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RESEARCH ARTICLE

# It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union

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The EU's international agreements with Morocco on trade in agricultural and fishery products have drawn criticism due to their application to the disputed territory of Western Sahara, a territory that remains on the list of non-self-governing territories to be decolonised in accordance with the right of self-determination of the indigenous Sahrawi people. Recently, the Sahrawi liberation movement Front Polisario brought an action for annulment before the General Court of the European Union (GC) against the Council Decision approving the conclusion of one such agreement, alleging multiple violations of European and international legal norms. Interestingly, although the GC concurred by annulling the Decision insofar as it applies to Western Sahara, it chose to exclusively base its judgment on EU fundamental rights, invoking the EU's failure to ensure that the fundamental rights of the Sahrawi people were not infringed by applying the agreements to Western Sahara. By summarily setting aside Front Polisario's other claims, several relevant questions of applicable international and European law, which warrant further discussion, remain. This article examines these questions using the GC's judgment in Front Polisario, thereby combining general matters of international and European law with the specific circumstances of the EU-Morocco relations and Western Sahara.

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**Keywords:** European Union; International law; General Court; Front Polisario, Western Sahara; Self-determination; Fundamental rights; EU-Morocco trade relations

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## I. Introduction

In December 2015, the General Court (GC) of the European Union (EU) delivered its judgment in Case T-512/12, or *Front Polisario v Council* (currently under appeal before the European Court of Justice),<sup>1</sup> an action for annulment brought by the national liberation movement Front Polisario<sup>2</sup> against Council Decision 2012/497/EU, which approved the conclusion of an agreement between the EU and Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products and introduced new protocols and amendments to the 2000 EU-Morocco Association Agreement.<sup>3</sup> The main point of contention was the application of the contested agreement to the territory of Western Sahara, which is largely under the effective control of Morocco but is not internationally recognised as part

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<sup>1</sup> Case C-104/16 P *Council of the European Union v Front Polisario and Commission* (pending).

<sup>2</sup> In full, *Front Popular de Liberación de Saguía el Hamra y Río de Oro* or Popular Front for the Liberation of Saguia el-Hamra and Río de Oro.

<sup>3</sup> Case T-512/12 *Front Polisario v Council of the European Union*, EU:T:2015:953; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2 (EU-Morocco Association Agreement); Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the 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 [2012] OJ L241/2.

of the Moroccan State and instead remains on the United Nations (UN) list of non-self-governing territories to be decolonised.<sup>4</sup>

The Front Polisario, a movement created in 1973 fighting for the liberation of the Sahrawi people and against the foreign occupation of Western Sahara, claimed infringement of several norms of EU law and international law, most notably breaches of fundamental rights as protected by Article 67 Treaty on the Functioning of the EU (TFEU)<sup>5</sup> and Article 6 Treaty on European Union (TEU),<sup>6</sup> infringement of international agreements concluded by the EU, the right to self-determination, essential provisions of international humanitarian law, and that the contested act was unlawful as a result of the 'the illicit nature of the European Union's conduct under international law'.<sup>7</sup> Although the GC seemed to agree in its judgment that the application of the agreement to Western Sahara was unlawful, annulling the Decision insofar as it applied to Western Sahara, the GC's legal argumentation was not quite as clear. In substance, the GC seemed to apply international legal obligations, including those of Morocco towards the Sahrawi people under the right to self-determination and the laws of administration/occupation, but, in its argumentation the Court invoked the EU's failure to consider the fundamental rights of the inhabitants of the territory as the Council's 'manifest error of assessment', thus establishing the Council's violation of its obligation to consider all the relevant elements of the case before adopting its decision.

The case thus brings with it a number of questions relating to the EU, EU law, and international law: Is international law binding on the EU, and if so, what is its effect both on the EU legal order and on the EU institutions? Can an individual —or, as in *Front Polisario*, an 'autonomous entity' not a legal person— invoke these international norms, and if so, before which Court and through which kind of proceedings? This article examines these questions from both a general and a specific viewpoint, using (the answers to) the general questions to analyse the *Front Polisario* case and the reasoning of the GC. To this end, the article first provides an overview of the legal and historical background of the Western Sahara dispute (Part II), moves on to the binding force and effect of international law on the EU and the EU legal order and the applicable principles of international law (Part III), then discusses the ramifications of EU's international agreements' incompatibility with international and/or EU law (Part IV), and concludes with some considerations and future prospects of the Western Sahara situation and the EU's role and obligations (Part V).

## II. Background of the Dispute

### A. Historical Background

In 1963, the UN Special Committee on Decolonization declared Western Sahara,<sup>8</sup> a Spanish colony since 1884,<sup>9</sup> a 'non-self-governing territory to be decolonised' in accordance with UN General Assembly (UNGA) Resolution 1514 (XV).<sup>10</sup> Two years later, the UNGA adopted Resolution 2072 (XX), in which it requested Spain, as the administering power, to decolonise the territory.<sup>11</sup> In subsequent resolutions, the UNGA repeatedly invited Spain to organise a referendum on the self-determination of the Sahrawi people under the auspices of the UN.<sup>12</sup> However, when the Spanish administration eventually announced to organise a referendum in the first half of 1975,<sup>13</sup> Morocco and Mauritania put a spoke in the wheel by raising historical claims towards the territory of Western Sahara.<sup>14</sup> Upon their request, the UNGA decided to obtain an

<sup>4</sup> UNGA 'Report of the Committee on Information from Non-Self-Governing Territories' UN GAOR 18th Session Supp No 14 (1963) UN Doc A/5514, Annex III.

<sup>5</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU).

<sup>6</sup> Consolidated version of the Treaty on European Union [2008] OJ C115/13 (TEU).

<sup>7</sup> *Front Polisario* (n 3) para 115.

<sup>8</sup> Until the termination of Spain's presence in the territory in 1976, most of the official UN documents referred to 'Spanish Sahara' instead of 'Western Sahara'. For reasons of legibility the designation 'Western Sahara' is used throughout the paper.

<sup>9</sup> cf *Western Sahara* (Advisory Opinion) (1975) ICJ Rep 12, 77.

<sup>10</sup> See UN Doc A/5514 (n 4) Annex III: List of Non-Self-Governing Territories under Chapter XI of the Charter at 31 December 1962 classified by geographical region; Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960) (adopted by 89 votes to none; 9 abstentions).

<sup>11</sup> UNGA Res 2072 (XX) (17 December 1965).

<sup>12</sup> UNGA Res 2229 (XXI) (20 December 1966); UNGA Res 2354 (XXII) (19 December 1967); UNGA Res 2428 (XXIII) (18 December 1968); UNGA Res 2591 (XXIV) (16 December 1969); UNGA Res 2711 (XXV) (14 December 1970); UNGA Res 2983 (XXVII) (14 December 1972); UNGA Res 3162 (XXVIII) (14 December 1973). The OAU Council of Ministers called on Spain to hold a self-determination referendum, see the Organization for African Unity (Council of Ministers) 'Resolution on the Situation in Territories under Portuguese Domination – Other Territories' (OAU Rabat 1972) CM/Res 272 (XIX).

<sup>13</sup> UNGA 'Letter dated 20 August 1974 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General' (20 August 1974) UN Doc A/9714.

<sup>14</sup> Even though Morocco and Mauritania, which share borders with Western Sahara, supported self-determination for Western Sahara until the early 1970s, as both states genuinely believed that if given the chance the Sahrawi people would opt to join them, this

advisory opinion of the International Court of Justice (ICJ) relating to the Moroccan-Mauritanian claims over Western Sahara and potential implications on the issue of self-determination of the Sahrawi population.<sup>15</sup> The Court found that neither Morocco nor Mauritania could claim any territorial sovereignty over the territory of Western Sahara, and negated the existence of legal ties of such a nature that might affect the decolonisation or the right to self-determination of the peoples of Western Sahara.<sup>16</sup> Nonetheless, Morocco saw its claims towards Western Sahara confirmed by the Court,<sup>17</sup> and acted accordingly: On 6 November 1975 Morocco launched the so-called 'Green March', a march of 350,000 Moroccans, then a number four times the size of the Sahrawi population,<sup>18</sup> into the territory of Western Sahara.<sup>19</sup> Although after several days the marchers were pulled back to a camp in Tarfaya, about thirty kilometres from the Western Saharan border,<sup>20</sup> the prospect of an open conflict with Morocco, with all its domestic and geopolitical ramifications, eventually prompted Spain to reach an agreement with Morocco and with Mauritania,<sup>21</sup> which had aligned with Morocco in 1974/1975.<sup>22</sup> In the so-called 'Declaration of Principles on Western Sahara' Spain agreed to terminate its presence by the end of February 1976 and to transfer its powers and responsibilities as the administering power of the territory to an interim tripartite administration, composed of a Spanish, a Moroccan and a Mauritanian representative.<sup>23</sup> Following the Declaration, Spain began to gradually withdraw its forces and administrative personnel, with Morocco and Mauritania simultaneously establishing a military and administrative presence in order to avoid a power vacuum.<sup>24</sup> Once Spain had completely terminated its presence in Western Sahara,<sup>25</sup> the Front Polisario seized the opportunity and proclaimed the Saharawi Arab Democratic Republic (SADR) on a small strip of land in the east of the territory.<sup>26</sup> By then the Front Polisario, which had opposed Spain's rule since its creation in 1973, fought its guerrilla war against Moroccan and Mauritanian occupation.<sup>27</sup> Mauritania, financially and militarily troubled by administering and defending

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changed when it became clear that the outcome of a referendum could not be predicted with certainty, cf Thomas M Franck, 'The Stealing of the Sahara' (1976) 70 *American Journal of International Law* 694, 702; John Damis, *Conflict in Northwest Africa: The Western Sahara Dispute* (Hoover Institution Press 1983) 31–32, 51–52. According to the 'Report of the United Nations Mission to Spanish Sahara' of 1975 (annexed to UNGA 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and People – Volume III', UN GAOR 30<sup>th</sup> Session Supp No 23 (1977) UN Doc A/10023/Rev 1) 'the majority of the population within the Spanish Sahara was manifestly in favour of independence.'

<sup>15</sup> UNGA Res 3292 (XXIX) (13 December 1974).

<sup>16</sup> *Western Sahara* (n 9) para 162.

<sup>17</sup> See Press Release of the Permanent Mission of Morocco to the UN of 16 October 1975 as discussed in UNSC Verbatim Record (20 October 1975) UN Doc S/PV/1849, para 25.

<sup>18</sup> According to the census undertaken by Spanish authorities in 1974, a prerequisite for the self-determination referendum, the population of Western Sahara amounted to 95,019, of whom 73,497 were indigenous Saharans. The rest were mostly people from Europe or other countries of Africa who temporarily resided in the territory. See 'Report of the United Nations Mission to Spanish Sahara' (n 14) 38.

<sup>19</sup> cf Yahia H Zoubir, 'The Western Sahara Conflict: A Case Study in Failure of Prenegotiation and Prolongation of Conflict' (1996) 26 *California Western International Law Journal* 173, 176–177. While denoted as an 'invasion' by the Spanish Government (see UNSC 'Letter dated 18 October 1975 from the Permanent Representative of Spain to the United Nations addressed to the President of the Security Council' (18 October 1975) UN Doc S/11851), the Government of Morocco stressed it to be an 'peaceful march' (see UNSC 'Letter dated 19 October 1975 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council' (19 October 1975) UN Doc S/11852). Either way, the UN Security Council deplored the holding of the march and called upon Morocco to immediately withdraw all participants in the march from the territory of Western Sahara (see UNSC Res 380 (6 November 1975) UN Doc S/RES/380).

<sup>20</sup> The volunteers participating in the March had been withdrawn on 12 November 1975. See UNSC 'Third Report by the Secretary General in Pursuance of Resolution 379 (1975) relating to the Situation concerning Western Sahara' (17 November 1975) UN Doc S/11880, 1.

<sup>21</sup> cf Tony Hodges, *Western Sahara: The Roots of a Desert War* (Lawrence Hill 1983) 210–225; see also UNSC 'Letter dated 6 November 1975 from the Charge d'affaires, a.i. of the Permanent Mission of Spain to the United Nations addressed to the President of the Security Council' (7 November 1975) UN Doc S/11871, however revoked by the Ambassador of Spain at Rabat, Morocco (see UNSC 'Letter dated 7 November 1975 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council' (7 November 1975) UN Doc S/11873).

<sup>22</sup> cf Hodges (n 21) 241.

<sup>23</sup> cf 'Declaration of Principles on Western Sahara' with Morocco and Mauritania of 14 November 1975, contained in Annex III of UN Doc S/11880 (n 20).

<sup>24</sup> cf Damis (n 14) 70.

<sup>25</sup> See UNGA 'Letter dated 26 February 1976 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General' (26 February 1976) UN Doc A/31/56.

<sup>26</sup> On 27 February 1976, the SADR was created as 'a free, independent, sovereign state ruled by an Arab national democratic system of progressive unionist orientation and of Islamic religion', as cited in Damis (n 14) 75. To date, neither the EU nor its Member States have recognised the SADR as an independent state. See *Front Polisario* (n 3) para 60.

<sup>27</sup> Zoubir (n 19) 177.

'its'<sup>28</sup> share of the territory,<sup>29</sup> retreated in August 1979, by concluding a peace treaty with Front Polisario in which it relinquished all of its claims towards Western Sahara.<sup>30</sup> For Morocco, who disregarded the Mauritanian-Sahrawi peace treaty and extended its control to the territory abandoned by Mauritania,<sup>31</sup> the so-called Western Sahara War lasted until a ceasefire came into effect in September 1991 as part of a 'Settlement Plan' the UN and the Organisation of African Unity had brokered between Morocco and the Front Polisario in a joint effort of good offices.<sup>32</sup> In order to implement the plan, particularly the holding of a referendum on the future of the territory, the Security Council established a UN Mission for the Referendum in Western Sahara (MINURSO).<sup>33</sup> Nevertheless, the efforts to organise a referendum have foundered to this day, mainly due to a stalemate regarding the preparation of the list of people eligible to vote.<sup>34</sup>

### **B. The Current Status of Western Sahara**

Geographically, Western Sahara is divided by a 2,700 km long sand berm stretching the length of the territory, which marks the frontier between the territory held by Morocco –located west of the berm and roughly comprising 80 per cent of Western Sahara– and the territory under the control of Front Polisario, claimed as the territory of the SADR.<sup>35</sup> Legally speaking, the Moroccan presence has not altered the status of the Western Sahara as a non-self-governing territory,<sup>36</sup> to which the principle of self-determination applies and which, accordingly, should be decolonised as outlined in UNGA Resolutions 1514 (XV) and 1541 (XV).<sup>37</sup> Consequently, the people of Western Sahara must be given the opportunity to freely express their wishes regarding the future status of Western Sahara,<sup>38</sup> including the option of forming an independent state.<sup>39</sup> The Declaration of Principles on Western Sahara had no impact on these findings, as it neither transferred sovereignty over Western Sahara to Morocco or Mauritania, nor did it confer upon them the status of an administering power, a status which Spain could not have transferred singlehandedly.<sup>40</sup> It is therefore only consistent that the UN has always regarded Spain as the administering power of Western Sahara,<sup>41</sup> even though Spain considers itself exempt from any international legal responsibilities relating to the administration of Western Sahara and therefore does not transmit information under Article 73(e) UN Charter.<sup>42</sup> However, this does not alter the fact that Morocco exercises effective control over most of the territory of

<sup>28</sup> In April 1976, Morocco and Mauritania had agreed on partition of the territory of Western Sahara. See Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco (adopted 14 April 1976, entered into force 10 November 1976) 1035 UNTS 118.

<sup>29</sup> cf Hodges (n 21) 241–246.

<sup>30</sup> See 'Accord Mauritaniano-Sahraoui, signé à Alger le 10 août 1979' and 'Déclaration du Premier Ministre de la République Mauritanie, en date du 14 août 1979', annexed to UNGA/UNSC 'Letter dated 18 August 1979 from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General' (20 August 1979) UN Doc A/34/427-S/13503; see also Damis (n 14) 29.

<sup>31</sup> cf UNGA Res 35/19 (11 November 1980); Zoubir (n 19) 181.

<sup>32</sup> The settlement proposals by the UN Secretary-General and the OAU Chairman of the assembly of Heads of State and Government had in principle been agreed with by Morocco and the Front Polisario on 30 August 1988 (see UNSC 'Report of the Secretary-General on the Situation Concerning Western Sahara' (18 June 1990) UN Doc S/21360, 4) and have been endorsed by the Security Council in UNSC Res 690 (29 April 1991) UN Doc S/RES/690.

<sup>33</sup> UNSC Res 690 (29 April 1991) UN Doc S/RES/690.

<sup>34</sup> Even though the Settlement Plan is quite clear on who shall be eligible to vote: all Saharans counted in the 1974 census undertaken by the Spanish authorities aged 18 years or over as well as Saharan refugees living outside the territory of Western Sahara. See UN Doc S/21360 (n 32) 9. For a comprehensive account of the impasse to put an end to the conflict in Western Sahara, see Erik Jensen, *Western Sahara: Anatomy of a Stalemate* (Lynne Rienner Publishers 2005).

<sup>35</sup> The sand berm was built by Morocco from 1980 to 1987 for defensive purposes.

<sup>36</sup> cf UNSC 'Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council' (12 February 2002) UN Doc S/2002/161, para 6 (Corell Opinion). For an assessment of the Corell Opinion, see Marcel Brus, 'The Legality of Exploring and Exploiting Minerals Resources in Western Sahara' in Karin Arts and Pedro Pinto Eite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2007) 201.

<sup>37</sup> cf *Western Sahara* (n 9) paras 54–70, 162. The right of self-determination of the people of Western Sahara is annually reiterated in the resolutions of the Security Council by which the mandate of MINURSO is prolonged: lastly by UNSC Res 2285 (29 April 2016) UN Doc S/RES/2285.

<sup>38</sup> cf *Western Sahara* (n 9) paras 57–59, 162; see also UNGA Res 1541 (XV) (15 December 1960) Annex, Principles VII and IX.

<sup>39</sup> See UNGA Res 1541 (XV) (15 December 1960) Annex, Principle VI; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (adopted without a vote) (Friendly Relations Declaration). See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (2010) ICJ Rep 79.

<sup>40</sup> cf Corell Opinion (n 36) para 6.

<sup>41</sup> UNGA Res 3458A (XXX) (10 December 1975). However, it also took notice of the agreement between Spain, Morocco and Mauritania in 1975: UNGA Res 3458B (XXX) (10 December 1975).

<sup>42</sup> See UN Doc A/31/56 (n 25); see also Annex to the Report of the Secretary-General, 'Information from Non-Self-Governing-Territories transmitted under Article 73(e) of the Charter of the United Nations' (2016) UN Doc A/71/68, 3. On the obligations of Spain as an administering power, see Carlos R Miguel, 'Spain's Legal Obligations as Administering Power of Western Sahara' in Neville

Western Sahara, which leads to the question of Morocco's status in relation to Western Sahara. Any possible answer to this question strongly depends on how one assesses the historical events surrounding Morocco's seizure of power over Western Sahara—a task beyond the scope of this paper. We therefore limit ourselves to the two main approaches towards Morocco's status relating to the parts of Western Sahara it controls, whereby Morocco is characterised as either a *de facto* administering power<sup>43</sup> or as an occupying power.<sup>44</sup> A third approach, advocated solely by Morocco, according to which Western Sahara forms an integral part of the Moroccan State,<sup>45</sup> has to be rejected for two reasons: Firstly, Morocco has never been the territorial sovereign of Western Sahara,<sup>46</sup> the consequence being that Morocco establishing military and administrative control cannot be qualified as a 'reintegration' of the Western Sahara into the Moroccan State.<sup>47</sup> And secondly, a non-self-governing territory, such as Western Sahara, has a status separate and distinct from the territory of the State administering it, a status which may only be modified or cease to exist as a result of the exercise of the right to self-determination of the peoples of the territory concerned.<sup>48</sup>

For the case at hand, as will be shown later, the classification of Morocco as a *de facto* administering or as an occupying power does not substantially alter the assessment of the legality of the contested EU-Morocco Agreement.

### III. The European Union's International Agreements and International Law

#### A. The Binding Force of International Law

Traditionally, international law was conceived as a system of rules governing the rights and duties of sovereign States and their international relations. In the last decades, however, international organisations have been exercising more and more powers, and are increasingly influencing and regulating international and domestic topics and issues. It is generally accepted that international organisations, as subjects of international law, are 'bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.<sup>49</sup> Although at first sight a clear statement confirming the binding application of international law to international organisations, on closer examination it becomes clear that some uncertainties remain. Considering that various rules of international law, especially those tailored to States and their specific rights and duties, are not relevant for and cannot be applied to international organisations,<sup>50</sup> the question remains which rules are binding on international organisations, and in which circumstances.

Botha, Michèle Olivier and Delarey van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study* (Unisa 2010) 222.

<sup>43</sup> An approach pursued by Hans Corell, former UN Legal Counsel and endorsed by the Commission, see Corell Opinion (n 36) para 6 and *Front Polisario* (n 3) para 56.

<sup>44</sup> Scholarly literature especially subscribes to the thesis of occupation, see eg Christine Chinkin, 'Laws of Occupation' in Neville Botha, Michèle Olivier and Delarey van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study* (Unisa 2010) 196; Martin Dawidowicz, 'Trading Fish or Human Rights in Western Sahara?' in Duncan French (ed), *Statehood and Self-Determination* (CUP 2013) 250; Eugene Kontorovich, 'Economic Dealings with Occupied Territories' (2015) 53 *Columbia Journal of Transnational Law* 584; Ben Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' (2015) 27 *Global Change, Peace & Security* 301; Jeffrey J Smith, 'The Taking of the Sahara: The Role of Natural Resources in the Continuing Occupation of Western Sahara' (2015) 27 *Global Change, Peace & Security* 263. Some authors also advocate the approach that Morocco annexed large parts of Western Sahara, see eg Franck (n 14) 714, 716; Robert T Vance Jr, 'Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara' (1980–1981) 7 *Yale Journal of World Public Order* 45, 58; Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 171. UN organs, on the other hand, have shown restraint in labelling Morocco's presence in a certain way. Though the UNGA did condemn Morocco's presence in Western Sahara as belligerent occupation in 1979 and 1980. See UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37 and UNGA Res 35/15 (11 November 1980) UN Doc A/RES/35/15. Subsequent resolutions and reports, however, omit such reference.

<sup>45</sup> On 6 November 2014, the 40th anniversary of the Green March, King Mohammed VI proclaimed that 'the Sahara will remain part of Morocco until the end of time' and that 'Morocco's sovereignty over its entire territory is effective, inalienable and non-negotiable', see UNSC 'Report of the Secretary-General on the Situation Concerning Western Sahara' (10 April 2015) UN Doc S/2015/246, para 6. See also UNSC 'Report of the Secretary-General on the Situation Concerning Western Sahara' (19 April 2016) UN Doc S/2016/355, para 90, which states that 'Morocco considers that Western Sahara is already part of Morocco'. In fact, three of Morocco's twelve regions, namely Guelmim-Oued Noun, Laâyoune-Sakia El Hamra and Dakhla-Oued Ed-Dahab, are entirely or in part located in Western Sahara (see Décret n° 2-15-40 du 1er jourmada I 1436 (20 février 2015) fixant le nombre des régions, leurs dénominations, leurs chefs-lieux ainsi que les préfectures et provinces qui les composent, Bulletin officiel n° 6340 du 14 jourmada I 1436 (5-3-2015)).

<sup>46</sup> As the ICJ clearly refuted Morocco's and Mauritania's historical claims over Western Sahara, see *Western Sahara* (n 9) 77.

<sup>47</sup> Although this is the Moroccan perception. See Hodges (n 21) 224.

<sup>48</sup> See Friendly Relations Declaration (n 39).

<sup>49</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) (1980) ICJ Rep 73, 89–90.

<sup>50</sup> Henry G Schermers and Niels M Blokker, *International Institutional Law* (5th rev edn, Martinus Nijhoff Publishers 2011) para 1572..

When it comes to international law, the European Union (EU) is considered both to be a 'normal' international organisation –in the sense that it is created by international treaties as a subject of international law with international legal personality<sup>51</sup>– and a 'special' or *sui generis* international organisation, based on the 'autonomous' character of the EU legal order and the special role of EU law in the Member State national legal order.<sup>52</sup> The EU Treaties (TEU and TFEU) contain multiple references to international law, stating for example that the Union shall contribute 'to the strict observance and development of international law' in Article 3(5) TEU, or that its external action shall be guided by respect for the principles of the UN Charter and international law in Article 21(1) TEU, with Article 21(2) TEU declaring the consolidation of and support for international law to be an objective of EU external action. Article 21(3) TEU determines that the principles and objectives of Article 21 TEU apply to the Union's external action as a whole, which is confirmed by several other provisions, e.g. Article 205 TFEU, which stipulates that the principles and objectives of Article 21 TEU also guide the EU's external action under the Common Commercial Policy, the cooperation with third States and humanitarian aid, and international agreements.<sup>53</sup> Additionally, Article 216(2) TFEU establishes that international agreements concluded by the EU are binding upon its institutions, and, according to the Court form 'an integral part of Union law'.<sup>54</sup> Even though, in comparison, Article 3(5) and 21(1) TEU may not be as clear on the binding force of international law other than international treaties, the Court has confirmed that the EU is in principle bound by international law, first in the *International Fruit Company* case of 1972,<sup>55</sup> and in several other cases since, whereby the Court confirmed that this includes customary international law.<sup>56</sup>

Because of this generally favourable position towards international law, the EU legal order and the ECJ have often been described as international law friendly, or *völkerrechtsfreundlich*, and the relationship between the European legal order and international law has widely been characterised as 'monist'.<sup>57</sup> This 'monist' conception, traditionally considered to encompass direct effect and primacy of international law within a domestic legal order, in EU practice translated into the acceptance of international agreements as an integral part of the EU legal order<sup>58</sup> and into granting international law a rank between primary and secondary law,<sup>59</sup> acknowledging the invocability of international law to review the legality of EU acts.<sup>60</sup> More recent case law, notably the *Intertanko* and *Kadi* cases,<sup>61</sup> and also elements of older Court decisions, paints a more complex picture, leading authors to suggest that the 'pure' monist approach might have been

<sup>51</sup> See TEU art 47.

<sup>52</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1; Case 6/64 *Flaminio Costa v E.N.E.L.*, EU:C:1964:66; Bart Van Vooren and Ramses A Wessel, *EU External Relations Law: Text, Cases and Materials* (CUP 2014) 208.

<sup>53</sup> Other provisions containing cross-references to the set of principles and objectives stipulated in TEU art 21 are: TEU art 23 (regarding common foreign and security policy), TFEU art 207(1) (regarding common commercial policy), TFEU art 208(1) (regarding development cooperation), TFEU art 212(1) (regarding economic, financial, and technical cooperation with third countries), TFEU art 214(1) (regarding humanitarian aid).

<sup>54</sup> Case 181/73 *R. & V. Haegeman v Belgian State*, EU:C:1974:41, paras 4–5.

<sup>55</sup> Joined Cases C-21/72, C-22/72, C-23/72, and 24/72 *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, EU:C:1972:115.

<sup>56</sup> See eg Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, EU:C:1992:453, paras 9–10; Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and Others*, EU:C:1996:312, paras 24–26; Case T-115/94 *Opel Austria GmbH v Council of the European Communities*, EU:T:1997:3, paras 84, 90; Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz*, EU:C:1998:293, paras 45–46; Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, EU:C:2011:864, paras 101, 123. See generally also Allan Rosas, 'The European Court of Justice and Public International Law' in Jan Wouters, André Nollkaemper and Erika de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (TMC Asser Press 2008) 79.

<sup>57</sup> Ramses A Wessel, 'Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012) 11.

<sup>58</sup> *Haegeman* (n 54); Case C-104/81, *Hauptzollamt Mainz v Kupferberg & Cie*, EU:C:1982:362, paras 13–14.

<sup>59</sup> Case C-61/94 *Commission of the European Communities v Federal Republic of Germany (International Dairy Arrangement)*, EU:C:1996:313; *Racke* (n 56) para 45; Case C-179/97 *Kingdom of Spain v Commission of the European Communities*, EU:C:1999:109; Case C-173/06 *Agrover Srl v Agenzia Dogane Circostrizione Doganale di Genova*, EU:C:2007:612.

<sup>60</sup> The main (and controversial) exception being WTO law, see Case C-149/96, *Portuguese Republic v Council of the European Union*, EU:C:1999:574; Christina Eckes, 'International Law as Law of the EU: The Role of the Court of Justice' (2010) 6 CLEER Working Papers 1, 11.

<sup>61</sup> Case C-308/06 *Intertanko and Others v Secretary of State for Transport*, EU:C:2008:312; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461.

'contaminated'<sup>62</sup> and that the Court seems to employ a more 'dualist' approach towards international law.<sup>63</sup> In short, then, although it has been definitively established that the EU is indeed bound by international law, the Court may reserve the right to decide on the validity, effect and applicability of international law in the EU legal order on a case-by-case basis, especially when there might be a conflict with EU constitutional principles.<sup>64</sup> Or as *Klabbers* puts it:

The better view would seem to be that instead of being particularly *völkerrechtsfreundlich* in general, the EU legal order is mostly friendly in its disposition to international law when being so coincides with, or even strengthens, the protection of its own legal order: this would help explain the positive attitude towards association agreements. But when international law threatens, or even only potentially threatens, the EU legal order, the fences go up and the wagons are circled.<sup>65</sup>

## **B. International Law and EU Decision-making**

With the binding force of international law on the EU established and its applicability in the EU legal order explored above, we turn to the question of the role international law plays when it comes to EU organs concluding international agreements or adopting acts related to the implementation of these agreements. In the *Front Polisario* case, the applicant raised multiple pleas alleging the unlawfulness of the Council act based on infringement of norms of international law, including the right to self-determination and essential provisions of international humanitarian law.<sup>66</sup> These pleas raise a more general question worth asking, namely that of the effect of international law on the decision-making and decision-taking abilities of EU organs. Also here, the ECJ case law provides some general guidance, by stating that the EU (and before it the European Community) 'must respect international law in the exercise of its powers'<sup>67</sup> and that it must comply with international law when adopting acts.<sup>68</sup> After adoption, an EU act 'must be interpreted, and its scope delimited, in light of the relevant rules [of international law]'.<sup>69</sup> Similarly, the primacy of international law over secondary EU law requires that this secondary legislation be, as far as possible, in conformity with international rules.<sup>70</sup> In summary, it can be said that effectively, international law functions as a limit to the scope of the EU's competences, and that the EU and its organs have to consider (conformity with) their obligations under international law when exercising their powers, *e.g.* when concluding international agreements with third States such as the agreements concluded between the EU and Morocco.<sup>71</sup>

<sup>62</sup> Enzo Cannizzaro, 'The Neo-Monism of the European Legal Order' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012) 38, who refers to *Kupferberg* (n 58) and Case C-12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*, EU:C:1987:400, para 14.

<sup>63</sup> Eckes (n 60) 5, 12; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harvard International Law Journal* 1. On monism, dualism, and the Court of Justice, see generally Lando Kirchmair, 'The "Janus Face" of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law' (2012) 4 *Goettingen Journal of International Law* 677.

<sup>64</sup> As in *Kadi* (n 61) paras 283–286, 326. See also Cannizzaro (n 62) 57, who describes the judicial management of conflict as based on a flexible and nuanced approach, and writes that recent legal analysis tends to consider the Court of Justice 'as being entitled to determine the outcome of conflict on a case-by-case basis'.

<sup>65</sup> Jan Klabbers, '*Völkerrechtsfreundlich?* International law and the Union Legal Order' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing 2011) 114.

<sup>66</sup> *Front Polisario* (n 3). *Front Polisario* also alleged that the Council Decision concerned violated the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). Although this point certainly warrants discussion, since the case also concerns the exploitation of waters adjacent to the coast of Western Sahara, the paper, for reasons of space, does not address the validity of the Decision in light of UNCLOS. On this matter, see Smith (n 44) 277.

<sup>67</sup> *Poulsen and Diva* (n 56) para 9; *Racke* (n 56) para 45; *Air Transport Association of America* (n 56) para 123.

<sup>68</sup> *Racke* (n 56) para 45. See also TFEU art 216(2), which stipulates that international agreements concluded by the EU are 'binding upon the institutions of the Union'.

<sup>69</sup> *Air Transport Association of America* (n 56) para 123, referring to *Poulsen and Diva* (n 56) para 9.

<sup>70</sup> See *eg* Case C-286/02 *Bellio F.lli Srl v Prefettura di Treviso*, EU:C:2004:212, para 33; Joined Cases C-447/05 and C-448/05 *Thomson and Vestel France v Administration des douanes et droits indirects*, EU:C:2007:151, para 30; Case C-335/05 *Řízení Letového Provozu ČR, s.p. v Bundesamt für Finanzen*, EU:C:2007:321, para 16.

<sup>71</sup> Notably the EU-Morocco Association Agreement and subsequent implementation and amending Agreements, see above n 3. A salient detail here is that the EU Commission explicitly refers to values such as development of poorer countries, high social standards, and respect for human rights around the world as a basis for their trade policy. See Commission, 'Trade for all – towards a more responsible trade and investment policy' (Communication) COM (2015) 497 final, 22.

## IV. The EU's International Agreements versus its Obligations under International Law

### A. Judicial Review

#### 1. Procedural Aspects: Legal Avenues and Standing before EU Courts

The previous sections discuss the more general questions of the binding force of international law on the EU, and the implications of these obligations for EU action, focusing more generally on the (il)legality of EU action. A separate matter, however, is the question of who can invoke and allege the illegality of EU action, specifically the conclusion of international agreements, before which Court, and in turn, what is the scope of review before the competent Court. In contrast to the ICJ, which relies for its jurisdiction on the consent of the parties currently provided only by a limited number of UN Member States,<sup>72</sup> the ECJ—and to a lesser extent the GC—has been given broad jurisdictional powers and exercises judicial review over the EU, its institutions and its Member States.<sup>73</sup> When it comes to reviewing the EU international agreements on their conformity with international law, there are two main mechanisms of judicial review available to the ECJ and GC:<sup>74</sup> The action for annulment of Article 263 TFEU and the preliminary rulings procedure of Article 267 TFEU. As illustrated by the *Front Polisario* case, actions for annulment allow the ECJ and GC to review the legality of certain acts of EU institutions, including acts approving the conclusion of an international agreement.<sup>75</sup> Similarly, the preliminary rulings procedure allows the ECJ (and, in theory, the GC)<sup>76</sup> to rule on the interpretation of the Treaties, as well as on the validity and interpretation of acts of the Union. Coincidentally, the possibility of review by way of a preliminary ruling has been triggered by the Western Sahara Campaign UK, an NGO supporting the Sahrawi people's claim to self-determination and independence, by lodging an application before the English High Court of Justice<sup>77</sup> raising doubts about the legality of the EU-Morocco Association Agreement and the Fisheries Partnership Agreement (EU-Morocco FPA),<sup>78</sup> which prompted the English Court to refer the matter to the Court.<sup>79</sup>

Whereas preliminary references are made by the domestic courts and tribunals of the EU Member States, actions for annulment can be brought by Member States, designated EU institutions and, in specific circumstances, by natural and legal persons. For individuals, in order to be able to institute proceedings—in addition to fulfilling the general requirements relating to the author and the type of acts—the disputed act must be addressed to them, be of direct and individual concern to them, or must be a regulatory act (not entailing implementation measures) of direct concern to them.<sup>80</sup> Also in this regard the *Front Polisario* case proved interesting, with the GC stating that, in specific cases, an entity could be considered a legal person in the sense of Article 263 TFEU even when it is not incorporated as a legal person under the law of an EU Member State or a third State.<sup>81</sup> Although the GC referred to multiple aspects of *Front Polisario's* actions on the international plane, including its participation in UN-led negotiations and *Front Polisario* signing a

<sup>72</sup> As of 14 July 2016, 72 States have deposited a declaration accepting the Court's compulsory jurisdiction, see 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>> accessed 14 July 2016. Additionally, States can accept the jurisdiction of the Court *ad hoc* or jurisdiction can be provided by the UN Charter of treaties and conventions in force. See generally Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCTAD 355, art 36.

<sup>73</sup> In Case C-294/83 *Parti écologiste "Les Verts" v Parliament*, EU:C:1986:166, para 23, the Court stated that: '[t]he Treaty established the Court as the judicial body responsible for ensuring that both the Member States and the Community institutions comply with the law'. See more generally on the Court's jurisdiction, TFEU art 251.

<sup>74</sup> Apart from the possibility to induce an incidental review of a Union act of general application in any proceeding before the CJEU, in which the said act is at issue; TFEU art 277.

<sup>75</sup> In *Front Polisario* (n 3), the applicant requested the annulment of a Council Decision 2012/497/EU (n 3) on the conclusion of an Agreement between the EU and Morocco.

<sup>76</sup> The jurisdiction of the GC to consider preliminary ruling requests has been provided for since the Treaty of Nice (2001) and has been incorporated in TFEU art 256(3), granting the GC jurisdiction in 'specific areas', but in practice, the Statutes do not yet designate such areas and the GC has not yet actually heard any request for preliminary rulings. See Morten Broberg and Niels Frenger, *Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Union* (Karsten Winterhoff tr, 2nd edn, Nomos 2014) 36–39. For the statistics concerning the judicial activity of the GC, see CJEU, *Annual Report 2015: Judicial Activity* (EU 2016).

<sup>77</sup> *Western Sahara Campaign UK v the Commissioners for her Majesty's Revenue and Customs and the Secretary of State for the Environment Food and Rural Affairs* [2015] EWHC 2898 (Admin).

<sup>78</sup> Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco [2006] OJ L141/4 (FPA). In fact, the Court was already confronted with the question of applicability of the FPA on the waters adjacent to the coast of Western Sahara, but, surprisingly, remained silent on the topic. See Case C-565/13 *Ove Ahlström and Others*, EU:C:2014:2273.

<sup>79</sup> Case C-266/16 *Western Sahara Campaign UK v the Commissioners for her Majesty's Revenue and Customs and the Secretary of State for the Environment Food and Rural Affairs* (pending).

<sup>80</sup> See TFEU art 263.

<sup>81</sup> *Front Polisario* (n 3) paras 50–52.



peace agreement with ‘internationally recognised State’ Mauritania,<sup>82</sup> the Court did not explicitly discuss Front Polisario’s possible legal personality under international law.<sup>83</sup> Instead, the GC opined that the Front Polisario, whose incorporation under Moroccan law would be practically impossible,<sup>84</sup> should be considered a legal person since it has the ‘necessary independence’ to act as a responsible entity in legal relationships, referring to Front Polisario’s statutes and structure and its role as a party to the Western Sahara dispute.<sup>85</sup> Similarly, the GC considered the ‘direct and individual concern’ requirement to be fulfilled, noting that provisions of the contested decision produce effects on the legal situation of the territory of Western Sahara and that these effects directly concern the Front Polisario, since the definitive international status of the territory is yet to be determined in international negotiations in which the Front Polisario is the ‘only other participant’.<sup>86</sup> In this case, the GC thus seems to slightly broaden the Court’s interpretation of standing before the Court. Although it is not uncommon for the Court to consider ‘autonomous entities’ to be legal persons in the sense of Article 263 TFEU,<sup>87</sup> the Court generally uses a strict interpretation of the requirement of ‘direct and individual concern’, especially when it comes to actions brought by ‘public interest associations’.<sup>88</sup>

## 2. Scope of Review: Limitations Placed on the EU Courts

With the admissibility affirmed, the GC moved on to the substance of the case, which brings us to the issue of the actual scope of the judicial review of international agreements on their compatibility with international law. To begin with, it is necessary to consider the scope of review inherent in the two provisions that provide for the Court’s jurisdiction, namely Articles 263 TFEU and 267 TFEU. The preliminary rulings procedure of Article 267 TFEU allows the Court to consider the validity and interpretation of ‘acts’ of EU institutions including –in addition to regulations, directives and decisions– so-called ‘soft law’, *i.e.* recommendations, opinions and communications of EU institutions.<sup>89</sup> In contrast, actions for annulment under Article 263 TFEU, brought by a natural or a legal person, can only be brought against an act ‘intended to produce legal effects vis-à-vis third persons’, meaning, in the case of complaints against international agreements, that the action must be brought against the internal act of approval; the Council Decision approving the conclusion.<sup>90</sup>

In the field of external economic relations, which includes international trade agreements such as the one contested by Front Polisario, the Union’s institutions enjoy a broad margin of appreciation.<sup>91</sup> Review by the Court is thus limited to considering whether the EU institution –in the case of international agreements the Council– ‘made manifest errors of assessment’ in approving the conclusion of the agreement.<sup>92</sup> This is especially so when the Court is asked to review the conformity of an act concluding an agreement with rules of customary international law: Because of the ‘complexity of these rules’ and the ‘imprecision of some of the concepts’ they refer to, the Court can only consider whether the EU institution made a ‘manifest error of

<sup>82</sup> *ibid* para 54. See also Part II.A.

<sup>83</sup> An especially current topic considering Switzerland’s acceptance of Front Polisario’s unilateral declaration undertaking to apply the Geneva Conventions and their Additional Protocols in 2015, see Geneva Call, ‘Geneva Conventions and Armed Movements: An Unprecedented Move’ (4 August 2015) <<http://www.genevacall.org/geneva-conventions-armed-movements-unprecedented-move/>> accessed 15 July 2016.

<sup>84</sup> It is not hard to imagine the difficulties a national liberation movement would encounter when trying to register as a legal person under the national laws of the very State it is trying to gain independence from.

<sup>85</sup> *Front Polisario* (n 3) paras 50–60.

<sup>86</sup> *ibid* paras 108–114; ‘only other participant’ in the original French: ‘le seul autre interlocuteur’, para 113.

<sup>87</sup> Case 175/73 *Union syndicale – Amalgamated European Public Service Union - Brussels, Denise Massa and Roswitha Kortner v Council of the European Communities*, EU:C:1974:95, paras 7–17; Case C-18/74 *General Union of Personnel of European Organisations v Commission of the European Communities*, EU:C:1974:96, paras 3–11; Case C-135/81 *Groupement des Agences de voyages v Commission of the European Communities*, EU:C:1982:371, para 10.

<sup>88</sup> See eg Case 25/62 *Plaumann & Co. v Commission of the European Economic Community*, EU:C:1963:17; Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities*, EU:C:1998:153; Case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA*, EU:C:2004:210, para 36. See also a study on legal standing before EU Courts requested by the European Parliament’s Committee on Legal Affairs; Mariolina Eliantonio and others, ‘Standing Up for Your Right(s) in Europe: A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States’ Courts’ (2012) PE 462.478, 25–51.

<sup>89</sup> Broberg and Frenger (n 76) 114.

<sup>90</sup> TFEU arts 218(5) and 218(6); see also Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 200–202; Case 22/70 *Commission of the European Communities v Council of the European Communities*, EU:C:1971:32 (ERTA); Case C-327/91 *French Republic v Commission of the European Communities*, EU:C:1994:305, paras 14–15.

<sup>91</sup> Case T-572/93 *Odigitria AAE v Council and Commission of the European Communities*, EU:T:1995:131, para 38; *Front Polisario* (n 3) para 164.

<sup>92</sup> *Front Polisario* (n 3) para 224.

appreciation' concerning the application of such rules.<sup>93</sup> To summarise, then, this entails that in its judicial review the Court must check whether the EU institution 'has examined, carefully and impartially, all the relevant elements of the case, elements which support the conclusion drawn from them'.<sup>94</sup>

### 3. Merits: Appraising EU Actions in Light of its International Obligations

Even though the Court is restricted to considering whether there were 'manifest errors of assessment' when reviewing the contested Council Decision, an overview of the law applicable to the case at hand is due since it is indispensable to an evaluation of the GC's assessment. Front Polisario raised several pleas, all of which substantially raise the question whether or not the Union is prohibited under international and EU law to conclude an international agreement applicable to territory controlled by the contracting State, although the latter has no territorial sovereignty over the said territory.<sup>95</sup>

#### *a. The Right to Self-Determination and the Laws of Administration/Occupation*

As to the international principles applicable to this question, the main arguments of the Front Polisario are based on the right to self-determination, including the permanent sovereignty over natural resources and the 'primacy of interests of the people of Western Sahara'.<sup>96</sup> According to the Front Polisario, these principles of international law are not only directly violated by the contested Council Decision, but also indirectly in that the Decision confirms Morocco's 'policy of occupation and economic colonisation'.<sup>97</sup> The GC set aside both arguments by observing that the Front Polisario fell short of demonstrating the existence of a rule of customary international law which prohibits the conclusion of an international treaty applicable to disputed territory.<sup>98</sup> The question of whether there is an absolute prohibition to conclude an international treaty applicable to disputed territory, however, is beside the point. Rather, the Court should have considered whether there is a prohibition on the side of the EU arising from Morocco's conduct in the given case. As a matter of law, Morocco may only exploit the natural resources of Western Sahara if it does so for the benefit or in the interest of the people of Western Sahara: Given that Morocco *de facto* administers a large part of Western Sahara, and given Western Sahara's status as a non-self-governing territory, it seems appropriate to apply the rules governing the powers and responsibilities of an administering power in matters of natural resource activities in such a territory *per analogiam*.<sup>99</sup> Following this line of argumentation, Morocco as the *de facto* administering power of Western Sahara would be bound by Article 73 UN Charter in conjunction with the principle of permanent sovereignty over natural resources: Article 73 UN Charter determines that administering powers recognise 'that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote to the utmost (. . .) the well-being of the inhabitants of these territories'. With recourse to the developments the principle of self-determination has brought with regard to non-self-governing territories, the ICJ concluded that the ultimate objective of the 'sacred trust' assumed by the administering power in relation to a non-self-governing territory was the self-determination and independence of that territory's peoples.<sup>100</sup> The principle of self-determination not only encompasses the right of a people to freely determine their future political status, including the option to form an independent State,<sup>101</sup> but also their permanent sovereignty over natural wealth and resources.<sup>102</sup> The latter principle comprises the right of peoples and nations to freely dispose of the natural resources in their territories in their national interest and in the interest of their well-being<sup>103</sup> and has been reaffirmed

<sup>93</sup> *ibid* para 224; *Racke* (n 56) 52.

<sup>94</sup> *Front Polisario* (n 3) para 225.

<sup>95</sup> *cf ibid* para 117.

<sup>96</sup> *ibid* paras 187–188.

<sup>97</sup> *ibid* paras 200–201.

<sup>98</sup> *ibid* paras 198 and 205.

<sup>99</sup> See also Corell Opinion (n 36) para 8. See also Hans Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' in in Neville Botha, Michèle Olivier and Delarey van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study* (Unisa 2010) 238: 'Any limitation of the powers of such an entity acting in good faith, would certainly apply *a fortiori* to an entity that did not qualify as an administering power but *de facto* administered the territory'.

<sup>100</sup> *Western Sahara* (n 9) para 56; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) (1971) ICJ Rep 16, para 53.

<sup>101</sup> *id.*

<sup>102</sup> See UNGA Res 1803 (XVII) (14 December 1962) which denotes the permanent sovereignty over natural resources 'as a basic constituent of the right to self-determination'. See also *East Timor (Portugal v Australia)* (Judgment) (Dissenting Opinion of Judge Weeramantry) (1995) ICJ Rep 90, 221.

<sup>103</sup> UNGA Res 1803 (XVII) (14 December 1962); Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974) (adopted without a vote); Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) (adopted by 115 votes to 6; 10 abstentions).

by common Article 1(2) of the International Covenant on Civil and Political Rights (ICCPR)<sup>104</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>105</sup> which have been ratified by Morocco in May 1979. Common Article 1(3) ICCPR and ICESCR obliges all States Parties to promote the realisation of and to respect that right, while highlighting these duties with regard to administering powers vis-à-vis non-self-governing territories. Confronted with the question of whether the principle of permanent sovereignty over natural resources prohibits Morocco as the *de facto* administering power of Western Sahara to conclude treaties on the exploitation of the natural resources of Western Sahara,<sup>106</sup> the UN Legal Counsel, *Hans Corell*, found that 'where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those territories, on their behalf, or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering power, and in conformity with the UNGA resolutions and the principle of "permanent sovereignty over natural resources" they enshrine'.<sup>107</sup> A classification of Western Sahara as an occupied territory would not fundamentally alter these findings, as the relevant provision under the laws of occupation – Article 55 of the Hague Regulations<sup>108</sup> – applicable to the exploitation of natural resources *in situ* stipulates that the proceeds of immovable public property may only be utilised for the benefit of the inhabitants of the territory.<sup>109</sup> Thus, *summa summarum*, 'the usufructuary limitations on a belligerent occupant largely parallel those of a territorial administrator',<sup>110</sup> which limits Morocco to only engage in the exploitation of natural resources of Western Sahara conducted for the benefit or according to the wishes of the people of Western Sahara.<sup>111</sup> The question then is, whether the people of Western Sahara *actually* benefit from the trade in fishery and agricultural products with the EU or endorse it. Suffice it to say here,<sup>112</sup> that the probability that Morocco takes due account of the interests or the benefit of the peoples of Western Sahara is quite low, considering the fact that Morocco does not perceive itself to be the occupying or *de facto* administering power of Western Sahara, but rather treats Western Sahara as part of its own territory.<sup>113</sup>

#### *b. The EU's Participation In or Encouragement of Morocco's Actions*

Proceeding on the assumption that Morocco exploits the agricultural land of Western Sahara and the waters adjacent to its coast contrary to the aforementioned obligations as a *de facto* administering/occupying Power, the EU's role in this unlawful exploitation needs to be evaluated. While it is true that the EU might not bear the same obligations and responsibilities towards Western Sahara as Morocco does, it would be premature to conclude that international law may not or does not limit the EU's conduct in this regard. In fact, international law knows several constellations in which States or international organisations incur international responsibility and/or obligations in conjunction with the wrongful act of another State.<sup>114</sup>

<sup>104</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>105</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>106</sup> In 2001, the UN Security Council had requested him to assess 'the legality (. . .) of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara'. See Corell Opinion (n 36) para 1.

<sup>107</sup> *ibid* para 24; see also Corell (n 99) 240–241 and 'Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories', UNGA Res 69/98 (5 December 2014) (adopted by 175 to 2; 2 abstentions).

<sup>108</sup> Regulations concerning the Laws and Customs of War on Land annexed to Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 277 (Hague Regulations 1907). Morocco is not a State Party to this convention. However, the provisions of the convention are considered as reflecting rules of customary international law (see judgment of the Nuremberg International Military Tribunal 1946 (1947) 41 American Journal of International Law 172, 248–249).

<sup>109</sup> cf Hague Regulations 1907, art 55 which reads:

'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.'

See also Saul (n 44) 316–317. The exception concerning movable property which may be requisitioned for military needs (Hague Regulations 1907, arts 48–49 and 52–53), does not seem relevant for the case at hand as the agreement concerns the exploitation of agricultural land and the waters of Western Sahara, thus immovable property.

<sup>110</sup> Kontorovich (n 44) 603.

<sup>111</sup> See also Corell (n 99) 240–241.

<sup>112</sup> A detailed factual assessment as to whether the profits made from natural resource exploitation are used for the benefit of the people of Western Sahara would go beyond the scope of this paper. On general considerations on this point in light of international humanitarian law, see Saul (n 44) 320–321.

<sup>113</sup> In that direction, see *Front Polisario* (n 3) para 235. See text at n 45.

<sup>114</sup> For instance, international responsibility may be incurred by aiding or assisting in the commission of an internationally wrongful act of another State/international organisation or by recognising as legal an illegal situation created by a breach of *ius cogens* or an

Front Polisario's claim that the contested EU-Morocco Agreement confirms Morocco's 'policy of occupation and economic colonisation' of Western Sahara alludes to these constellations.<sup>115</sup>

First of all, such a claim can be construed as an allegation that the EU aids or assists Morocco in illegally exploiting resources of Western Sahara, conduct which, according to Article 14 Draft Articles on the Responsibility of International Organizations<sup>116</sup> (DARIO), would be unlawful in itself, triggering the international responsibility of the EU. However, the threshold of Article 14 DARIO is quite high, as it requires that an international organisation deliberately provide significant aid or assistance with a view to facilitating the commission of a wrongful act of a State.<sup>117</sup> Furthermore, the exploitation of natural resources of Western Sahara would need to be internationally wrongful if committed by the EU itself.<sup>118</sup> Whereas the latter point may be fulfilled if it is accepted that the EU is bound by the principle of permanent sovereignty over natural resources as a general principle of customary international law,<sup>119</sup> the other legal prerequisites require further scrutiny. As the GC pointed out, from the moment when the Front Polisario publicly campaigned against the contested EU-Morocco Agreement, even bringing its protests to the knowledge of the UN, the Union institutions could no longer ignore that Morocco's exploitation of natural resources in Western Sahara might be unlawful and should have assessed the probability of this allegations.<sup>120</sup> Instead, the Council proceeded on the assumption that the conclusion of the contested Agreement with Morocco could not incur the responsibility of the EU for Morocco's potentially unlawful exploitation of natural resources.<sup>121</sup> It is debateable whether by turning a blind eye on Morocco's conduct the Council has tacitly accepted such unlawful exploitation, thereby satisfying the criterion of deliberately facilitating it.<sup>122</sup> The key question, however, is whether the approval of the contested Agreement actually and significantly facilitates Morocco's exploitation of natural resources of Western Sahara. Is agreeing to import fishery and agricultural products on favourable terms enough to significantly contribute to an unlawful exploitation of Western Saharan agricultural land and waters by Morocco? In this regard it is worthwhile to pay attention to the findings of the GC:<sup>123</sup>

[T]he export to the EU of products, in particular from Western Sahara, is facilitated by the agreement in question. Indeed, this is part of the objectives of the said agreement. Therefore, should it turn out that the Kingdom of Morocco exploited the resources of Western Sahara to the detriment of its inhabitants, this exploitation could be indirectly encouraged by the conclusion of the agreement approved by the contested decision.<sup>124</sup>

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obligation *erga omnes* of another State/international organisation. On this topic, see generally Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010); Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' in André Nollkaemper (ed), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014).

<sup>115</sup> *Front Polisario* (n 3) para 200.

<sup>116</sup> ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) UN Doc A/66/473 (DARIO). Although the DARIO have not been transposed into a binding international treaty they may nevertheless be useful as an indicator of customary international law incumbent upon international organisations. See ILC, 'Report of the International Law Commission on the Work of its Sixty-Third Session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, 102–103, para 1 (ILC Report 2011).

<sup>117</sup> See ILC Report 2011 (n 116) 104, paras 3–6.

<sup>118</sup> DARIO (n 116) art 14(b).

<sup>119</sup> For the classification as a principle of general customary international law, see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) (2005) ICJ Rep 168, 244; see also Corell Opinion (n 36) para 14.

<sup>120</sup> *Front Polisario* (n 3) paras 242, 245.

<sup>121</sup> *ibid* paras 230, 246.

<sup>122</sup> An internal memorandum of the UN Legal Counsel concerning the support of the Forces Armées de la République Démocratique du Congo (FARDC) by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) might be indicative of a rather low threshold of intent:

If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. (...) MONUC may not lawfully provide logistic or 'service' support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. (...) This follows directly from the [UN]'s obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.

Quoted in ILC Report 2011 (n 116) 104f, para 6.

<sup>123</sup> It should be noted, however, that the General Court has made these findings in the context of an assessment of a potential violation of the Charter of Fundamental Rights of the EU. See *Front Polisario* (n 3) paras 227–247.

<sup>124</sup> *ibid* para 238.

Whether this ‘indirect encouragement’ can be deemed a significant contribution to the conduct of Morocco should be considered against the backdrop of the size of the EU’s market<sup>125</sup> and the excellent trade relations between the EU and Morocco, with the EU being Morocco’s prime partner in the trade of goods:<sup>126</sup> The prospect of almost unrestrictedly trading in agricultural and fishery products of Western Sahara to its most important importer of goods and one of the three biggest markets in goods worldwide may be considered enough to significantly contribute to Morocco’s preparedness to exploit such goods, whether lawfully or unlawfully.

Even if one rejects the argument of ‘indirect encouragement’ as too vague as to amount to a significant contribution to a wrongful act, the EU should still be careful to conclude trade agreements applicable to disputed territory. When considering the contested EU-Morocco Agreement in a broader context, it might be asked if it not (also) contributes to the legitimisation of Morocco’s territorial claims on Western Sahara, a claim contradictory to the right to self-determination of the people of Western Sahara. The ICJ, in its *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, declared that the right to self-determination constitutes an obligation *erga omnes*, a breach of which triggers several third party obligations.<sup>127</sup> According to the ICJ, a breach of an obligation *erga omnes* by a State triggers the obligations of all States not to recognise the illegal situation resulting from this breach and, additionally, an obligation not to render aid or assistance in maintaining this situation.<sup>128</sup> Although it is true that these obligations have been framed so as to apply to *States*, it seems justified to also apply them to the EU, since the EU, an entity with international legal personality, is actually capable of such conduct.<sup>129</sup> In this respect, it is quite significant that the GC found that the practice of EU institutions indicates that they –at least implicitly– accepted the application of the contested EU-Morocco Agreement to the parts of Western Sahara under control of Morocco.<sup>130</sup> Nonetheless, the GC denied that the approval of the contested Agreement supports Morocco’s claim to sovereignty over Western Sahara, because ‘the mere fact that the Union admits the application of the terms of the agreement with the Kingdom of Morocco in respect of agricultural products or fishery products exported to the EU from the part of the territory of Western Sahara that it controls, or products that are imported into the territory, does not amount to a recognition of Moroccan sovereignty over the territory’.<sup>131</sup> The GC remained silent on the reasons for this apodictic finding. As the ICJ has held in its *Namibia* opinion, the obligation of non-recognition requires States not to enter into treaty relations with other States if doing so would imply recognition of an illegal situation as legal.<sup>132</sup> Such recognition may result from the contested EU-Morocco Agreement if Morocco purported to exercise territorial sovereignty over Western Sahara beyond its powers as a *de facto* administering/occupying power.<sup>133</sup> In that case, Morocco’s conduct should ‘be construed as an implicit *legal* claim to territorial sovereignty over Western Sahara –which third states are obligated not to recognize’.<sup>134</sup> This reasoning is supported by international practice: For instance, the 2004 US-Morocco Free Trade Agreement<sup>135</sup> and the 1997 EFTA-Morocco Free Trade

<sup>125</sup> The EU is one of the largest economies in the world. See Commission, ‘EU position in world trade’ <<http://ec.europa.eu/trade/policy/eu-position-in-world-trade/>> accessed 20 July 2016.

<sup>126</sup> According to figures of the Directorate-General for Trade the EU is Morocco’s first trading partner with total trade amounting to approximately €29.25 billion in 2014. The EU has spent approximately €11 billion in the import of goods from Morocco and is thus the prime importer of Moroccan goods, particularly of machinery and transport equipment, textiles and clothing and agricultural products. See Commission, ‘European Union, Trade in goods with Morocco’, 7 and 9–10 <[http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113421.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113421.pdf)> accessed 20 July 2016.

<sup>127</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136.

<sup>128</sup> *ibid* para 159. It is noteworthy in that regard that these obligations established by the ICJ resemble the obligations stipulated in ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) UN Doc A/56/49(Vol. I)/Corr.4 (ARSIWA) art 41(2) and DARIO (n 116) art 42(2) concerning the consequences of a serious breach of *ius cogens*. Although the ICJ has never determined that the right to self-determination constitutes a peremptory norm of international law, the ILC has often proceeded on the assumption that it does, see eg ILC, ‘Report of the International Law Commission on the Work of its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10 (ILC Report 2001) 85, para 5; ILC Report 2011 (n 116) 120, para 2. On the consequences thereof on the conclusion of the EU-Morocco FPA, see Vincent Chapaux, ‘The Question of the European Community-Morocco Fisheries Agreement’ in Karin Arts and Pedro Pinto Eite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2007) 217, 233–337.

<sup>129</sup> As a matter of fact, the EU, just like all of its Member States, has not, at least not explicitly, recognised Morocco’s claims to sovereignty over the Western Sahara, see *Front Polisario* (n 3) para 117.

<sup>130</sup> *ibid* paras 98–103.

<sup>131</sup> *ibid* para 154.

<sup>132</sup> *Namibia* (n 100) para 121; see also ILC Report 2001 (n 128) 287, para 5.

<sup>133</sup> cf Dawidowicz (n 44) 267–274.

<sup>134</sup> *id*, 268.

<sup>135</sup> United States – Morocco Free Trade Agreement (15 Jun 2004) 44 ILM 544.

Agreement<sup>136</sup> exclude waters off the coast of Western Sahara from their territorial scope.<sup>137</sup> With regard to the exclusion of Western Saharan territorial waters from the scope of the EFTA-Morocco Agreement, Norway and Switzerland issued statements underlining that, in their view, Morocco does not exercise internationally recognised sovereignty over Western Sahara and therefore does not have the right to exploit the territory's resources as if they were its own.<sup>138</sup> Hence, unless the Court tacitly assumed that Morocco has acted within its limited treaty-making capacity as a *de facto* administering/occupying power, *i.e.* the benefit and interests of the people of Western Sahara are observed when exploiting the land and coast of Western Sahara, there is no apparent reason not to consider the approval of the EU-Morocco agreement as an implicit recognition of Morocco's claim to sovereignty over Western Sahara.<sup>139</sup>

As to the obligation not to render aid or assistance in maintaining a situation created by a breach of an obligation *erga omnes*, similar arguments which could speak against the approval of the contested EU-Morocco Agreement can be brought forward. The approval of an agreement indiscriminately applicable to disputed territory may not only confirm illegitimate territorial claims of the contracting partner, but also provides a strong economic incentive to hold on to these claims, in turn subverting the right of the people of Western Sahara to freely decide on the future status of the territory.<sup>140</sup> What is more, it contributes to a progressively developing acquiescence towards the situation in Western Sahara.<sup>141</sup>

To sum up, from an international law perspective the question of whether the Council was barred from approving the contested EU-Morocco Agreement depends on an assessment of Morocco's conduct: If it can be established that Morocco has acted within its limited treaty-making capacity as a *de facto* administering/occupying power, *i.e.* the exploitation of resources of Western Sahara benefits the people of Western Sahara, international law does not impose any limits on the EU and EU decision-making. In the opposite case, however, the EU risks acting internationally wrongful in connection with Morocco's wrongful act(s) (Article 14 DARIO) and risks violating the obligation not to recognise the illegal situation resulting from a breach of an obligation *erga omnes* and the obligation not to render aid or assistance in maintaining such situation.<sup>142</sup>

### c. The EU's Actions and the Fundamental Rights of the Sahrawi Population

Even though the GC refused to take an 'international law friendly' path in *Front Polisario*, this did not prevent it from chastising the EU for its actions related to the contested EU-Morocco Agreement and the EU's argumentation that it could not be held accountable for actions carried out by a third State, whether these actions are in conformity with or violating fundamental rights. Regarding the Council's argument, the GC stated that although this view is technically correct, 'it ignores the fact that, if the European Union allows the export to its Member States of products originating in that other country which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate, it may indirectly encourage such infringements or profit from them'.<sup>143</sup> When the Union concludes an agreement that facilitates, particularly, the export of products from a disputed territory, 'the Council must examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights',<sup>144</sup> including various rights under the EU Charter of

<sup>136</sup> Free Trade Agreement between the EFTA States and the Kingdom of Morocco (19 June 1997) <<http://www.efta.int/free-trade/free-trade-agreements/morocco>> accessed 20 July 2016.

<sup>137</sup> cf Dawidowicz (n 44); Kontorovich (n 44) 607.

<sup>138</sup> See Western Sahara Resource Watch, 'Western Sahara not part of EFTA-Morocco free trade agreement' (12 May 2010) <<http://www.wsrw.org/a105x1410>> accessed 20 July 2016.

<sup>139</sup> cf Dawidowicz (n 44) 267–274; see also ILC Report 2001 (n 128) 287, para 5.

<sup>140</sup> If it can be held that the principle of permanent sovereignty of resources, as a basic constituent of the principle of self-determination, also constitutes an obligation *erga omnes*, it would be worth considering whether the approval of the EU-Morocco Agreement aids or assists in maintaining a situation contrary to the Sahrawi peoples' right to freely dispose of their natural wealth and resources.

<sup>141</sup> With a view to the FPA (n 78), which basically raises the same question as the discussed EU-Morocco Agreement, see Dawidowicz (n 44). The UN Secretary-General furthermore stated that as 'the impasse continues, the international community unavoidably grows more accustomed to Moroccan control over Western Sahara', see UNSC 'Report of the Secretary-General on the Situation Concerning Western Sahara' (16 October 2006) UN Doc S/2006/817, para 20. See also Smith (n 44) 268; Stephanie Koury, 'The European Community and the Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law' in Karin Arts and Pedro Pinto Eite (eds), *International Law and the Question of Western Sahara* (International Platform of Jurists for East Timor 2007) 165, 189.

<sup>142</sup> *Construction of a Wall* (n 127) para 159.

<sup>143</sup> *Front Polisario* (n 3) para 231.

<sup>144</sup> *ibid* para 228.

Fundamental Rights.<sup>145</sup> Thus, the Council, in exercising its broad power of appreciation, must *itself* ensure that there is no evidence of such exploitation, and cannot merely refer to the obligations of the third State in this regard.<sup>146</sup>

The duty of the EU institution to consider all relevant elements of the case when concluding an agreement thus includes a consideration of potential fundamental rights violations of non-EU nationals in non-EU territory.<sup>147</sup> Especially noticeable is the GC's interpretation of fundamental rights of the population of the disputed territory, in this case of the Sahrawi people, as the Court seems to consider the export of products from such territory that does not benefit the peoples of this territory, is not done on their behalf, or in consultation with their representatives, to be in violation of the fundamental rights of these peoples, a conclusion it supports by referring to *Corell's* conclusions on international legal rules on self-determination and the permanent sovereignty over natural resources.<sup>148</sup> The Court also touched upon the absence of an international mandate and of international recognition of Morocco's jurisdiction over the territory of Western Sahara, noting that Morocco failed to submit information as required under Article 73(e) of the UN Charter, conjuring doubts about whether Morocco actually recognises and respects the principle of the primacy of the interests of the territory's inhabitants as is required by Article 73 UN Charter.<sup>149</sup> Seeing as the EU Charter of Fundamental Rights contains neither collective or peoples' rights, nor a right to self-determination or to permanent sovereignty over natural resources, it seems as if the GC indirectly applied international law, specifically rights and obligations under the right to self-determination and the laws of administration/occupation, without clarifying why and how these rules should be applied. Instead, it built its argumentation on the EU's obligations under the EU Charter of Fundamental Rights, and expanded the EU's obligations to encompass a duty to ensure no such violations might occur as a result of the Agreement concluded. Since, in the case of the Decision under review, the Council failed to examine all the relevant elements before the adoption of the Decision, the GC annulled the contested Decision insofar as it approved the application to Western Sahara of the EU-Morocco Agreement.<sup>150</sup>

## **B. International Responsibility of the EU**

Within the EU legal order, judicial review by the Court serves to establish the invalidity of the Council's act of conclusion of an international agreement, whereby the Court can (partially) annul these acts if it indeed finds that the Council has acted contrary to EU law when adopting the act. On the international plane, however, this annulment has limited effect, especially when it comes to the EU's international obligations, as for example those towards Morocco under the contested EU-Morocco Agreement. Seeing as the (partial) annulment of the Council's Decision only has an effect within the EU legal order, the EU's international obligations it undertook by concluding the agreement are unaffected and continue to bind the EU. As a result of the annulment, however, the EU and its institutions are prohibited from executing the agreement insofar as it was annulled, leading to a discrepancy between what is legally expected from them on the one hand, and what they are legally allowed to do on the other. As a principle of customary international law codified in Article 27 of the 1969 Vienna Convention on the Law of Treaties and repeated in Article 27 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, the EU cannot invoke its internal law to justify a failure to uphold its international obligations.<sup>151</sup>

A theoretical argument can thus be made about what this might entail for the EU when it comes to international responsibility: Failure by the EU to execute the agreement in its entirety would, in theory, lead to a failure to uphold its international obligations under the agreement. Under the rules of the responsibility of

<sup>145</sup> id. Specifically, the GC referred to the following rights in the Charter of Fundamental Rights: the rights to human dignity, life and personal integrity (arts 1 to 3), the prohibition of slavery and forced labour (art 5), occupational freedom (art 15), business freedom (art 16), the right to property (art 17), the right to fair and just working conditions and the prohibition of child labour and protection of young people at work (arts 31 and 32). See also Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

<sup>146</sup> *Front Polisario* (n 3) para 241.

<sup>147</sup> See also Geraldo Vidigal, 'Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in *Frente Polisario v Council* and the Protection of Fundamental Rights Abroad' (*EJIL: Talk!*, 11 December 2015) <<http://www.ejiltalk.org/13901-2/>> accessed 14 July 2016.

<sup>148</sup> *Front Polisario* (n 3) para 229.

<sup>149</sup> *ibid* paras 233–235.

<sup>150</sup> *ibid* para 247.

<sup>151</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) UN Doc A/CONF.129/15. See also Kirsten Schmalenbach, 'Article 27' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012).

international organisations, such a breach of an international obligation by the institutions of the EU would constitute an internationally wrongful act of the EU, which entails the EU's international responsibility.<sup>152</sup> With the GC's *Front Polisario* judgment only a couple months old, and currently under appeal before the Court of Justice,<sup>153</sup> possible international responsibility is in our case still very much a hypothetical situation but, especially if the ECJ would confirm the GC's judgment, not an impossible or unrealistic one. In such a case, new negotiations with Morocco—or generally with the contracting party—would have to be held in order to bring the agreement in accordance with the Court's judgment, and thus with the EU's obligations, be they domestic or international.

## V. Concluding Remarks and Prospect

The question of the legality of the EU concluding trade agreements with Morocco, which are likely to be applied to Western Sahara without consideration of the interests of the indigenous Sahrawi population, is not just relevant to the Agreement approved by Council Decision 2012/497/EU. Rather, it arises with regard to the entire EU-Morocco Association Agreement and related Agreements, including the EU-Morocco FPA and the EU-Morocco Deep and Comprehensive Free Trade Agreement (EU-Morocco DCFTA)<sup>154</sup> currently under negotiation. Insofar, the GC's judgment may not only have implications on the future EU-Morocco DCFTA,<sup>155</sup> but also on the outcome of related cases, such as *Front Polisario's* action for annulment of Council Decision 2013/785/EU<sup>156</sup> approving the Protocol setting out the fishing opportunities and financial contribution provided for in the EU-Morocco FPA,<sup>157</sup> or the preliminary reference made by the English High Court of Justice on the legality of both the EU-Morocco Association Agreement and the EU-Morocco FPA.<sup>158</sup>

This will, however, only be the case if the ECJ does not reverse the GC's judgment, seeing as the Council has already filed an appeal against it.<sup>159</sup> In this respect, the critics of the contested Council Decision should be careful not to celebrate too soon: Although the assessment of the international law applicable to the case at hand presumably supports their view of the incompatibility of the decision with the rights of the people of Western Sahara, the GC's judgment exhibits some weak points in its line of argumentation. First of all, it should be borne in mind that the ECJ usually pursues a quite restrictive approach when it comes to the capacity of individuals to bring an action for annulment.<sup>160</sup> Particularly the finding that the *Front Polisario* constituted a legal person in the sense of Article 263 TFEU because it had the 'necessary independence' to act as a responsible entity in legal relationships might come under scrutiny, as it seems to give leeway to other 'autonomous entities' to instigate proceedings before the Court. Similarly, the GC's finding that 'direct and individual concern' was given because of the *Front Polisario's* role in the international negotiations on the status of the territory might considerably widen the pool of prospective complainants. Even if the ECJ should confirm the legal standing of *Front Polisario*, which would be eligible to provide the Sahrawi people with access to justice, the annulment of the contested decision arguing (potential) violations of the EU fundamental rights of the people of Western Sahara is disputable, as the GC did not conclusively show in what way and to what extent the alleged exploitation of natural resources of Western Sahara contrary to the interest of the people of Western Sahara constitutes a violation of EU fundamental rights under the EU Fundamental Rights Charter. The GC referenced a number of fundamental rights of the EU Charter (including the right to human dignity and life, the prohibition of slavery and forced labour, the right to fair and just working conditions and occupational and business freedom)<sup>161</sup> without establishing how these rights are connected to or can invalidate a trade agreement that does not guarantee that the exploitation of resources in a non-self-governing territory is done in accordance with the indigenous population's rights. Does the GC

<sup>152</sup> DARIO (n 116) arts 3–6.

<sup>153</sup> More on the appeal in Part V.

<sup>154</sup> Commission, 'EU and Morocco start negotiations for closer trade ties' (Press Release, 22 April 2013) IP/13/344.

<sup>155</sup> In fact, the GC's judgment in the case *Front Polisario* already casts a cloud on the current negotiations on the EU-Morocco DCFTA. See Aziz El Yakoobi, 'Morocco Suspends contacts with the EU over Court ruling on the farm trade' *Reuters* (Rabat, 25 February 2015) <uk.reuters.com/article/uk-eu-morocco-westernsahara-idUKKCN0VY273> accessed 20 July 2016.

<sup>156</sup> Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco [2013] OJ L349/1.

<sup>157</sup> Action for Annulment T-180/14 *Front Polisario v Council of the European Union* (Application) [2014] OJ C184/55.

<sup>158</sup> See text at n 78–80.

<sup>159</sup> On April 7, the Court granted the Council's request for an accelerated procedure, see *Council v Front Polisario* (n 1) (Order of the President of the Court), EU:C:2016:232.

<sup>160</sup> See *Plaumann* (n 88); Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625.

<sup>161</sup> *Front Polisario* (n 3) para 228.



imply that these *individual rights* contain rules substantially similar to those stemming from the principles of self-determination and permanent sovereignty over natural resources? Dogmatically, such an approach seems to stand on shaky ground, even when taking into account that since the Treaty of Lisbon, the EU is under increased pressure to foster EU fundamental rights in its external action.<sup>162</sup>

These concerns are only amplified when considering that international law contains several rules that determine the conditions under which the exploitation of natural resources of a non-self-governing territory is lawful. The question that remains then is why the GC, instead of indicating the rules of international law that the Council should have considered before approval of the contested decision, made a somewhat surprising move and based its argumentation on EU fundamental rights. The GC's reserved attitude towards applying international law might partly be motivated by its reluctance to imply that the EU may have acted in violation of international law, which in turn could bring with it questions as to the EU's international responsibility. Another piece of the puzzle might be that the international law applicable to the case at hand is not quite clear and much depends on how one assesses Morocco's status in relation to Western Sahara. Given that the UN, unlike in other situations such as Palestine,<sup>163</sup> fell short of taking up a distinct stance with regard to the conflict in Western Sahara, it is understandable that the GC would feel somewhat overburdened in adopting a definitive position on a politically sensitive issue such as the conflict in Western Sahara. It remains to be seen whether the ECJ will take on this task.

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## Competing Interests

The authors declare that they have no competing interests.

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