court; and

– order Front Polisario to pay the entirety of the costs in both sets of proceedings, including those of the appellant in the appeal.

52 By its appeal, the Council (Case C-799/21 P) claims that the Court should:

– set aside the judgment under appeal;

– give a final ruling on the matters that are the subject of the Council's appeal and dismiss the action brought by Front Polisario;

– order Front Polisario to pay the costs connected with the appeal and with Case T-279/19; and

– in the alternative, order that the effects of the decision at issue are to be maintained for a period of 12 months from the date of delivery of the forthcoming judgment.

53 Front Polisario contends that the Court should:

– dismiss the appeals;

– order the Commission to pay the entirety of the costs incurred by Front Polisario in connection with the present case; and

– order the Council to pay the entirety of the costs incurred by Front Polisario in connection with the present case and before the General Court at first instance.

54 The French Republic claims that the Court should:

– set aside the judgment under appeal;

– give a final ruling on the matters that are the subject of the present appeals and dismiss the action brought by Front Polisario or, if the Court of Justice considers that the state of the proceedings does not permit it to give final judgment in the matter, refer the case back to the General Court; and

– in the alternative, for the reasons relied on by the Council and the Commission, order that the effects of the decision at issue are to be maintained for a period of 18 months from the date of delivery of the forthcoming judgment.

55 Comader claims that the Court should:

– set aside the judgment under appeal;

– declare the action brought by Front Polisario to be inadmissible or, at the very least, unfounded; and

– order Front Polisario to pay the costs.

56 The Kingdom of Spain claims that the Court should uphold the Commission's appeal in Case-779/21 P and the Council's appeal in Case C-799/21 P. The Kingdom of Belgium, Hungary, the Portuguese Republic and the Slovak Republic claim that the Court should uphold the Council's appeal.

The appeals

57 In support of their appeals, the Commission, the appellant in the appeal in Case C-779/21 P, and the Council, the appellant in the appeal in Case C-799/21 P, rely on five grounds of appeal and four grounds of appeal, respectively. The first three grounds of the appeal in Case C-779/21 P and the first two grounds of the appeal in Case C-799/21 P allege that the General Court erred in law with regard to the admissibility of the action brought before it by Front Polisario, while the fourth and fifth grounds of the appeal in Case C-779/21 P and the third and fourth grounds of the appeal in Case C-799/21 P allege that the General Court erred in law in connection with its examination of the merits of that action.

The first ground of the appeal in Case C-779/21 P and the first ground of the appeal in Case C-799/21 P, alleging that Front Polisario lacks capacity to be a party to legal proceedings

Arguments of the parties

58 By their respective first grounds of appeal, the Council and the Commission claim that the General Court erred in law in recognising Front Polisario, in paragraphs 90 to 114 of the judgment under appeal, as having capacity to be a party to legal proceedings before the EU judicature.

59 The Council and the Commission, like the French Republic and Comader, submit, inter alia, in essence, that Front Polisario does not have legal personality, either under international law or under EU law. In addition, they dispute that the principle of effective judicial protection can be relied on in order to recognise Front Polisario as having capacity to bring an action before the General Court to defend the people of Western Sahara's right to self-determination, which risks rendering every action brought before the EU judicature, as 'internal' courts, admissible, even if such an action concerns an international dispute, covered by international law and brought by a subject of international law, which cannot be brought before an international court. According to

the Council, the right to effective judicial protection does not involve universal access to the EU judicature in disregard of the conditions for admissibility set out in the fourth paragraph of Article 263 TFEU.

60 In addition, according to the Commission, while it is true that Front Polisario is participating in a 'political solution' to the question of the definitive status of Western Sahara as indicated in paragraphs 91 and 92 of the judgment under appeal, the significance of Resolution 34/37 of the United Nations General Assembly, cited by the General Court and referred to in paragraph 29 of the present judgment, must be put in perspective. That resolution does, admittedly, recommend Front Polisario's participation, as the 'representative' of the people of Western Sahara, in the political solution to the conflict concerning that territory. However, the resolution, which is not binding, predates the emergence of a form of local representativeness of the people of Western Sahara through elections by direct universal suffrage. The European Union has never recognised Front Polisario as anything other than one of the 'parties' to a peace process conducted at United Nations level, and the precise proportion of the people of Western Sahara which, to date, can be considered to be represented by Front Polisario remains uncertain.

61 The Council considers that the General Court erred in law in adopting a broad interpretation of the concept of 'legal person' within the meaning of the fourth paragraph of Article 263 TFEU, which does not take account of the limits of Front Polisario's role and representativeness in international law, and by rejecting, in paragraph 103 of the judgment under appeal, the Council's arguments in that regard. It argues that the General Court was incorrect to hold that Front Polisario's representativeness in the context of the process of finding a political solution to the dispute at United Nations level justified granting Front Polisario the status of 'legal person', in order to enable it to contest the validity of a decision concluding an agreement which had no impact on the resolution of that dispute. The role of Front Polisario at international level is limited to its capacity to participate, as the representative of the people of Western Sahara, in the negotiations conducted under the auspices of the United Nations concerning the definitive status of Western Sahara in accordance with Resolution 34/37 of the United Nations General Assembly, referred to in paragraph 29 of the present judgment. The fact that the EU institutions recognise the existence of a dispute which is the subject of negotiations within the United Nations in no way means that the European Union or its institutions recognise Front Polisario as their interlocutor, as the Union is not a party to those negotiations.

62 Front Polisario contests those arguments.

Findings of the Court

63 As was recalled, in essence, by the General Court in paragraphs 82 and 83 of the judgment under appeal, although, under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures, the Court of Justice has nonetheless recognised the capacity of entities to be parties to legal proceedings before the Courts of the European Union irrespective of whether they are constituted as legal persons under national law.

64 As was held by the General Court in paragraph 84 of the judgment under appeal, that was the case, in particular, where, on the one hand, the entity in question was sufficiently representative of the persons whose rights derived from EU law it sought to defend and had the autonomy and liability

necessary to act in the framework of legal relationships governed by EU law and, on the other hand, it had been recognised by the institutions as an interlocutor in negotiations relating to those rights (see, to that effect, judgments of 8 October 1974, *Union syndicale – Service public européen and Others* v *Council*, 175/73, EU:C:1974:95, paragraphs 9 to 17, and of 8 October 1974, *Syndicat général du personnel des organismes européens* v *Commission*, 18/74, EU:C:1974:96, paragraphs 5 to 13).

65 That was also the case, as was noted by the General Court in paragraph 85 of the judgment under appeal, where the EU institutions had treated that entity as a distinct subject with its own rights and obligations. In fact, consistency and justice require recognition of the capacity of such an entity to be a party to legal proceedings so that it can challenge measures restricting its rights or decisions unfavourable to it on the part of the institutions (see, to that effect, judgments of 28 October 1982, *Groupement des Agences de voyages* v *Commission*, 135/81, EU:C:1982:371, paragraphs 9 to 11; of 18 January 2007, *PKK and KNK* v *Council*, C-229/05 P, EU:C:2007:32, paragraphs 107 to 112; and of 15 June 2017, *Al-Faqih and Others* v *Commission*, C-19/16 P, EU:C:2017:466, paragraph 40).

66 The General Court also correctly recalled, in paragraph 86 of the judgment under appeal, that it follows from the case-law of the Court of Justice that the concept of 'legal person' used in the fourth paragraph of Article 263 TFEU cannot be interpreted restrictively (see, to that effect, judgment of 22 June 2021, *Venezuela* v *Council (Whether a third State is affected)*, C-872/19 P, EU:C:2021:507, paragraph 44).

67 In this instance, it must be held, as the Advocate General did in point 82 of her Opinion, that Front Polisario is a self-proclaimed liberation movement which was created for the purpose of fighting for a particular type of future model of governance of the non-self-governing territory of Western Sahara, namely that of the independence of that territory, currently with regard to the Kingdom of Morocco, and the creation of a sovereign Sahrawi State. That movement therefore seeks to establish, in connection with the exercise of the right to self-determination of the people of the non-self-governing territory of Western Sahara, an independent State.

68 In so far as that movement seeks precisely, relying on the people of Western Sahara's right to self-determination, to establish a state legal order for that territory, it cannot be required, in order to be recognised as having capacity to be a party to legal proceedings before the Courts of the European Union, to be constituted as a legal person under a particular national legal order.

69 Furthermore, Front Polisario is one of the legitimate interlocutors in the process conducted, with a view to determining the future of Western Sahara, under the auspices of the United Nations Security Council, referred to in paragraph 31 of the present judgment and the decisions of which are binding on all the EU Member States and institutions, despite the fact that it has never been given the status of 'national liberation movement' either by the United Nations or by the European Union and its Member States.

70 Accordingly, Front Polisario, which also participates in various international fora, including African fora, and maintains bilateral legal relations at international level, has sufficient legal existence to be able to be a party to legal proceedings before the Courts of the European Union.

71 As regards the question whether that entity may legitimately represent the interests of the people of Western Sahara, that question concerns its *locus standi* in the context of an action for annulment brought against the decision at issue, and not its capacity to be a party to legal proceedings before the EU judicature.

72 Lastly, the line of argument relating to the fact that Front Polisario has not been recognised as having legal personality in the legal orders of the Member States or the fact that no court of any Member State has recognised its capacity to be a party to legal proceedings is ineffective. Indeed, as was noted by the General Court in paragraph 83 of the judgment under appeal, although the concept of 'legal person' in the fourth paragraph of Article 263 TFEU implies, in principle, the existence of legal personality, which must be determined in the light of the national law under which the legal person in question was constituted, it does not necessarily coincide with those specific to the different legal orders of the Member States. It should also be noted, in that regard, that the Court of Justice has recognised that a third State, as a State with international legal personality, must be regarded as a 'legal person' within the meaning of the fourth paragraph of Article 263 TFEU (see, to that effect, judgment of 22 June 2021, *Venezuela* v *Council (Whether a third State is affected)*, C-872/19 P, EU:C:2021:507, paragraph 53).

73 Having regard to the foregoing considerations, the General Court could, without erring in law, conclude that Front Polisario had the capacity to be a party to legal proceedings before the Courts of the European Union, within the meaning of the fourth paragraph of Article 263 TFEU.

74 Consequently, the first ground of the appeal in Case C-779/21 P and the first ground of the appeal in Case C-799/21 P must be rejected as unfounded.

The second and third grounds of the appeal in Case C-779/21 P and the second ground of the appeal in Case C-799/21 P, alleging that Front Polisario is not directly and individually concerned by the decision at issue

75 The Commission, by the second and third grounds of the appeal in Case C-779/21 P, and the Council, by the first and second parts of the second ground of the appeal in Case C-799/21 P, argue that the General Court was incorrect to hold, in paragraph 224 of the judgment under appeal, that Front Polisario was directly concerned by the decision at issue, within the meaning of the fourth paragraph of Article 263 TFEU, and, in paragraph 238 of the judgment under appeal, that it was individually concerned by that decision, within the meaning of that provision.

The second ground of the appeal in Case C-779/21 P and the first part of the second ground of the appeal in Case C-799/21 P, alleging that Front Polisario is not directly concerned by the decision at issue

– *Arguments of the parties*

76 The Council and the Commission submit that the General Court was incorrect to conclude, in paragraph 224 of the judgment under appeal, that Front Polisario was directly concerned by the decision at issue.

77 The Commission submits, in particular, that the General Court disregarded EU law in holding that some of the effects of the decision at issue and the agreement at issue satisfied the conditions permitting a finding that Front Polisario was directly concerned by the decision at issue, even though the agreement at issue, which that decision was intended to approve on behalf of the Union, confined itself, by amending the rules on origin, to giving preferential access within the European Union to certain products originating in Western Sahara, while taking care to recognise the separate status of that territory and leaving entirely open the outcome of the process conducted at United Nations level concerning that non-self-governing territory. The Commission therefore considers that it is the importers who, where appropriate, may assert 'rights' conferred by the agreement at issue and contest decisions by the customs authorities implementing that agreement before the courts of the Member States, in the event that those rights are not observed. Customs declarants must, as a general rule, however, be established in the Union. Producers from the non-member country concerned by the agreement at issue may admittedly benefit from a more open European market, but such a benefit is an 'economic' effect of that agreement. The effects 'outside the European Union' are thus not of a legal nature and are also not governed by EU law.

78 The reasoning used by the General Court to reject the institutions' arguments was in fact intended not to establish that Front Polisario is directly concerned by the decision at issue but rather to establish that the agreement at issue is applicable to the territory of Western Sahara and thus affects the people of that territory. However, the fact that the Moroccan customs authorities are called upon to participate in the implementation of the agreement at issue as regards the issuing of certificates of origin, that exporters must comply with certain conditions in order to enable importers to benefit from preferential tariffs, or that that agreement has an impact on products from Western Sahara, in no way means that the agreement at issue has legal effects in a third territory.

79 The Council adds, in particular, that the finding, set out in paragraph 171 of the judgment under appeal, that, in view of the nature of a decision concluding an international agreement and its own legal effects, the existence of direct effects of the decision at issue on Front Polisario's legal situation, on account of the content of the agreement at issue, cannot be excluded from the outset, is based on grounds which are vitiated by errors of law.

80 It argues that the General Court was incorrect to hold, in paragraphs 150 and 162 of the judgment under appeal, that a decision concluding an international agreement is a constituent element of that agreement and produces legal effects vis-à-vis other parties 'in so far as it formalises the acceptance by the European Union of commitments made to them'. The decision at issue does not produce legal effects outside the internal legal order of the European Union. By that decision, the Union expressed its consent within its internal legal order, contrary to what was held by the General Court in paragraph 162 of the judgment under appeal.

81 It was the act of notification by the Union, expressly mentioned both in the last paragraph of the agreement at issue and in Article 2 of the decision at issue, that Front Polisario should have challenged before the General Court – assuming that all the conditions for admissibility were satisfied. The Council disputes that those conditions are satisfied in this instance.

82 It also disputes the finding of the General Court in paragraph 215 of the judgment under appeal that, in so far as the conclusion of the agreement at issue affects the people of Western Sahara and must obtain its consent, the decision at issue has direct effects on Front Polisario's legal situation as the representative of that people.

83 The French Republic considers that the General Court made a series of errors of law relating to the legal effects of a decision of the Council concluding an international agreement. Like the Council, it emphasises that, while the finding, set out in paragraph 150 of the judgment under appeal, that a decision concluding an international agreement gives concrete expression to the European Union's consent to be bound by that agreement, is accurate within the legal order of the European Union, only the act of notifying the party concerned that the internal procedures have been completed constitutes an expression, at international level, of consent to be bound by an agreement. In addition, it argues that the General Court made another series of errors of law by claiming that the legal situation of Front Polisario is directly changed by the agreement at issue itself.

84 Similarly, Comader supports, in the first place, the Council's arguments concerning the errors of law which the General Court is alleged to have made in paragraphs 149 to 159 of the judgment under appeal, given that the decision to conclude a treaty does not entail the entry into force of that treaty. In addition, it argues that the principle of effective judicial protection is not intended to extend the rights of action of a non-European applicant to defend collective rights derived from international law. In the second place, Comader submits that, by holding, in paragraph 215 of the judgment under appeal, that Front Polisario was 'directly' concerned by the decision at issue, the General Court confused Front Polisario with the people of Western Sahara.

85 Front Polisario contests those arguments.

– *Findings of the Court*

86 As has been recalled in paragraph 63 of the present judgment, under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

87 As was recalled 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 which that person is contesting requires that two cumulative conditions be satisfied, namely that the measure being contested, first, directly affects the legal situation of that person and, second, leaves no discretion to the 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, to that effect, judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42 and the case-law cited, and of 12 July 2022, *Nord Stream 2* v *Parliament and Council*, C-348/20 P, EU:C:2022:548, paragraph 43 and the case-law cited).

88 In this instance, by its action for annulment before the General Court, Front Polisario was seeking to protect the people of Western Sahara's right to self-determination, as already recognised by the Court of Justice in paragraphs 88, 91 and 105 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973). It is in the light of the effects of the decision at issue and, accordingly, of the agreement at issue on the legal situation of that people, represented for the purposes of the present cases by Front Polisario, that it is necessary to examine whether the latter is directly concerned by that decision for the purposes of the case-law recalled in paragraph 87 of the present judgment.

89 Although it has not been officially recognised as being the exclusive representative of the people of Western Sahara, Front Polisario is, according to the resolutions of the highest bodies of the United Nations, including those of the United Nations Security Council referred to in paragraph 31 of the present judgment, a privileged interlocutor in the process conducted under the auspices of the United Nations with a view to determining the future status of Western Sahara. It also participates in other international fora in order to defend that people's right to self-determination.

90 Those particular circumstances allow the finding that Front Polisario is entitled to contest, before the EU judicature, the legality of an act of the Union which directly affects the legal situation of the people of Western Sahara in its capacity as holder of the right to self-determination where that act individually concerns that people or, if the act is a regulatory act, where it does not entail implementing measures.

91 In such circumstances, the condition, laid down in the fourth paragraph of Article 263 TFEU, that a natural or legal person must be directly concerned by the decision which that person is contesting must be assessed, taking into account Article 73 of the Charter of the United Nations and the principle of effective judicial protection, in relation to the legal situation of the people of Western Sahara, represented for the purposes of the present cases by Front Polisario.

92 In this instance, the decision at issue and, by extension, the agreement at issue, satisfy, through their impact on the people of Western Sahara's right to self-determination, the conditions recalled in paragraph 87 of the present judgment (see, to that effect, judgment of 21 December 2016, *Council* v *Front Polisario*, C-104/16 P, EU:C:2016:973, paragraph 106).

93 First, as was stated, in essence, by the Advocate General in point 75 of her Opinion, the purpose of that decision is the conclusion of an international agreement which is intended to be applied to the majority of a territory in respect of which the people of Western Sahara holds the right to self-determination. It therefore necessarily has an impact on the rights of that people with regard to that territory, including the right, derived from Article 73 of the Charter of the United Nations and the customary international law principle of permanent sovereignty over natural resources, to exploit the natural riches of the territory (see, to that effect, ICJ, Case concerning Armed Activities on the Territory of the Congo (*Democratic Republic of Congo v. Uganda*), judgment of 19 December 2005, ICJ Reports 2005, p. 168, paragraph 244).

94 In particular, although the European Union does not, by the agreement at issue, recognise the claims of the Kingdom of Morocco concerning sovereignty over the territory of Western Sahara, that agreement nonetheless recognises the legal effects, in EU law, of acts carried out in that non-self-governing territory by the competent authorities of the Kingdom of Morocco, including the customs authorities, such as those concerning the grant of certificates of origin for products originating in Western Sahara.

95 In that regard, it is necessary to reject the Commission's argument that the fact that the agreement at issue has an impact on products originating in Western Sahara does not entail, in law, an 'application of the agreement at issue to the territory of Western Sahara'. Indeed, the implementation of that agreement requires the presence of the Moroccan authorities in the territory of Western Sahara and the exercise by those authorities of administrative functions in that territory, with a view to the adoption of certain acts provided for by that agreement. Thus, by recognising that such acts by the Moroccan authorities have legal effects in EU law, the decision at issue directly affects the legal situation of the people of Western Sahara in its capacity

as holder of the right to self-determination, regardless of whether or not the agreement at issue can be relied on against that people in international law having regard to the principle of the relative effect of treaties.

96 Second, after the entry into force of the agreement at issue, the obligation to grant preferential treatment to products originating in Western Sahara and certified as such by the Moroccan customs authorities is binding on the European Union, without there being a need for the adoption of any other additional act supplementing the decision at issue which would involve discretion on the part of the authorities tasked with the implementation of that agreement, which is, to that extent, purely automatic.

97 In that context, it is necessary to reject the line of argument put forward by the Council and the French Republic, directed against paragraphs 150 and 162 of the judgment under appeal, according to which Front Polisario's action before the General Court should have been brought not against the decision concluding the agreement at issue, but against the act whereby the Union notified the Kingdom of Morocco of its approval of that agreement.

98 The decision concluding an international agreement constitutes a definitive act in the internal legal order of the European Union, expressing the will of the Union to be bound by that agreement (see, to that effect, Opinion 2/00 (*Cartagena Protocol on Biosafety*) of 6 December 2001, EU:C:2001:664, paragraph 5). Such a decision constitutes, according to settled case-law recalled in paragraph 135 of the judgment under appeal, an act which is open to challenge, as the Court does not have jurisdiction to annul an international agreement (see, to that effect, judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraphs 45 to 51). By contrast, the act of notifying the other contracting party of the approval of such an agreement constitutes an implementing measure which, in principle, must be regarded as an act which is not open to challenge.

99 Having regard to the foregoing considerations, the General Court was fully entitled to hold, in paragraph 224 of the judgment under appeal, that Front Polisario was directly concerned by the decision at issue.

100 Consequently, the second ground of the appeal in Case C-779/21 P and the first part of the second ground of the appeal in Case C-799/21 P must be rejected as unfounded.

The third ground of the appeal in Case C-779/21 P and the second part of the second ground of the appeal in Case C-799/21 P, alleging that Front Polisario is not individually concerned by the decision at issue

– *Arguments of the parties*

101 The Council and the Commission, like the French Republic and Comader, consider that the General Court was incorrect to conclude, in paragraph 238 of the judgment under appeal, that Front Polisario was individually concerned by the decision at issue.

102 The Commission notes, in particular, that, in paragraph 230 of the judgment under appeal, the General Court confines itself to referring to developments relating to the condition concerning whether Front Polisario was directly concerned by the decision at issue; developments which, as

it has argued in connection with the second ground of the appeal in Case C-779/21 P, are vitiated by errors of law. Similarly, the Council argues that the General Court made errors of law which also vitiate the conclusion that Front Polisario is individually concerned by the decision at issue.

103 Furthermore, the Council and the Commission both contest the rejection by the General Court, in paragraph 235 of the judgment under appeal, of the relevance of the judgment of 10 April 2003, *Commission* v *Nederlandse Antillen* (C-142/00 P, EU:C:2003:217), in which the Court of Justice held that the general interest which an overseas country or territory (OCT), as an entity responsible for economic and social affairs within its jurisdiction, may have in obtaining a result that is favourable for its economic prosperity is not sufficient on its own to enable that OCT to be regarded as being individually concerned within the meaning of the fourth paragraph of Article 263 TFEU.

104 The Commission emphasises in that regard that the distinction drawn by the General Court, in paragraphs 234 and 235 of the judgment under appeal, between the situation at issue in the judgment of 10 April 2003, *Commission* v *Nederlandse Antillen* (C-142/00 P, EU:C:2003:217), and that at issue in this instance is artificial and incorrect in law, as the measure being contested in that judgment of the Court of Justice concerned only OCTs, some of which are or were non-self-governing territories. It argues that it is not possible to accept that the Government of the Netherlands Antilles is not entitled to challenge an act of the Union which economically concerns its territory while Front Polisario is entitled to do so, without considering that movements which seek the independence of a territory or which are in conflict with a State have more guarantees than regional governments.

105 For its part, the Council considers that the reasons relied on by the General Court do not correspond to the argument which it had drawn from the judgment of 10 April 2003, *Commission* v *Nederlandse Antillen* (C-142/00 P, EU:C:2003:217), recalling that it had argued, in its rejoinder before the General Court, that it followed from that judgment that, even assuming that Front Polisario is an entity responsible for economic issues concerning Western Sahara, *quod non*, that status is not sufficient for it to be capable of being regarded as being individually concerned by the agreement at issue.

106 Front Polisario contests those arguments.

– *Findings of the Court*

107 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, only if the measure in respect of which annulment is sought affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (judgment of 18 October 2018, *Internacional de Productos Metálicos* v *Commission*, C-145/17 P, EU:C:2018:839, paragraph 34 and the case-law cited).

108 Having regard to the considerations set out in paragraphs 88 to 92 of the present judgment, it must be held that the people of Western Sahara, represented in the present cases by Front Polisario, is individually concerned by the decision at issue, in so far as the express inclusion of the territory of Western Sahara in the scope of the agreement at issue, which is binding on the European Union by virtue of the decision at issue, changes the legal situation of that people

because of its status as holder of the right to self-determination with regard to that territory. That status differentiates it from all other persons or entities, including any other subject of international law.

109 The line of argument put forward by the Commission and the Council relating to the judgment of 10 April 2003, *Commission* v *Nederlandse Antillen* (C-142/00 P, EU:C:2003:217), in which the Court of Justice held that the general interest which an OCT, as an entity responsible for economic and social affairs within its jurisdiction, may have in obtaining a result that is favourable for its economic prosperity is not sufficient on its own to enable that OCT to be regarded as being concerned, for the purposes of the fourth paragraph of Article 173 of the EC Treaty (now the fourth paragraph of Article 263 TFEU), must be rejected. The General Court based the finding that Front Polisario is individually concerned by the decision at issue and, by extension, by the agreement at issue, not on the economic effects of that agreement, but rather on the fact that that organisation represents the people of Western Sahara as holder of the right to self-determination with regard to that territory.

110 Consequently, the third ground of the appeal in Case C-779/21 P must be rejected as unfounded. Similarly, it is necessary to reject the second part of the second ground of the appeal in Case C-799/21 P as unfounded and, accordingly, to reject that ground in its entirety.

The fourth ground of the appeal in Case C-779/21 P and the fourth ground of the appeal in Case C-799/21 P, alleging that the General Court erred in law as regards the extent of the judicial review of, and the consent of the people of Western Sahara to, the agreement at issue

Arguments of the parties

111 By their respective fourth grounds of appeal, the Council and the Commission claim that the General Court made a series of errors of law relating to an incorrect interpretation and application of international law, to the extent of the Council's discretion in the sphere of external relations (in particular concerning the requirement for the people of Western Sahara's consent in this instance), to the breach of the principle that documents must be construed in accordance with their actual terms, to the distortion of the Council's arguments, and to the infringement of Article 36 of the Statute of the Court of Justice of the European Union, read in conjunction with the first paragraph of Article 53 thereof.

112 The Commission argues that, in paragraphs 307 to 392 of the judgment under appeal, the General Court, in breach of EU law, gave the principle of the relative effect of treaties, in conjunction with the right to self-determination, an absolute and extreme effect, by incorrectly interpreting the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), and by disregarding the case-law concerning the Council's discretion in the sphere of external relations, in particular concerning customary international law.

113 According to the Commission, those errors can be grouped into four main complaints, namely (i) errors of law as regards the extent of judicial review, the discretion of the institutions and the need to establish the existence of a manifest error in order to find that the decision at issue is invalid as a result of its alleged incompatibility with the rules of international law; (ii) errors of law relating to the absence, in the particular context of the case, of a requirement for consent from the people of Western Sahara; (iii) errors of law, even assuming that such consent from the people of Western Sahara is necessary to confirm the validity of the decision at issue, inasmuch as the concept of

'consent' used by the General Court is too narrow; and (iv) errors of law relating to the identification of Front Polisario as the entity to which such consent is to be expressed, in view of its limited status and representativeness. The Commission argues, in connection with those four complaints, that the General Court did not correctly determine the customary international law, even though it was required to do so in the context of the case before it.

114 The Commission notes that any decision concluding an agreement with a non-member country requires assessment, in line with the principles and objectives of external action set out in Article 21 TEU, of the interests of the Union in the context of relations with the non-member country concerned and reconciliation of the divergent interests arising in those relations. The Council has a wide discretion to weigh the objective of promoting the universality and indivisibility of human rights against (i) the other objectives on which the Union's action on the international scene is based and (ii) the other interests of the Union. Judicial review in that regard must necessarily be limited to the question whether, in adopting the act in question, the EU institutions have made manifest errors of assessment concerning the conditions for applying those principles.

115 However, the General Court undermined the Council's discretion by treating the condition of express consent from Front Polisario – the basis of which in public international law is not established – as absolute. It disregarded the breadth and the diversity of the objectives to be taken into consideration by the Council in the context of Article 21 TEU, making reference only, in paragraphs 277 and 278 of the judgment under appeal, to paragraph 1 of that article, and not to paragraph 2 thereof. In so doing, the General Court exceeded the bounds of its power of review.

116 In that regard, the General Court misinterpreted the consequences to be drawn from the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973). It is not possible to deduce from the people of Western Sahara's right to self-determination, confirmed in that judgment, a requirement for express consent from the people of that territory solely through the intermediary of Front Polisario in order that an international agreement granting tariff preferences for products originating in that territory, concluded by the European Union with a State acting as the administrative power in that territory and having the competence to do so, may cover such a territory.

117 The concept of 'people' and the concept of 'consent' in this instance must take account of the legal and factual context surrounding the adoption of the decision at issue and the conclusion of the agreement at issue, from which it follows that the solution ultimately adopted is consistent with all the applicable rules of international law, including Article 73 of the Charter of the United Nations, which seeks to promote the well-being of the inhabitants of non-self-governing territories, as well as Article 21(2)(d) and (e) TEU. Although paragraphs 311 and 312 of the judgment under appeal confirmed that the law applicable to non-self-governing territories remains, to this day, uncertain in some regards, the Commission argues that, in paragraphs 313 to 390 of that judgment, the General Court went on to make a series of errors, summarised in paragraphs 112, 113, 115 and 116 of the present judgment.

118 The Council submits that, contrary to what was held by the General Court in paragraph 391 of the judgment under appeal, the consultation process conducted between the Moroccan authorities, on the one hand, and the Commission and the EEAS, on the other, enabled consent to be obtained from the people of Western Sahara. It considers that that paragraph, as well as paragraphs 307 to 390 of the judgment under appeal, which support the conclusion set out in paragraph 391 of that judgment, are vitiated by errors of law, given that the General Court was

mistaken as to the content of the concept of 'consent' of a people of a non-self-governing territory and indeed as to the need to obtain that consent, and that it either acted in breach of the principle that Council documents must be construed in accordance with their actual terms or distorted the arguments put forward by the Council. It also argues that the General Court failed to fulfil its obligation to state reasons.

119 Front Polisario contends that those grounds should be rejected.

Findings of the Court

– *Preliminary observations*

120 As is apparent from paragraph 251 of the judgment under appeal, Front Polisario argued, in the third plea of its action before the General Court, that, by concluding, without its consent, an international agreement with the Kingdom of Morocco which was explicitly applicable to the territory of Western Sahara, the Council had disregarded the obligation to implement the judgments of the Court of Justice; an obligation stemming from Article 266 TFEU. It argued that the Court of Justice had held that the implied inclusion of that territory in the scope of the agreements concluded between the European Union and the Kingdom of Morocco was legally impossible by virtue of the principle of self-determination and the principle of the relative effect of treaties. It followed that, a fortiori, an explicit application of such agreements to that territory was precluded. Front Polisario argued, in particular, that the conclusion of the agreement at issue was contrary to the case-law inasmuch as it did not respect the separate and distinct status of Western Sahara and the requirement for the consent of the people of that territory.

121 As was noted by the General Court in paragraph 298 of the judgment under appeal, that plea comprised, in essence, three parts, alleging, first, that it was impossible for the European Union and the Kingdom of Morocco to conclude an agreement which would be applicable to Western Sahara, second, that the separate and distinct status of that territory had been violated, in breach of the principle of self-determination, and, third, that the requirement for the consent of the people of that territory, as a third party to the agreement at issue within the meaning of the principle of the relative effect of treaties, had not been met.

122 The General Court rejected the first part of the third plea, but upheld the third part of that plea. It thus held that it was necessary, without there being a need to examine either the second part of the third plea or the other pleas of the action, to annul the decision at issue.

123 In paragraph 391 of the judgment under appeal, the General Court summarised its reasoning in response to the third part of the third plea of Front Polisario's action as follows:

'…in adopting [the decision at issue], the Council did not take sufficient account of all the relevant factors concerning the situation in Western Sahara and wrongly took the view that it had a margin of appreciation to decide whether it was necessary to comply with the requirement that the people of that territory must express [its] consent to the application of the agreement at issue, as a third party to that agreement, in accordance with [the Court of Justice's] interpretation of the principle of the relative effect of treaties in relation to the principle of self-determination. In particular, first, the Council and the Commission were wrong to take the view that the current situation in that territory did not make it possible to ascertain the existence of that consent and, in particular, to do so through the agency of [Front Polisario]. Second, in taking the view that the consultation

process conducted by the Commission and by the EEAS, which was not intended to obtain such consent and was not addressed to "representative bodies" of that people, had made it possible to comply with the principle of the relative effect of treaties as interpreted by [the Court of Justice] in paragraph 106 of [the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973)], the Council was mistaken as to both the scope of that consultation [process] and the scope of the requirement set in that paragraph. Third, the Council was wrong to consider that it could rely on the letter of 29 January 2002 from the [United Nations Legal Counsel, the Assistant Secretary-General for Legal Affairs ('the letter of 29 January 2002 from the United Nations Legal Counsel')] to substitute that requirement with the criteria purportedly established by that letter.'

124 It is necessary to begin by examining the appellants' complaints concerning the consent of the people of Western Sahara by means of consultation of the representatives of the peoples of Western Sahara and the extent of the judicial review of the decision at issue and, by extension, the agreement at issue regarding that consent, including their arguments concerning the scope of the letter of 29 January 2002 from the United Nations Legal Counsel. It is then necessary to examine their complaints concerning the need for such consent and the identification of Front Polisario as the entity to which that consent is to be expressed.

– The complaints concerning the consent of the people of Western Sahara by means of consultation of the representatives of the peoples of Western Sahara and the extent of the judicial review of the decision at issue

125 It should be borne in mind that, in paragraph 106 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), the Court noted, in connection with interpreting the expression 'the territory of the Kingdom of Morocco' used in Article 94 of the Association Agreement, that the people of Western Sahara had to be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties and that, as such, that third party could be affected by the implementation of the Association Agreement in the event of the territory of Western Sahara being included in the scope of that agreement, without it being necessary to determine whether such implementation would be likely to harm it or, on the contrary, to benefit it. It held that, in either case, that implementation had to receive the consent of such a third party. However, it was not apparent from the judgment being appealed in the case which gave rise to the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), that the people of Western Sahara had expressed such consent.

126 In this instance, it should be noted that recital 10 of the decision at issue states the following:

'Having regard to the considerations on consent in the [judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973)], the Commission, in liaison with [the 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 …'

127 In that regard, it is necessary, in the first place, to recall that, as has been noted in paragraph 26 of the present judgment, following the outbreak in the 1970s of the armed conflict between, inter alia, the Kingdom of Morocco and Front Polisario, a large part of the population of Western Sahara fled that conflict and found refuge in Algerian territory. The representative of Front Polisario indicated at the hearing before the Court of Justice, without being contradicted in that regard, that, to date, of a total of around 500 000 Sahrawi, approximately 250 000 are living in refugee camps in Algeria, another quarter are living in the area of Western Sahara which is under Moroccan control, and the remaining quarter are living in other parts of the world.

128 It follows that the majority of the current population of Western Sahara is not part of the people holding the right to self-determination, namely the people of Western Sahara. That people, which for the most part has been displaced, is the sole holder of the right to self-determination with regard to the territory of Western Sahara. The right to self-determination belongs to that people, and not to the population of that territory in general, of which – according to the estimates provided by the Commission at the hearing before the Court of Justice – only 25% is of Sahrawi origin.

129 As was noted by the Advocate General in points 123 and 124 of her Opinion, there is a difference in that regard between the concept of the 'population' of a non-self-governing territory and that of the 'people' of that territory. The latter refers to a political unit which holds the right to self-determination, whereas the concept of 'population' refers to the inhabitants of a territory.

130 In this instance, the Commission and the EEAS conducted a consultation process with the 'people concerned', which, as was noted by the General Court in paragraph 337 of the judgment under appeal, encompasses, 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. As was correctly held by the General Court, in essence, in paragraph 373 of the judgment under appeal, that consultation process cannot therefore be equivalent to obtaining the consent of the 'people' of the non-self-governing territory of Western Sahara.

131 In the second place, it should be borne in mind that, among the relevant rules that may be relied on in the context of relations between the parties to an agreement between the European Union and a non-member country is the general international law principle of the relative effect of treaties, according to which treaties do not impose any obligations, or confer any rights, on third States (*pacta tertiis nec nocent nec prosunt*). That principle of general international law finds particular expression in Article 34 of the Vienna Convention, under which a treaty does not create either obligations or rights for a third State without its consent (judgment of 25 February 2010, *Brita*, C-386/08, EU:C:2010:91, paragraph 44).

132 That principle, also referred to in paragraph 106 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), has a broader scope than that of a mere rule for the interpretation of international agreements. Even if, as the appellants correctly assert, an agreement affecting the rights or obligations of a third party remains, if the consent of the third party has not been obtained, unenforceable against that third party in international treaty law, the third party concerned may nonetheless be affected by the implementation of the agreement in the event that a territory with regard to which that third party has sovereignty or holds the right to self-determination is included in the scope of that agreement. Such implementation is, in that regard, liable alternatively to breach, for a State, its sovereignty over its territory and, for a people, its right to self-determination with regard to the territory to which that right relates. Thus, as was noted by the Court of Justice in paragraph 106 of that judgment, the

implementation of an international agreement between the European Union and the Kingdom of Morocco in the territory of Western Sahara must receive the consent of the people of Western Sahara.

133 It follows that a lack of consent by that people to such an agreement, the implementation of which extends to that territory, is capable of affecting the validity of the act of the Union, such as the decision at issue, concluding that agreement. It should be borne in mind in that regard that, under Article 3(5) and Article 21(1) TEU, the Union's action on the international scene is to contribute, in particular, to the strict observance and the development of international law, including respect for the principles of the Charter of the United Nations, and that, under Article 207(1) TFEU, the common commercial policy is to be conducted in the context of the principles and objectives of the Union's external action (see, to that effect, Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017, EU:C:2017:376, paragraphs 142 to 147).

134 That conclusion is not affected by the Council's margin of discretion. Indeed, as was noted by the General Court in paragraph 349 of the judgment under appeal, that margin of discretion is legally circumscribed by, on the one hand, the obligation, derived from the principle of self-determination, to respect, in the context of relations between the European Union and the Kingdom of Morocco, the separate and distinct status of Western Sahara, and, on the other, the requirement, derived from the principle of the relative effect of treaties, that the people of that territory must consent to any agreement between the European Union and the Kingdom of Morocco which would be implemented in that territory.

135 The General Court was thus fully entitled to conclude, in paragraph 349 of that judgment, that it was indeed for the Council to assess whether the current situation of that territory justified an adaptation of the way in which that consent should be expressed and whether the conditions for a finding that the people of Western Sahara had expressed such consent were satisfied, but that that institution was not free to decide whether that consent could be waived without infringing the requirement that the people of that territory must consent to such an agreement.

136 Consequently, the General Court cannot be said to have exceeded the limits of its power of review of acts of the Union forming part of the external action of the Union in the light of customary international law, as established in the case-law of the Court of Justice, as regards the assessment of the condition concerning the need for the consent of the people of Western Sahara.

137 In the third place, as regards the line of argument relating to the scope of the letter of 29 January 2002 from the United Nations Legal Counsel concerning the requirement for consent from the people of Western Sahara, that line of argument must be rejected as unfounded.

138 The General Court was correct to hold, in essence, in paragraph 385 of the judgment under appeal, that that letter does not constitute a source of EU law which can be relied on before the EU judicature, given that it is not akin, as such, either to a rule of international treaty law which is binding on the European Union or to a rule of customary international law (see, to that effect, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)*, C-66/18, EU:C:2020:792, paragraph 87 and the case-law cited).

139 It is also necessary to reject as ineffective the Commission's line of argument relating to the comparison, made by the General Court in paragraphs 338 and 339 of the judgment under appeal, between, on the one hand, the consultation process at issue, conducted by the Commission and the EEAS, and, on the other, wide-ranging consultations with the parties

concerned as referred to in Article 11(3) TEU and Article 2 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and the FEU Treaty. It is sufficient to point out in that regard that, in any event, as was stated, in essence, by the General Court, such consultations, which must take place in particular before legislative proposals are submitted by the Commission, differ fundamentally, in terms of both their nature and their purpose, from the requirement, derived from customary international law, that a people holding the right to self-determination consent to the application, in the territory to which that right relates, of an international agreement in respect of which it has the status of a third party.

140 Accordingly, the General Court was fully entitled to conclude, in paragraph 391 of the judgment under appeal, first, that the Council, in taking the view that the consultation process conducted by the Commission and by the EEAS had made it possible to comply with the principle of the relative effect of treaties as interpreted by the Court of Justice in paragraph 106 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), was mistaken as to both the scope of that consultation process and the scope of the requirement set out in that paragraph of that judgment of the Court of Justice and, second, that the Council had been wrong to consider that it could rely on the letter of 29 January 2002 from the United Nations Legal Counsel to substitute that requirement with the criteria purportedly established by that letter.

– The complaints concerning the need for the consent of the people of Western Sahara and the identification of Front Polisario as the entity to which that consent is to be expressed

141 As has been recalled in paragraph 123 of the present judgment, the General Court concluded, in paragraph 391 of the judgment under appeal, that, in adopting the decision at issue, the Council had not taken sufficient account of all the relevant factors concerning the situation in Western Sahara and had wrongly taken the view that it had a margin of appreciation to decide whether it was necessary to comply with the requirement that the people of that territory had to express its consent to the application of the agreement at issue to it, as a third party to that agreement, in accordance with the Court of Justice's interpretation of the principle of the relative effect of treaties in relation to the principle of self-determination. In particular, it held that the Council and the Commission had been wrong to take the view that the current situation in the territory of Western Sahara did not make it possible to ascertain the existence of that consent.

142 More specifically, it noted, in paragraph 321 of the judgment under appeal, that, although the agreement at issue is capable of creating rights with regard to exporters established in Western Sahara, those effects concern only individuals and not a third party that is subject to the agreement and capable of consenting to it. In addition, the General Court held that, as regards the benefits which may be derived from that agreement by the population of that territory as a whole, it was necessary, in any event, to regard those benefits as 'purely socio-economic and not legal', and that 'these benefits are, moreover, indirect and so cannot be equated with rights granted to a third party within the meaning of the relative effect of the treaties'. It went on to state the following in paragraph 322 of the judgment under appeal:

'Conversely, the effect of the agreement at issue is to impose an obligation on the third party in that it grants one of the parties to that agreement competence within the territory of the third party, which the latter is not therefore entitled to exercise itself or, as the case may be, delegate (see, to that effect, judgment of 25 February 2010, *Brita*, C-386/08, EU:C:2010:91, paragraph 52). The assertion made by the Council that it is not in a position to exercise such competence at this

stage, given its status as a non-self-governing territory and the situation currently prevailing in that territory, cannot override that finding or the need for that third party to consent to the said obligation.'

143 The General Court inferred from this, in paragraph 323 of the judgment under appeal, that the principle expressed in Article 36(1) of the Vienna Convention whereby, if a right arises for a third State from a provision of a treaty, that State's assent to the treaty is to be presumed, unless the treaty otherwise provides, was not applicable in the case at hand and that the expression of that consent therefore had to be explicit.

144 However, the reasoning of the General Court as set out in paragraphs 322 and 323 of the judgment under appeal is vitiated by an error of law.

145 In that regard, it is true that, as has been held in paragraphs 132 to 135 and paragraph 140 of the present judgment, the General Court was correct to conclude, in essence, that, on the basis of the principles of the right to self-determination and of the relative effect of treaties, as interpreted by the Court of Justice, the consent of the people of Western Sahara to the implementation of the agreement at issue in that territory was a condition for the validity of the decision at issue and that the consultation process conducted by the Commission and by the EEAS was not capable of establishing such consent on the part of that people.

146 On the other hand, it incorrectly interpreted the agreement at issue when it held, in essence, in paragraph 322 of the judgment under appeal, that the effect of that agreement was to impose an obligation on the people of Western Sahara by granting the authorities of the Kingdom of Morocco certain powers, to be exercised in the territory of Western Sahara.

147 Indeed, although the implementation of the agreement at issue means that the acts of the Moroccan authorities carried out in the territory of Western Sahara have legal effects as described in paragraphs 94 to 96 of the present judgment, changing the legal situation of the people of that territory, the fact that that agreement recognises those authorities as having certain administrative powers which are exercised in that territory does not however allow the finding that that agreement creates legal obligations for that people as a subject of international law.

148 In that regard, as is emphasised in the agreement at issue, that agreement does not mean that the European Union recognises the alleged sovereignty of the Kingdom of Morocco over Western Sahara. The people of Western Sahara is not, moreover, the addressee of the certificates of origin or other administrative acts drawn up by the Moroccan authorities in connection with the implementation of that agreement, which it would be required to recognise; nor is it the addressee of the measures taken by the EU authorities and by the authorities of the Member States with regard to them. Moreover, in so far as it is apparent from the agreement at issue that it applies only to products originating in Western Sahara which are subject to controls by the customs authorities of the Kingdom of Morocco, the conclusion of that agreement does not prevent the Union from providing, where appropriate, for separate arrangements which would apply to products originating in Western Sahara which are not subject to controls by those authorities, including products originating in the part of the territory of Western Sahara controlled by Front Polisario.

149 It follows that the General Court relied on an incorrect premiss in order to find, in paragraph 323 of the judgment under appeal, that the expression of the people of Western Sahara's consent to the agreement at issue had to be explicit.

150 However, it should be borne in mind that, if the grounds of a decision of the General Court reveal an infringement of EU law, but the operative part of that decision can be seen to be well founded on other legal grounds, that infringement is not capable of leading to the setting aside of that decision and a substitution of grounds must be made (judgment of 17 January 2023, *Spain* v *Commission*, C-632/20 P, EU:C:2023:28, paragraph 48 and the case-law cited).

151 It is therefore necessary to verify whether the operative part of the judgment under appeal, inasmuch as it annulled the decision at issue, can be seen to be well founded on legal grounds other than those vitiated by the error identified in paragraphs 146 to 149 of the present judgment.

152 In that regard, it should be noted that customary international law does not provide that the consent of a third party that is subject to an agreement which confers a right on that third party is to be expressed in a particular form (see, to that effect, judgment of the Permanent Court of International Justice of 7 June 1932, '*Free Zones of Upper Savoy and the District of Gex*', PCIJ Reports 1927, Series A/B, No 46, p. 148). It follows that customary international law does not exclude the possibility that such consent may be granted implicitly in certain circumstances. Thus, in the particular case of a people of a non-self-governing territory, the consent of that people to an international agreement in respect of which it has the status of a third party and which is to be applied in the territory to which its right to self-determination relates may be presumed so long as two conditions are satisfied.

153 First, the agreement in question must not give rise to an obligation for that people. Second, the agreement must provide that the people itself, which cannot be adequately represented by the population of the territory to which the right of that people to self-determination relates, receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory's natural resources which is proportional to the degree of that exploitation. That benefit must be accompanied by guarantees that that exploitation will be carried out under conditions consistent with the principle of sustainable development so as to ensure that non-renewable natural resources remain abundantly available and that renewable natural resources, such as fish stocks, are continuously replenished. Lastly, the agreement in question must also provide for a regular control mechanism enabling it to be verified whether the benefit granted to the people in question under that agreement is in fact received by that people.

154 Fulfilment of those conditions is necessary in order to ensure that such an agreement is compatible with the principle, derived from Article 73 of the Charter of the United Nations and enshrined in customary international law, that the interests of the peoples of non-self-governing territories are paramount. It thus contributes to the Union's action on the international scene being based, as provided for in Article 21(1) TEU, on the principles of the Charter of the United Nations and of international law.

155 In the event that the two conditions set out in paragraph 153 of the present judgment are satisfied, the consent of the people concerned must be held to have been obtained. The fact that a movement which presents itself as the legitimate representative of that people objects to that agreement cannot, as such, be sufficient to call in question the existence of such presumed consent.

156 That presumption of consent may nonetheless be reversed so long as legitimate representatives of that people establish that the system of benefits conferred on that people by the agreement in question, or the regular control mechanism which must accompany it, does not satisfy the conditions set out in paragraph 153 of the present judgment. It is, where appropriate, for the EU judicature to determine that question, with a view to assessing, in particular, whether that agreement adequately preserves the right of the people in question to self-determination or the permanent sovereignty over natural resources which derives from that right and from Article 73 of the Charter of the United Nations. It is also open to the Commission, the Council, the European Parliament, and any Member State to obtain, even before an agreement between the European Union and the Kingdom of Morocco providing for such a system of benefits is signed or concluded, the opinion of the Court regarding the compatibility of the envisaged agreement with the provisions of the Treaties, in particular Article 21(1) TEU.

157 In this instance, regarding the first of the two conditions set out in paragraph 153 of the present judgment, that condition must be regarded as satisfied. For the reasons set out in paragraphs 147 and 148 of the present judgment, the agreement at issue, although it changes the legal situation of the people of Western Sahara in EU law with regard to the right to self-determination which that people holds in respect of that territory, does not give rise to legal obligations for that people as a subject of international law.

158 Regarding the second condition, it must be pointed out that any benefit for the people of Western Sahara which displays the characteristics listed in paragraph 153 of the present judgment is manifestly absent from the agreement at issue, as can be seen from, inter alia, the answers given by the Commission to the questions put by the Court of Justice at the hearing before that court.

159 In particular, as was correctly stated by the General Court in paragraphs 318 and 319 of the judgment under appeal, the agreement at issue is not intended to confer rights on the people of Western Sahara as a third party to that agreement. It is the Kingdom of Morocco, as a party to the agreement at issue, which is the beneficiary of the tariff preferences granted by the European Union to products originating in Western Sahara under that agreement. In addition, the Commission explained at the hearing before the Court of Justice that the effect of that agreement was to include products originating in Western Sahara in the scope of the Association Agreement and thus to place them on an equal footing, as regards tariff preferences, with Moroccan products, as well as with products originating in Algeria and Mauritania, which also benefit from tariff preferences.

160 It follows that the people of Western Sahara cannot be presumed to have given its consent to the application of the agreement at issue in that territory.

161 It should be specified that the possibility of presumed consent in accordance with paragraphs 152 to 155 of the present judgment cannot be called in question by the fact that Article 73 of the Charter of the United Nations, relating to non-self-governing territories, refers to the ‘peoples’ and the ‘inhabitants’ of those territories and defines as a ‘sacred trust’ the obligation to promote their well-being to the utmost, thereby covering, in the case of Western Sahara, a part of the ‘peoples’ of that territory which is not included in the ‘people’ of Western Sahara. In that regard, it is considered as being essential in Resolution 2703 (2023) of the United Nations Security Council, referred to in paragraph 31 of the present judgment, that negotiations progress in order that the quality of life of the inhabitants of Western Sahara improve in all respects. While an agreement should, in the future, benefit the people of Western Sahara in accordance with the

requirements set out in paragraph 153 of the present judgment, the possibility that that agreement might also benefit the inhabitants of that territory in general is not such as to prevent a finding of presumed consent on the part of that people.

162 Having regard, in addition, to the finding in paragraph 145 of the present judgment that the consultation process conducted by the Commission and by the EEAS was not capable of establishing such consent on the part of that people, the conclusion of the General Court, in paragraph 391 of the judgment under appeal, that, in adopting the decision at issue, the Council had not taken sufficient account of all the relevant factors concerning the situation in Western Sahara and that the Council and the Commission had been wrong to take the view that the current situation in that territory did not make it possible to ascertain the existence of consent on the part of the people of Western Sahara to the agreement at issue, must be held to be well founded.

163 The fourth ground of the appeal in Case C-779/21 P and the fourth ground of the appeal in Case C-799/21 P must therefore be rejected as unfounded.

The fifth ground of the appeal in Case C-779/21 P and the third ground of the appeal in Case C-799/21 P, alleging that the General Court erred in law as regards the possibility of relying on international law

Arguments of the parties

164 The Commission, by its fifth ground of appeal, and the Council, by its third ground of appeal, claim that the General Court erred in law as regards whether rules of international law may be relied upon in the context of an action concerning the validity of a decision concluding an international agreement by the European Union. Those grounds of appeal are directed against the judgment under appeal inasmuch as the General Court held, in paragraph 297 of that judgment, that Front Polisario could rely on the principle of self-determination, as well as the principle of the relative effect of treaties, and that the third plea raised before it was not, therefore, ineffective.

165 Those institutions recall, in particular, the case-law according to which the principles of customary international law may not be relied upon by an individual for the purposes of the examination, by the Court of Justice, of the validity of an act of the Union unless they are capable of calling into question the competence of the Union to adopt that act and the act in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in that individual's regard (see, to that effect, judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 107).

166 The Council also emphasises that, if the rules of international law can be relied upon, review by the Court of Justice is limited, in any event, to whether there are manifest errors of assessment by the institutions concerning the conditions for applying those rules in accordance with the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 107). In this instance, the principles of self-determination and of the relative effect of treaties are not capable of calling into question the competence of the Union, as the Court of Justice has already implicitly indicated that international law does not prevent a treaty from being capable, by way of derogation from the general rule, of binding a State with regard to another territory, which the General Court explicitly confirmed by rejecting the plea

alleging that the Council lacked competence to conclude the agreement at issue. In any event, the relative effect of treaties does not concern the validity of an agreement but the question whether that agreement can be relied upon against another person.

167 The French Republic indicates in that regard that, even if the principle of the relative effect of treaties could be relied on and had been breached in this instance, such a breach would not entail the invalidity of the decision at issue in so far as, by virtue of that principle, the validity of a treaty is not conditional upon the consent of a third party.

168 Front Polisario contests those arguments.

Findings of the Court

169 The General Court recalled, in paragraph 284 of the judgment under appeal, that, in paragraph 107 of the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), the Court of Justice had held that the principles of customary international law referred to in paragraph 103 of that judgment could be relied upon by an individual for the purposes of the examination, by the Court of Justice, of the validity of an act of the Union only in so far as, first, those principles were capable of calling into question the competence of the Union to adopt that act, and, second, the act in question was liable to affect rights which the individual derived from EU law or to create obligations under EU law in that individual's regard. The General Court indicated that the case which had given rise to that judgment concerned the principle that each State has complete and exclusive sovereignty over its airspace, the principle that no State may legitimately claim to subject any part of the high seas to its sovereignty, and the principle of freedom to fly over the high seas.

170 It held, inter alia, in paragraph 276 of the judgment under appeal, that, as regards the possibility of relying on the principles of international law interpreted by the Court of Justice, in particular the principle of self-determination and the principle of the relative effect of treaties, first of all, the EU judicature has jurisdiction to assess the compatibility of a decision concluding an international agreement with the rules of international law in particular, as the European Union must exercise its powers in compliance with those rules, which are binding on it under the Treaties. Next, in paragraph 279 of the judgment under appeal, the General Court recalled that the Court of Justice had held, in paragraphs 88 and 89 of the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), that 'the right to self-determination constituted a legally enforceable right *erga omnes* and one of the essential principles of international law and that, as such, it formed part of the rules of international law applicable to relations between the European Union and the Kingdom of Morocco, which the EU Courts were required to take into account'.

171 It concluded, in paragraph 291 of the judgment under appeal, that, 'in the present case, the possibility of relying on the principle of self-determination and … the principle of the relative effect of treaties cannot be assessed in the light of the considerations set out in paragraphs 107 to 109 of the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), since those considerations were based on an assessment of the particular circumstances of that case, relating to the nature of the principles of international law relied on and of the contested act and to the legal situation of the applicants in the main proceedings, which are not comparable with the circumstances of the present case'. In particular, according to the General Court, 'the possibility of relying on the two principles referred to above cannot be limited, in the present case, to challenging the competence of the European Union to

adopt [the decision at issue], since, on the one hand, [Front Polisario] relies on clear, precise and unconditional obligations that were incumbent on the European Union when it adopted that decision and, on the other hand, that reliance is intended to ensure respect for the rights of a third party to the agreement where those rights are liable to be affected by the breach of the said obligations'.

172 That reasoning is not vitiated by errors of law.

173 Indeed, the European Union is bound, in accordance with settled case-law, when exercising its powers, to observe international law in its entirety, including the rules and principles of general and customary international law, as well as the provisions of international conventions that are binding on it (see, to that effect, judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraph 47 and the case-law cited).

174 It follows that the Court of Justice has jurisdiction, in the context of an action for annulment, to assess whether an international agreement concluded by the European Union is compatible with the rules of international law which, in accordance with the Treaties, are binding on the Union. The review of validity which the Court of Justice may be led to carry out with regard to the act by which the European Union has concluded such an international agreement is capable of encompassing the legality of that act in the light of the actual content of the international agreement in question (see, to that effect, judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraphs 48 to 51 and the case-law cited).

175 Thus, the General Court could correctly consider that the principle of self-determination and the principle of the relative effect of treaties could be relied upon in connection with the review of the validity of the decision at issue.

176 Accordingly, the argument, put forward by the Commission and the Council, that it must be inferred from the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), that those principles cannot be relied upon in connection with the review of the validity of the decision at issue cannot succeed.

177 As regards the complaint, put forward by the Council, that the review by the EU judicature of whether an act of the Union complies with such rules of international law must be confined to whether there are manifest errors of assessment, that complaint is, in essence, indissociable from the complaint, put forward in connection with the fourth grounds of the appeals, alleging that the General Court disregarded the Council's discretion in the sphere of external relations. It must therefore be rejected for the same reasons as those set out in paragraph 134 of the present judgment.

178 Consequently, the fifth ground of the appeal in Case C-779/21 P and the third ground of the appeal in Case C-799/21 P must be rejected as unfounded.

179 As none of the grounds raised by the Commission and the Council in support of the appeals in Cases C-779/21 P and C-799/21 P have been accepted, those appeals must be dismissed in their entirety.

The claims put forward in the alternative by the Council and the Commission

Arguments of the parties

180 In the alternative, the Council, emphasising the risk, in the event of the annulment of the decision at issue, of serious negative consequences for the external action of the European Union, and of the legal certainty of the international commitments to which it has agreed and which are binding on the institutions and the Member States being called in question, considers it necessary, in the event that the Court dismisses the appeal brought against the judgment under appeal, for the Court to order that the effects of the decision at issue are to be maintained for a period of 12 months.

181 For its part, the Commission considers that it would be desirable to maintain the effects of the decision at issue for a year and a half, in the event that the Court concludes that the annulment of that decision is justified on grounds other than those indicated in the judgment under appeal and in the event that it is possible to infer from the findings of the Court that there is a realistic possibility that an agreement covering Western Sahara may nonetheless be concluded with the Kingdom of Morocco, so as to enable the negotiations necessary for the adoption of the decisions of the Council on the signing and conclusion of such an agreement.

182 Front Polisario objects to those claims.

Findings of the Court

183 According to the wording of the second paragraph of Article 264 TFEU, the Court may, if it considers this necessary, state which of the effects of an act which it has declared void are to be considered definitive.

184 In that regard, it is apparent from the case-law of the Court that, on grounds of legal certainty, the effects of such an act may be maintained, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the parties concerned (judgment of 1 March 2022, *Commission* v *Council (Agreement with the Republic of Korea)*, C-275/20, EU:C:2022:142, paragraph 54 and the case-law cited).

185 In this instance, the annulment of the decision at issue, without its effects being maintained for a limited period, would be liable to give rise to serious negative consequences for the external action of the European Union and to call in question the legal certainty of the international commitments to which it has agreed and which are binding on the EU institutions and the Member States. The purpose of the decision at issue was to approve the agreement at issue on behalf of the Union, with that agreement entering into force on 19 July 2019.

186 Consequently, it is necessary to order, for reasons of legal certainty, that the effects of the decision at issue are to be maintained for a period of 12 months from the date of delivery of the present judgment.

Costs

187 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

188 Under Article 138(1) of those rules, applicable to appeal proceedings pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

189 In this instance, as Front Polisario has applied for costs and the Council and the Commission have been unsuccessful, those institutions must be ordered to bear their own costs and to pay those incurred by Front Polisario in connection with the present appeals.

190 Article 140(1) of the Rules of Procedure, also applicable to appeal proceedings pursuant to Article 184(1) of those rules, provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

191 In this instance, the Kingdom of Belgium, Hungary, the Portuguese Republic and the Slovak Republic, interveners in the appeal in Case C-799/21, the Kingdom of Spain, intervener in the appeals in Cases C-779/21 and C-799/21, as well as the French Republic, intervener at first instance, are to bear their own costs.

192 Lastly, Article 140(3) of the Rules of Procedure, also applicable to appeal proceedings pursuant to Article 184(1) of those rules, provides, inter alia, that the Court may order an intervener other than a Member State or an institution to bear its own costs.

193 In this instance, it is appropriate to order Comader to bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeals;**

2. **Orders that the effects of Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, are to be maintained for a period of 12 months from the date of delivery of the present judgment;**

3. **Orders the European Commission and the Council of the European Union to bear their own costs and to pay those incurred by the Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario) in connection with the present appeals;**

4. **Orders the Kingdom of Belgium, the Kingdom of Spain, Hungary, the Portuguese Republic, the Slovak Republic, the French Republic and the Confédération marocaine de l'agriculture et du développement rural (Comader) to bear their own costs.**

[Signatures]