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## WESTERN SAHARA, A THORN IN THE EU’S SIDE: ANALYSIS OF THE CJEU’S INCOHERENT WORDS TO PROTECT FUTURE EU-MOROCCO AGREEMENTS

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I. INTRODUCTION: A NEW LEGAL CHAPTER IN THE WESTERN SAHARA ISSUE BEFORE THE EU — II. FACTS AND CONTEXT OF THE ‘QUESTION OF WESTERN SAHARA’ AND THE STRUGGLE BEFORE THE CJEU — III. JUDGEMENT IN JOINED CASES C-778/21 P AND C-798/21 P: PROTECTION OF THE WATERS OF WESTERN SAHARA AGAINST EXPLOITATION BY MOROCCO AND THE EU — IV. FINAL REMARKS: THE IMPLICATIONS OF THE JUDGEMENT FOR WESTERN SAHARA — V. BIBLIOGRAPHY

**ABSTRACT:** On 4 October 2024, the Court of Justice of the European Union delivered three judgments concerning Western Sahara, joined cases C-779/21 P and C-799/21 P, joined cases C-778/21 P and C-798/21 P, and case C-399/22. The second of these judgments annulled the fisheries agreement between the EU and Morocco because of the lack of consent of the Saharawi people, as the Court found that the Saharawi territory was affected by this agreement. In principle, the judgement appears to be favourable to the Front POLISARIO, recognized as the legitimate representative of the Saharawi people. Nevertheless, at the same time it presents inconsistencies that may have negative consequences for the Saharawi people. The Court based its argument on the right to self-determination and the principle of the relative effects of treaties, recognizing the Saharawi people as a “third party” affected by the agreements between the EU and Morocco. However, the Court also introduced the concept of implied consent in case the agreement in question does not impose obligations on the people under occupation and provides them with benefits. This interpretation could lead to a weakening of the right to self-determination of the Saharawi people by not having to consult directly with the Front POLISARIO when concluding an agreement affecting the Saharan territory. Therefore, the purpose of this paper is to analyse the legal arguments introduced by the Court in this matter that allow the occupying power, Morocco, to exploit the Saharawi natural resources without requiring the express consent of this people. It will also examine how the Court’s lack of

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clarity perpetuates the legal and political uncertainty surrounding trade relations between the EU and Morocco, jeopardising the peaceful and legal resolution of the conflict in Western Sahara.

**KEYWORDS:** Western Sahara, territory, occupation, self-determination, agreements, consent.

### **EL SAHARA OCCIDENTAL, UNA ESPINA EN EL COSTADO DE LA UE: ANÁLISIS DE LAS PALABRAS INCOHERENTES DEL TJCE PARA PROTEGER LOS FUTUROS ACUERDOS UE-MARRUECOS**

**RESUMEN:** El 4 de octubre de 2024, el Tribunal de Justicia de la Unión Europea dictó tres sentencias relativas al Sáhara Occidental, asuntos acumulados C-779/21 P y C-799/21 P, asuntos acumulados C-778/21 P y C-798/21 P, y el asunto C-399/22. La segunda de estas sentencias anuló el Acuerdo de pesca entre la UE y Marruecos en base a la falta de consentimiento del pueblo saharaui, ya que el Tribunal observó que el territorio saharaui era afectado por dicho acuerdo. En principio, el fallo parece ser favorable al Frente POLISARIO, reconocido como el representante legítimo del pueblo saharaui, pero presenta, al mismo tiempo, incoherencias que pueden tener consecuencias negativas para el pueblo saharaui. El Tribunal basó su argumentación en el derecho a la libre determinación y el principio de los efectos relativos de los tratados, reconociendo al pueblo saharaui como una “tercera parte” afectada por los acuerdos entre la UE y Marruecos, pero introdujo de la misma manera el concepto de consentimiento implícito en caso de que el acuerdo en cuestión no suponga obligaciones para el pueblo bajo ocupación y le proporcione beneficios. Esta interpretación podría provocar el debilitamiento del derecho a la libre determinación del pueblo saharaui al no ser necesario consultar directamente al Frente POLISARIO a la hora de celebrar un acuerdo que afecte al territorio saharaui. Por consiguiente, el presente trabajo tiene como objeto analizar los argumentos jurídicos introducidos por el Tribunal en esta cuestión que permiten a la potencia ocupante, Marruecos, explotar los recursos naturales saharauis sin necesidad de consentimiento expreso de este pueblo. Asimismo, se estudiará cómo la falta de claridad del Tribunal perpetúa la incertidumbre jurídica y política que envuelven las relaciones comerciales entre la UE y Marruecos, poniendo en peligro la resolución pacífica y conforme al Derecho del conflicto del Sáhara Occidental.

**PALABRAS CLAVE:** Sahara Occidental, territorio, ocupación, libre determinación, acuerdos, consentimiento.

### **LE SAHARA OCCIDENTAL, UNE ÉPINE DANS LE CÔTÉ DE L'UE : ANALYSE DES PAROLES INCOHÉRENTES DE LA CJUE POUR PROTÉGER LES FUTURS ACCORDS UE-MAROC**

**RÉSUMÉ:** Le 4 octobre 2024, la Cour de justice de l'Union européenne a rendu trois arrêts concernant le Sahara occidental, les affaires jointes C-779/21 P et C-799/21 P, les affaires jointes C-778/21 P et C-798/21 P, ainsi que l'affaire C-399/22. Le second de ces arrêts a annulé l'accord de pêche entre l'UE et le Maroc sur la base du manque de consentement du peuple sahraoui, puisque la Cour a constaté que le territoire sahraoui était concerné par cet accord. En principe, la décision semble favorable au Front Polisario, reconnu comme représentant légitime du peuple sahraoui, mais elle présente, dans le même temps, des incohérences qui peuvent avoir des conséquences négatives pour le peuple sahraoui. La Cour a fondé son argumentation sur le droit à l'autodétermination et le principe des effets relatifs des traités, reconnaissant le peuple sahraoui comme une «tierce partie» concernée par les accords entre l'UE et le Maroc. Il a également introduit le concept de consentement implicite dans les cas où l'accord en question n'impose pas d'obligations à la population sous occupation et lui procure des avantages. Cette interprétation risque d'affaiblir le droit à l'autodétermination du peuple sahraoui, puisqu'il n'est pas nécessaire de consulter directement le Front Polisario pour



la conclusion d'un accord concernant le territoire sahraoui. Le présent travail a donc pour objet d'analyser les arguments juridiques introduits par la Cour sur cette question qui permettent à la puissance occupante, le Maroc, d'exploiter les ressources naturelles sahraouies sans avoir besoin du consentement exprès de ce peuple. Il examinera également comment le manque de clarté de la Cour perpétue l'incertitude juridique et politique qui entoure les relations commerciales entre l'UE et le Maroc, mettant en péril le règlement pacifique et conforme au droit du conflit du Sahara occidental.

**MOT CLES:** Sahara Occidental, territoire, occupation, autodétermination, accords, consentement.

## I. INTRODUCTION: A NEW LEGAL CHAPTER IN THE WESTERN SAHARA ISSUE BEFORE THE EU

On 4 October 2024, the Grand Chamber of the Court of Justice of the European Union (CJEU/Court) delivered three judgments of significant importance in relation to the “question of Western Sahara”. The first, the judgment in Joined Cases C-779/21 P and C-799/21 P<sup>2</sup>, the second in Joined Cases C-778/21 P and C-798/21 P<sup>3</sup>, and finally the judgment in case C-399/22<sup>4</sup>. These new judgments form part of the extensive judicial saga developed by the CJEU following complaints lodged by the Popular Liberation Front of Saguia el Hamra and Rio de Oro (Front POLISARIO) against the European Commission (Commission) and the Council of the European Union (Council), under economic and commercial agreements concluded by them on behalf of the European Union (EU) and the Kingdom of Morocco<sup>5</sup>.

These agreements, which date back to 1985 with the now defunct European Economic Community (EEC), have in common that they concern a

<sup>2</sup> CJEU, Judgement of 4 October 2024, Joined Cases, *Commission v Front Polisario*, C-779/21 P, and *Council v Front Polisario*, C-799/21 P, ECLI:EU:C:2024:835.

<sup>3</sup> CJEU, Judgement of 4 October 2024, Joined Cases, *Commission v Front Polisario*, C-778/21 P, and *Council v Front Polisario*, C-798/21 P, ECLI:EU:C:2024:833.

<sup>4</sup> CJEU, Judgement of 4 October 2024, *Confédération paysanne () and tomates du Sahara occidental*, C-399/22, ECLI:EU:C:2024:839.

<sup>5</sup> See: SOROETA LICERAS, J., “La jurisprudencia del TJUE en relación con la legalidad de la explotación de los recursos naturales del Sáhara Occidental o el dogma de la inmaculada legalidad de la acción exterior de la Unión Europea y sus consecuencias”, *Revista General de Derecho Europeo*, vol. 46, 2018; SUÁREZ-COLLADO, Á. and CONTINI, D., “The European Court of Justice on the EU-Morocco agricultural and fisheries agreements: and analysis of the legal proceedings and consequences for the actors involved”, *The Journal of North African Studies*, 2021.



non-self-governing, a Non-Autonomous Territory, pending decolonization, occupied by Morocco since 1975, namely, Western Sahara. However, these three judgements are characterized by being the first favourable to the Front POLISARIO and, consequently, to the people of Western Sahara. In other words, in the three cases the CJEU observed for the first time that Saharawi territory was affected by the agreements between the EU and the Kingdom of Morocco without having the consent of the Saharawi people. Therefore, 4 October 2024 has been named as *dies mirabilis*<sup>6</sup>.

It must be borne in mind that the CJEU does not hold jurisdiction to adjudicate international disputes concerning the nature of the “question of Western Sahara”, as its competences are confined to matters within the framework of EU law. The Court does have the capacity to monitor that actions and decisions taken by EU institutions are in accordance with EU legislation and respect Public International Law (PIL), according with art. 3 of the Treaty on the Functioning of the EU (TFEU)<sup>7</sup>. Nevertheless, these judgements do not condemn, as have previous ones, the violations of basic principles of the EU by the Commission and the Council. The Court seems to limit itself once again exclusively to the text of the agreements, without assessing the de facto application of these and other agreements by Morocco in the Saharawi territory with the knowledge of the EU, since this State considers this territory as its own<sup>8</sup>.

This article will explore one of the three judgments of 4 October 2024, Joined Cases C-778/21 P and C-798/21 P, due to the legal analysis made by the CJEU on *consent necessary* for an agreement to affect the territory of Western Sahara. The first part will set out the context of the “question of Western Sahara”, including the case law of the Front POLISARIO’s appeals against agreements between the EU and Morocco. The second part will deal with the entire judicial procedure in Joined Cases C-778/21 P and C-798/21 P, from

<sup>6</sup> GONZÁLEZ VEGA, J.A., “Tres sentencias y un destino (confuso): las decisiones del tribunal de justicia de 4 de octubre de 2024 sobre el Sáhara Occidental”, *La Ley: Unión Europea*, nº 131, 2024.

<sup>7</sup> Treaty on the Functioning of the EU of 13 December 2007 (OJ C 202, 7.6.2016).

<sup>8</sup> UN Security Council (UNSC), *Letter dated 11 April 2007 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council*, S/2007/206 of 13 April 2007; BOUKHARI, A., “Las dimensiones internacionales del conflicto del Sáhara Occidental y sus repercusiones para una alternativa marroquí”, *Real Instituto Elcano*, nº 16, 2004.



the decision of the General Court (GC) to the final decision. This study will highlight the omission of the concept of *occupation*, the CJEU's argument on the legal capacity of the Front POLISARIO, and the reconciliation of the principle of self-determination and the exploitation of an occupying power in a Non-Self-Governing Territory. Finally, the possible consequences of the judgement for Western Sahara and the Saharawi people will be identified and developed.

## II. FACTS AND CONTEXT OF THE 'QUESTION OF WESTERN SAHARA' AND THE STRUGGLE BEFORE THE CJEU

### 1. The Case of the Unfinished Decolonization of Western Sahara

The United Nations (UN) began the process of decolonization in 1946, on the basis of articles 1.2 and 55 of its Charter<sup>9</sup>, culminating in UN General Assembly (UNGA) Resolution 1514(XV) of 14 December 1960, recognizing the right of colonial peoples to self-determination and to territorial integrity<sup>10</sup>. However, of the 71 Non-Self-Governing Territories in 1960, 17 have not yet been decolonized, including Western Sahara, Africa's final colonial territory<sup>11</sup>. This case is considered a "frozen conflict" due to political and economic interests of third States, which prevent the Saharawi people from exercising their right to self-determination<sup>12</sup>.

In 1975, Morocco occupied Western Sahara, at that time a Spanish colony, through the "Green March". Spain withdrew in 1976 from the territory,

<sup>9</sup> "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"; "(...) for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples (...)" UN, Charter of the United Nations signed on 26 June 1945, entered into force on 24 October 1945.

<sup>10</sup> UNGA, *Declaration on the granting of independence to colonial countries and peoples*, A/RES/1514(XV) of 14 December 1960.

<sup>11</sup> UN, The United Nations and Decolonization. <https://www.un.org/dppa/decolonization/en/nsgt/western-sahara>.

<sup>12</sup> ZOUBIR, Y.H., Conflict in Western Sahara. In *Interpreting the Modern Middle East*, *Westview Press*, 2010, pp. 303-336.



but did not hold the referendum promised, which means that today it is still the administering power of the territory<sup>13</sup>. The Moroccan occupation, which divided the territory in two, led to the exodus of more than 700,000 Saharawis, many of whom took refuge in Tindouf (Algeria). The Front POLISARIO, in origin an anti-colonialist and liberation force against the Spanish power, declared the Saharawi Arab Democratic Republic (SADR) on 27 February 1976. The Front POLISARIO has been, in fact, recognised as the “representative of the people of Western Sahara”<sup>14</sup>. Nevertheless, although the SADR has been recognized by 84 States<sup>15</sup> and is a member of the African Union (AU) since 22 February 1982<sup>16</sup>, the sovereignty of the Republic has been hampered. The reasons are the impossibility of holding a referendum, the long-term dispute with Morocco and the lack of a definitive agreement on its status within the framework of the UN. Additionally, most of the Saharawi population lives outside of the Saharawi territory. Therefore, according to the Montevideo Convention on the Rights and Duties of States of 1933, the SADR does not meet the necessary elements to become a sovereign State<sup>17</sup>.

By occupying Western Sahara, Morocco violated the international principle of *uti possidetis juris*, which protects the borders inherited from colonialism<sup>18</sup>, and the UNGA Resolution 1514(XV) of 14 December 1960, which equates alien occupation to the denial of human rights and protects the right

<sup>13</sup> UNGA, *Question of Ifni and Spanish Sahara*, A/RES/2072(XX) of 16 December 1965; UNGA, *Question of Ifni and Spanish Sahara*, A/RES/2229(XXI) of 20 December 1966; DAMIS, J., “The Western Sahara Conflict: Myths and Realities”, *Middle East Journal*, vol. 37, n° 2, 1983, p. 173; See also: LIPPERT, A., “Emergence or Submergence of a Potential State: The Struggle in Western Sahara”, *Indiana University Press*, vol. 24, n° 1, 1977; SOROETA LICERAS, J., *El conflicto del Sáhara Occidental, reflejo de las contradicciones y carencias del Derecho Internacional*, Universidad del País Vasco, Servicio Editorial, 2001; BÁRBULO, T., *La historia prohibida del Sáhara Español. Las claves del conflicto que condiciona las relaciones entre España y el Magreb*, Ed. Península, 2017.

<sup>14</sup> UNGA, *Question of Western Sahara*, A/RES/34/37 of 21 November 1979; UNGA, *Question of Western Sahara*, A/35/596 of 11 November 1980.

<sup>15</sup> See: <https://saharaoccidental.es/sahara/reconocimientos-de-la-rasd/>.

<sup>16</sup> See: [https://au.int/en/member\\_states/countryprofiles2](https://au.int/en/member_states/countryprofiles2).

<sup>17</sup> Montevideo Convention on the Rights and Duties of States, adopted at Montevideo on 26 December 1933, entered into force 26 December 1934, art. 1.

<sup>18</sup> SOROETA LICERAS, J., *International Law and the Western Sahara Conflict*, Wolf Legal Publisher, 2014, pp. 4-5.



to self-determination of all peoples<sup>19</sup>, unleashing a long guerrilla war against the Front POLISARIO. Furthermore, PIL rejects conquest as a basis for territorial sovereignty. Conquest is a breach of the State obligations established in arts. 1(2) -respect of the right to self-determination- and 2(4) -obligation to refrain from “use of force against the territorial integrity or political independence of any state”- of the Charter, which are *ius cogens* rules<sup>20</sup>.

As a result, in accordance with principle *ex injuria jus non oritur*, which prevents illegal acts from conferring rights<sup>21</sup>, Morocco has no right of sovereignty over the Saharawi territory as it has carried out a military occupation over the Saharawi territory and prevented the Saharawi people from exercising their right to self-determination. In addition, the International Court of Justice (ICJ) determined in 1975 that Western Sahara was not *terra nullius* at the time of the Spanish colonization, because when Spain occupied the territory, it was inhabited by organized peoples who had no sovereign ties with either Morocco or Mauritania<sup>22</sup>. Nonetheless, Morocco has maintained its illegal occupation and has promoted that its own nationals settle in Saharawi territory<sup>23</sup>, referred to as “Southern Territories”<sup>24</sup>, and even proposed in 2007 a plan for the autonomy of Western Sahara under its sovereignty, excluding self-determination, contrary to international law<sup>25</sup>. In the occupied areas, in-

<sup>19</sup> UNGA, A/RES/1514(XV), *op. cit.*

<sup>20</sup> See: ICJ, Judgement of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, paras. 209 and 212.

<sup>21</sup> See: <https://unterm.un.org/unterm2/es/view/6fe59c6d-9d6a-41bb-997e-d2478a976ec0>.

<sup>22</sup> ICJ, Advisory Opinion of 16 October 1975, *Western Sahara*, ICJ Reports 1975.

<sup>23</sup> International Committee of the Red Cross (ICRC), Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art. 49; ICRC, Rule 130. Transfer of Own Civilian Population into Occupied Territory, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule130>; See also: ICJ, Advisory Opinion of 19 July 2024, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, paras. 146-147.

<sup>24</sup> BOUKHARI, A., *op. cit.*, pp. 1-18; SAADOUN, S., “Responsible Business in Occupied Territories”, *Human Rights Watch*, 21 June 2016. <https://www.hrw.org/news/2016/06/21/responsible-business-occupied-territories>.

<sup>25</sup> UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/2625/(XXV), 24 October 1970; UNSC, S/2007/206, *op. cit.*; RUIZ MIGUEL, C., “La propuesta marroquí de autonomía para el Sáhara Occidental de 2007: una antigua propuesta sin credibilidad”, *REAF*,



deed, the Saharawi population is subject to repression and discrimination<sup>26</sup>, while Morocco exploits the Saharawi natural resources for its own benefit, in violation of UNGA Resolution 1803(XVII) of 14 December 1962<sup>27</sup>.

It should be noted that the exploitation of natural resources by the occupying power is permitted only to meet strictly military or administrative needs related to the occupation, according to art. 55 of The Hague Regulations<sup>28</sup>, and never for profit purposes that are tantamount to looting, arts. 33 and 55 of the IV Geneva Convention. In addition, if an occupying power does not have the consent of the legitimate sovereign people, in this case the Front POLISARIO<sup>29</sup>, trade agreements concluded in relation to an occupied territory are illegal and void<sup>30</sup>. The exploitation of Saharawi natural resources by Morocco does not translate into benefits for the people of Western Sahara, because the only purpose of Morocco is to benefit and consolidate its control.

Despite this situation and the international legal framework, the EU has concluded numerous trade agreements with Morocco, which has become an “important neighbour”, and granted it *advanced status* in 2008<sup>31</sup>, strengthening

nº 7, 2008, pp. 268-291; FERNÁNDEZ MOLINA, I., *Moroccan Foreign Policy under Mohammed VI*, Durham Modern Middle East and Islamic World East Serie, Routledge, 2016.

<sup>26</sup> UN, *Taking Up Question of Western Sahara, Some Speakers in Special Decolonization Committee Call for Urgent Self-Determination Referendum, Voice Concern over Human Rights Abuses*, GA/COL/3370 of 13 June 2023. <https://press.un.org/en/2023/gacol3370.doc.htm>.

<sup>27</sup> UNGA, *Permanent sovereignty over natural resources*, A/RES/1803(XVII) of 14 December 1962; UNGA, *Permanent sovereignty over national resources in the occupied Arab territories*, A/RES/3175 (XXVIII) of 17 December 1973; Arts. 43 and 47 of the IV Geneva Convention; See: CJUE, Judgement of 25 February 2010, *Brita*, C-386/08, ECLI:EU:C:2010:91.

<sup>28</sup> ICRC, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague of 18 October 1907, entered into force 26 January 1910; MILANO, E., “Front Polisario and the Exploitation of Natural Resources by the Administrative Power”, *European Papers*, vol. 2, nº 3, 2017, p. 963.

<sup>29</sup> UNGA, A/RES/1514(XV), *op. cit.*; UNGA, A/RES/34/37, *op. cit.*; UNGA, A/35/596, *op. cit.*; UNGA, *Question of Western Sahara*, A/RES/35/19 of 17 November 1980; UNSC, S/RES/2414 (2018) of 27 April 2018; Among others.

<sup>30</sup> Arts. 1 and 55 of the UN Charter. / UNGA, A/RES/3175 (XXVIII), *op. cit.*; Art. 47 of the IV Geneva Convention.

<sup>31</sup> LOVATT, H., and MUNDY, J., “Free to choose: A new plan for peace in Western Sahara”, *European Council on Foreign Relations*, 26 May 2021, <https://ecfr.eu/publication/free-to-choose->



cooperation between both parties<sup>32</sup>. Nevertheless, the EU has not established any ties with the representative of the Saharawis, currently the Front POLISARIO, unlike with the Palestine Liberation Organisation (PLO) on the “question of Palestine”<sup>33</sup>, and indirectly encourages the occupation to last and be perpetuated with its indifference to the rights of Saharawis<sup>34</sup>. As a consequence, the EU has been accused of being placed in “the wrong corner, politically and legally”<sup>35</sup>, because EU policies and economic interests cannot “swap the Front POLISARIO for the Kingdom of Morocco (...) nor can they replace the consent of “the Saharan originating in the territory” (...)”<sup>36</sup>.

## **2. The Judicial Saga of Western Sahara: Between the Recognition of the Front POLISARIO and the Evasive Stance of the CJEU**

The EU institutions, especially the Council and the Commission, have not recognised the reality of the occupation of Morocco and the need for decolonization of Western Sahara. The Front POLISARIO brought the issue to the CJEU to disrupt the EU’s balance and encourage a move toward resolving the conflict. The decisions of the CJEU have had a significant impact

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[a-new-plan-for-peace-in-western-sahara/](#); European Commission, *Morocco. EU trade relations with Morocco. Facts, figures and latest developments*, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/morocco\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/morocco_en).

<sup>32</sup> RUIZ GIMÉNEZ, E., “La posición de la Unión Europea en el conflicto del Sáhara Occidental. ¿Terminan los principios donde empiezan los intereses?”, *Serie Unión Europea y Relaciones Internacionales*, nº 117, 2022, p. 38; SOROETA LICERAS, J., “La cuestión de la legalidad de la explotación de los recursos del Sáhara Occidental ante el Tribunal de Justicia de la UE”, en MARTÍNEZ CAPDEVILA, C., and MARTÍNEZ PÉREZ, E.J. (dirs.), *Retos para la acción exterior de la Unión Europea*, 2017, pp. 79-80.

<sup>33</sup> CJUE, *Brita*, *op. cit.*

<sup>34</sup> DÍEZ PERALTA, E., “El Sáhara Occidental: una piedra en el camino de la asociación privilegiada entre la Unión Europea y Marruecos”, *LA LEY Unión Europea*, nº 46, 2017, pp. 5-11.

<sup>35</sup> WRANGE, P., “Western Sahara, the European Commission and the Politics of International Legal Argument”, en DUVAL, A., and KASSOTI, E. (eds.), *Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives*, London, Routledge, 2020, p. 2.

<sup>36</sup> IGLESIAS BERLANGA, M., “El Acuerdo de Pesca entre la Unión Europea y el Reino de Marruecos y su Protocolo de Aplicación 2018-2022 a la luz de la última jurisprudencia del TJUE y del Derecho Internacional”, *Dereito*, vol. 28, nº 1, 2019, p. 238.



on the “question of Western Sahara”, as they have allowed the conflict to become visible in the European judicial sphere. They have also highlighted the tensions between EU economic interests and international law.

However, the judicial saga is characterized by the internal conflict between the GC and the CJEU, which has generated doubts due to its contradictions, in particular with regard to the legal capacity of the Front POLISARIO and the implementation by Morocco of the agreements on the territory of Western Sahara. The Court has followed a rather tortuous path in its examination of the appeals lodged by the Front POLISARIO, avoiding making clear pronouncements on the legal status of Western Sahara and the lack of sovereignty of Morocco. This situation has allowed this country to continue exploiting that territory for its own benefit. In fact, the Court has been accused not only of exercising its judicial function but also of carrying out a rather “diplomatic” function<sup>37</sup>.

The GC<sup>38</sup>, on the one hand, has been open to understand the Front POLISARIO as a legal and internationally recognized representative of the Saharawis, with judicial capacity to defend the rights and interests of the Saharawi people and *locus standi*. In addition, the GC has clearly observed that Morocco implements these agreements in the territory of Western Sahara due to the fact that Morocco considers Western Sahara as part of its national territory, which means under its sovereignty<sup>39</sup>. The GC has noted that the agreements do not establish geographical boundaries, which has allowed Morocco to apply in Saharawi territory the agreements concluded with the EU by using terms such as “territory” means, for Morocco, the land areas (mainland and islands), internal waters and territorial sea under its sovereignty or

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<sup>37</sup> FERRER LLORET, J., “El conflicto del Sáhara Occidental ante los Tribunales de la Unión Europea”, *Revista General de Derecho Europeo*, vol. 42, 2017, p. 58.

<sup>38</sup> CJEU, Judgement of 10 December 2015, *Front Polisario/Council*, T-512/12, ECLI:EU:T:2015:953; CJEU, Judgement of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, ECLI:EU:C:2018:118; CJEU, Judgement of 29 September 2021, Joined Cases, *Front Polisario v Council*, T-344/19, and *Council v Front Polisario*, T-356/19, ECLI:EU:T:2021:640; CJEU, Judgement of 29 September 2021, *Front Polisario v Council*, T-279/19, ECLI:EU:T:2021:639.

<sup>39</sup> BOUKHARI, A., *op. cit.*, pp. 1-18 ; RUIZ GIMÉNEZ, E., *op. cit.*



jurisdiction”<sup>40</sup>, “products originating in Morocco”<sup>41</sup>, or “waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco”<sup>42</sup>.

On the other hand, however, the CJEU has in all the cases chosen to set aside the decisions of the GC, keeping the legal effects of the contested agreements<sup>43</sup>. The CJEU has considered that the Front POLISARIO is not entitled to seek the annulment of the agreements between the EU and Morocco, as they do not, in its view, affect the territory of Western Sahara. The Court, therefore, has understood that the Front POLISARIO is not a third party affected by these agreements because nothing in them suggests that the territory of Western Sahara is included in the implementation term. The Court has chosen to limit its examination of the various cases brought before it in relation to Western Sahara to the text of the agreements at issue, without taking into account the context of their implementation. The implementation of the agreement takes place while there is a Moroccan occupation over Western Sahara. The CJEU does not address the fact that Morocco, which considers the Sahrawi territory as its own, applies the agreements in question to this territory. In other words, the Court chose to tolerate, as the other EU institutions, the application de facto of the treaties over the territory of Western Sahara, without considering PIL, especially as regards permanent sovereignty over the natural resources of the Saharawis<sup>44</sup>.

<sup>40</sup> Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part of 29 December 2006, art. 1.15.

<sup>41</sup> Agreement (EU) 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 of 7 September 2012, art. 5.1.

<sup>42</sup> Regulations Council Regulation (EU) No 1270/2013 of 15 November 2013 on the allocation of fishing opportunities under 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, art. 2.

<sup>43</sup> CJEU, Judgement of 21 December 2016, *Council v Front Polisario*, C-104/16 P, ECLI:EU:C:2016:973; CJEU, *Western Sahara Campaign UK*, *op. cit.*

<sup>44</sup> DÍEZ PERALTA, E., *op. cit.*, pp. 18-19.



### **3. The Annulment of the EU-Morocco Fisheries and Agriculture Agreements: A Milestone in the Protection of the Right to Self-Determination of the Saharawi People**

A. Joined Cases C-779/21 P, Commission v Front Polisario, and C-799/21 P, Council v Front Polisario

One of the judgments delivered by the CJEU on 4 October 2024 concerning the “question of Western Sahara” was in Joined Cases C-779/21 P and C-799/21 P, which dealt with an agricultural agreement between the EU and Morocco<sup>45</sup>. In this judgment, the CJEU confirmed the annulment of Council Decision (EU) 2019/217 of 28 January 2019<sup>46</sup>, requested by the Front POLISARIO. The Decision violated the right to self-determination of Western Sahara and the principle of relative effect of treaties by not having the consent of the persons affected by such Decision. In fact, the Decision established in its art. 6 its clear application in the territory of Western Sahara, indicating that

“(a)n agreement between the European Union and the Kingdom of Morocco is the only means of ensuring that the import of products originating in Western Sahara benefits from preferential origin, given that only the Moroccan authorities are able to ensure compliance with the rules necessary for the granting of such preferences”.

The GC, in its judgment T-279/19<sup>47</sup>, the judgment appealed in this proceeding, held that the Council had wrongly assumed a margin of appreciation to decide whether or not the consent of the Saharawi people was necessary. The CJEU departed from this judgement, firstly ruling that the Saharawi liberation movement, the Front POLISARIO, without being a legal person under any national legal system of any member State, is representative of the Saharawis. It further held that the contested Decision directly and indi-

<sup>45</sup> CJEU, Joined Cases C-779/21 P and C-799/21 P, *op. cit.*

<sup>46</sup> Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

<sup>47</sup> CJEU, Case T-279/19, *op. cit.*



ividually affected this movement, since its application extends to the territory of Western Sahara, thereby affecting the right to self-determination of the Saharawi people (paras. 63-64).

The CJEU confirmed that, in accordance with the principle of relative effect of treaties, the implementation of an agreement between the EU and Morocco in Western Sahara requires the consent of the Saharawi people (paras. 132-135). Furthermore, as regards consent, the CJEU established implied consent if the agreement in question does not create obligations for the people of Western Sahara (para. 153), which is not the population of the territory, but the persons entitled to self-determination (paras. 127-129). The consultation conducted by the Commission and European External Action Service (EEAS) was not correct in not differentiating between the affected populations and the people of Western Sahara (para. 130). Therefore, the principle of relative effect of treaties and the principle of self-determination legally limit the margin of discretion of the EU institutions<sup>48</sup>.

In addition, “*specific, tangible, substantial and verifiable benefit* from the exploitation of that territory’s natural resources” must be obtained and have an impact on the Saharawi people (para. 153). Nevertheless, the CJEU, at this point of its argumentation, forgot to mention The Hague Regulations (IV), whose art. 55 states that the occupier State, Morocco in the present case, can only act for the needs of the local population or for its own security interests, but not for the sake of profit<sup>49</sup>. Therefore, it should be noted that the Court’s argument regarding the benefits of economic activities in occupied territories contradicts PIL, as it allows them to operate outside the causes permitted by The Hague Regulations (IV).

The CJEU found that above requirements are not met in this case, because the people of Western Sahara are not particularly distinguished from

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<sup>48</sup> ODERMATT, J., “Whose Consent? On the Joined Cases C-779/21 P, Commission v Front Polisario and C-799/21 P, Council v Front Polisario”, *Verfassungsblog on matters constitutional*, 5 October 2024. <https://verfassungsblog.de/commission-v-front-polisario/>.

<sup>49</sup> VON MASSOW, S., “Joined Cases C-779/21 P, *Commission v Front Polisario* and C-799/21 P, *Council v Front Polisario*: The Unresolved Contest Between ‘Benefits’ and ‘Consent’”, *EJIL:Talk!*, 23 October 2024. <https://www.ejiltalk.org/joined-cases-c-779-21-p-commission-v-front-polisario-and-c-799-21-p-council-v-front-polisario-the-unresolved-contest-between-benefits-and-consent/>.



the population of the territory (para. 161)<sup>50</sup>, and because Morocco “is the beneficiary of the tariff preferences granted by the European Union to products originating in Western Sahara under that agreement” (paras. 159-160). Nevertheless, according to the CJEU, if these requirements are met, art. 73 of the UN Charter and art. 21(1) of the Treaty on EU (TEU) are fulfilled (para. 154). Consequently, following this judgment, the possibility of considering an agreement as being in conformity with international law is left open if the agreement essentially provides for a system of benefits, that is to say, reduces the right to self-determination to profit.

B. Case C-399/22, *Confédération paysanne v Ministre de l'Agriculture et de la Souveraineté alimentaire, Ministre de l'Économie, des Finances et de la Souveraineté industrielle et numérique*

Case C-399/22, another case which the Court of Justice decided on 4 October 2024 concerning Western Sahara, settled the request for a preliminary ruling<sup>51</sup>. This case is related to the labelling of agricultural products, in particular melons and cherry tomatoes harvested in Western Sahara. The preliminary questions were raised by the French Council of State on the basis of a complaint by the “Confédération paysanne” concerning the incorrect labelling of these products as Moroccan, despite being products from the territory of Western Sahara. This French trade union understood that, since the Western Sahara was not part of Moroccan territory, the labelling violated EU legislation on consumer information.

The CJEU conducted an analysis focusing mainly on EU legislation, on the basis that a Member State cannot unilaterally adopt a measure prohibiting the import of agricultural products whose labelling is not systematically in accordance with EU legislation on the indication of the country or territory of origin. The reason is that the competence in the field of the Common Commercial Policy (CCP) is exclusive to the EU, art. 3.1.e) TFEU (paras. 46 and 48). However, the CJEU was inclined to apply the logic presented by the French trade union. Western Sahara is not a Moroccan territory, which means that if a product comes from this geographical region, it must indicate its Saharawi origin, not Moroccan (para. 85), i.e. the “country of origin”, in

<sup>50</sup> UNSC, S/RES/2703 of 30 October 2023.

<sup>51</sup> CJEU, Case C-399/22, *op. cit.*



view of the Union's Customs Code<sup>52</sup>. Otherwise, it would be misleading to consumers (paras. 86-87), as the Court has already established in the *Brita* case on products of Palestinian and Israeli origin, by which the Commission issued an interpretative note on the origin of the products<sup>53</sup>.

In this case, unlike the previous Joined Cases C-778/21 P and C-798/21 P, the CJEU did not pronounce on the consent of the persons concerned, the Saharawi people. The Court simplified its reasoning by stating that it only recognizes Western Sahara as “country of origin” (para. 89) in the light of the EU Customs Code, because “(t)he territory of Western Sahara constitutes a territory distinct from that of the Kingdom of Morocco” (para. 85). The CJEU therefore limited itself to demonstrating the correct application of European rules on product labelling to protect consumers’ rights.

### **III. JUDGEMENT IN JOINED CASES C-778/21 P AND C-798/21 P: PROTECTION OF THE WATERS OF WESTERN SAHARA AGAINST EXPLOITATION BY MOROCCO AND THE EU**

#### **1. Judgement of the Court on the EU-Morocco Fisheries Agreement: Joined Cases T-344/19 and T-356/19**

The judgment in Joined Cases T-344/19 and T-356/19 constitutes the starting point of the judicial saga that led to the judgment in Joined Cases C-778/21 P and C-798/21 P<sup>54</sup>. The judgment in T-344/19 arose following two applications brought by the Front POLISARIO before the GC, the first of which was brought against Council Decision (EU) 2019/441 of 4 March 2019<sup>55</sup>, which expressly includes the Saharawi territory —“waters adjacent to the territory of Western Sahara”— in its art. 3. The second of the actions,

<sup>52</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast) of 10 October 2013.

<sup>53</sup> DÍEZ PERALTA, E., *op. cit.*

<sup>54</sup> CJEU, Joined Cases T-344/19 and T-356/19, *op. cit.*

<sup>55</sup> Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement.



T-356/19, was directed against Council Regulation (EU) 2019/440 of 29 November 2018<sup>56</sup>, which allocated fishing opportunities under the Protocol implementing the Fisheries Agreement.

The GC annulled Council Decision (EU) 2019/441 due to lack of consent of the people of Western Sahara, as it assumed that this territory is a third State to the agreement. The Court observed that the intention of the parties to the agreement was to include these waters in the fishing zone authorised for EU vessels, that is to say, it applies to the territory of Western Sahara and adjacent waters. For this reason, as required by the principle of relative effects of treaties, art. 34 of the Vienna Convention on the Law of Treaties (VCLT)<sup>57</sup>, the consent of the people whose territory is affected is required.

In addition, the GC set up that the Front POLISARIO has legitimacy to challenge the Decision of the Council, since it points out that it is subject to PII, i.e., it has legitimacy before the EU courts as a representative of the people of Western Sahara. The Front POLISARIO is for this reason directly affected by the Decision 2019/441, as it directly affects the people of Western Sahara and its role in the process of self-determination of Western Sahara confers on it an individual interest. Therefore, the consultations of the Council and the EEAS to obtain the consent of the Saharawi people were not sufficient, as they did not consult the representative body of the Saharawi people. In not having such consent, the Council violated the principle of relative effects of treaties.

The GC consequently annulled the Council's Decision on the fisheries agreement, although it maintained the effects of the Decision in order to avoid negative consequences for EU action. However, the action in case T-356/19 against the Council Regulation (EU) 2019/440 was dismissed as inadmissible because the applicant was not directly concerned by that Regulation. In conclusion, the GC, in its judgment, confirmed the importance of the principle of self-determination and the principle of relative effect of treaties, as well as the obligation of the EU to respect these basic principles

<sup>56</sup> Council Regulation (EU) 2019/440 of 29 November 2018 on the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco and the Implementation Protocol thereto.

<sup>57</sup> UN, Vienna Convention on the Law of Treaties signed on 23 May 1969, entered into force on 27 January 1980.



of PIL. The Court determined that this is only possible by obtaining the consent of the people of the Non-Autonomous Territories before concluding agreements affecting them.

## **2. Analysis of the Judgment in Joined Cases C-778/21 P and C-798/21 P on 4 October 2024**

This favourable judgment for the Saharawi cause was appealed by the Commission in case C-778/21 P and by the Council in case C-798/21 P<sup>58</sup>. Both institutions claimed that the GC had made errors of law as regards the admissibility of the cases and the legal reasoning. Contrary to its earlier case-law, the CJEU largely followed the reasoning applied by the GC, that is, at least on paper, it protects the right of self-determination of the Saharawis and the right to enjoy their natural resources, a positive turning point in the “question of Western Sahara”<sup>59</sup>.

The Court’s ruling is also considered a victory for the Saharawi people and the respect for the PIL, as the CJEU ruled that Decision 2019/441 was null and void. Thus, the CJEU recognized, on the one hand, the rights of the people of Western Sahara to self-determination and to enjoy their own natural resources, and on the other hand, stated that their consent is necessary for any agreement affecting their territory and natural resources. However, although the CJEU stressed the need to involve the Saharawi people in any decision affecting their territory, it left open the possibility that such consent may be presumed under certain circumstances.

A. The connection between the omission of the term “occupation” and the lack of consideration of the fundamental values of the EU

The CJEU has always been characterized by its continued silence regarding the *occupation* situation which constitutes the “question of Western Sahara”. It does not study the international situation and position of each of the parties, the Western Sahara and the Kingdom of Morocco, in this matter. The Court has also avoided analysing the effect of this situation on the agree-

<sup>58</sup> CJEU, Joined Cases C-778/21 P and C-798/21 P, *op. cit.*

<sup>59</sup> CARROZZINI, A., “Working Its Way Back to International Law? The General Court’s Judgments in Joined Cases T-344/19 and T-356/19 and T-279/19 *Front Polisario v Council*”, *European Paper*, vol. 7, n° 1, 7 April 2022, p. 41. <https://www.europeanpapers.eu/en/european-forum/working-way-back-to-international-law-general-court-judgments-front-polisario>.



ments between the EU and Morocco, but neither has it done so regarding the consequences of these agreements on the occupation itself, despite Morocco's public position to consider Western Sahara as part of its territory. This omission has prevented the Court from examining under the microscope of EU values the "question of Western Sahara". These omissions raise serious doubts about the legitimacy of these agreements and their impact on the right to self-determination of the Saharawi people, leading to inconsistencies.

On the one hand, the omission of the term *occupation* allows the CJEU to circumvent the application of the PIL that protects the rights of peoples under occupation, such as the right to self-determination and sovereignty over their natural resources. The Court refers, as in other cases, to international law applicable to situations of occupation, such as arts. 1, which underlines the aim of "develop friendly relations" between nations<sup>60</sup>, and 73 of the UN Charter on Non-Self-Governing Territories<sup>61</sup>, or Resolution III of the UN Conference on the Law of the Sea, although this is the Court's first reference to this Resolution<sup>62</sup>. However, in the present case, the lack of prior analysis of this situation limits the application of this legislation and weakens the coherence of the legal framework. Furthermore, the reference to Resolution III seems to aim at establishing a legal loophole to justify the exploitation by Morocco of the natural resources of Western Sahara which, in application of art. 1.b) of Resolution III, can be justified if it is made in favour of the Saharawi people, bypassing The Hague Regulations (IV). However, the Court seems to ignore that all agreements between the EU and Morocco have been characterised by benefiting exclusively Morocco<sup>63</sup>.

Furthermore, it should also be taken into consideration that an illegal occupation constitutes an illegal situation, which cannot imply any right in favour of the occupying power, according to the principle of international law

<sup>60</sup> See also: UNGA, A/RES/2625/(XXV), *op. cit.*

<sup>61</sup> See also: UNGA, A/RES/1514(XV), *op. cit.*

<sup>62</sup> UN Resolution III relation to territories whose people have not obtained either full independence or some other self-governing status recognized by the United Nations or territories under colonial domination. The Third United Nations Conference on the Law of the Sea of 3-15 December 1973.

<sup>63</sup> WRANGE, P., *op. cit.*; SMITH, JJ., "The taking of the Sahara: the role of natural resources in the continuing occupation of Western Sahara", *Global Change Peace & Security*, 2015, pp. 1-3; MILANO, E., *op. cit.*, pp. 962-963.



of *ex injuria jus non oritur* —‘unlawful acts cannot create rights’—, in favour of the offending State. The occupation of Western Sahara by Morocco has been declared illegal by the UN on several occasions, but, in addition, the occupation of the territory has been characterized by the consequent violation of art. 73 of the UN Charter, *inter alia*, starting with the fact that Morocco is torpedoing any attempt to resolve the situation —which can only be resolved by holding a referendum—, the illegal exploitation of natural resources, and the treatment of the Saharawi population<sup>64</sup>.

On the other hand, by failing to analyse the situation of the Moroccan occupation of Western Sahara, the CJEU ignores and relegates the values of the EU. These values or principles, which include the defence of peace, freedom and Human Rights, are considered “the very core of the European project” and define its identity<sup>65</sup>. Hence, the EU values encapsulate what the EU should be and is, at least according to its Treaties, especially art. 2 of the TEU: a “comunidad de valores”<sup>66</sup>. In reality, they are not only principles but also obligations, arts. 3.5 and 21 TEU require the EU and Member States to promote these values in their external relations.

The Court mentioned values in arts. 3.5 and 21.1 of the TEU<sup>67</sup>, which constitute “an ethical framework” with normative effect on the international relations of the EU<sup>68</sup>, and argued that “the Union’s action on the interna-

<sup>64</sup> UNGA, A/RES/2229(XXI), *op. cit.*; UNSC, S/RES/380(1975) of 6 November 1975; UNGA, *Question of Western Sahara*, A/RES/37/28 of 23 November 1982; UNGA, *Question of Western Sahara*, A/RES/43/33 of 22 November 1988; UNSC, S/RES/2703, *op. cit.*; Among others.

<sup>65</sup> LANE SCHEPPELE, K., VLADIMIROVICH KOCHENOV, D., and GRABOWSKA-MOROZ, B., “EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union”, *Yearbook of European Law*, vol. 39, nº 1, 2020, p. 5.

<sup>66</sup> “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. (...).” MARTÍN Y PÉREZ DE NANCLARES, J., “La Unión Europea como comunidad de valores: a vueltas con la crisis de la Democracia y el Estado de Derecho”, *UNED. Teoría y Realidad Constitucional*, nº 43, 2019, p. 129.

<sup>67</sup> “In its relations with the wider world, the Union shall uphold and promote its values”; “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation”. Treaty on European Union of 1 August 2024 (OJ C 202, 7.6.2016).

<sup>68</sup> CANNIZZARO, E., “The Value of the EU International Values”, in DOUMA, W.T.H. (eds.), *The Evolving Nature of EU External Relations Law*, T.M.C. Asser Press: Conference paper, 2021,



tional scene is to contribute, in particular, to the strict observance and the development of international law, including respect for the principles of the Charter of the United Nations" (para. 162). In addition, the CJEU recognized the importance of the principles of self-determination and the relative effect of treaties for the specific case (para. 197). However, the absence of an exhaustive analysis on the legality of the Moroccan occupation and the conclusion of agreements contradicts the EU's commitment to its own values, calling into question the value of solidarity between peoples.

The Court's failure to respect these values therefore weakens the EU's role as an authoritative actor in the international sphere and challenges the coherence of its foreign policy<sup>69</sup>. Thus, by omitting the term *occupation*, the Court does not need to enter into an examination of the application of the fundamental values of the EU to the specific case. The CJEU is building a legal framework that seems to include the legitimization of occupation itself and Morocco's exploitation of Western Sahara's natural resources. This means that, ultimately, the EU's economic interests, reflected in the trade agreements with Morocco, take precedence over the values of the EU and the PIL<sup>70</sup>.

## B. The Legal Capacity of the Front POLISARIO in the EU-Morocco Agreements

In its judgments of 4 October 2024, the Court referred for the first time positively to the legal capacity of the Front POLISARIO. In the light of EU law and the case-law of the CJEU, for a natural or legal person to be able to bring an action for annulment before the Court against acts of the Union, the conditions laid down in the Treaties must be fulfilled —art. 263 of the TFEU. Furthermore, these conditions, according to the Court, "cannot be interpreted restrictively" (para. 92).

On the one hand, the Front POLISARIO, although not recognized as a legal person in the legal systems of Member States, has sufficient legal existence to be a party to a judicial proceeding before the courts of the EU. Thereby, "with its own rights and obligations. In fact, consistency and justice pp. 3-18.

<sup>69</sup> RUIZ GIMÉNEZ, E., *op. cit.*

<sup>70</sup> GONZÁLEZ VEGA, J.A., "¿Retorno a la Historia? El Tribunal General de la UE ante el Acuerdo de Pesca UE-Marruecos de 2019", *Anuario español de derecho internacional*, nº 38, 2022, p. 12.



require recognition of the capacity of such an entity to be a party to legal proceedings so that it can challenge measures restricting its rights or decisions unfavourable to it on the part of the institutions” (para. 91). In other words, the Front POLISARIO has autonomy through its own statutes and internal organization.

On the other hand, the Front POLISARIO is a national liberation movement fighting for the independence of Western Sahara in order to set up a sovereign Saharawi State, free from Moroccan control. This organization, as the Court has stated, “is one of the legitimate interlocutors in the process conducted, with a view to determining the future of Western Sahara, under the auspices of the United Nations Security Council” (para. 95)<sup>71</sup>. It is in consequence a key actor playing a fundamental role in the conflict in Western Sahara, as a partner in international negotiations and forums and in its struggle for self-determination of the Saharawi people (para. 96).

In addition, because of this international recognition, especially at the level of the UN through various resolutions, it is noted that the Front POLISARIO has the power to seek annulment of the contested Decision as far as it concerns the territory of Western Sahara. The contested Decision directly affects the Front POLISARIO, as it affects the right to self-determination of the people of Western Sahara, since it affects the “waters adjacent to Western Sahara” —art. 3 of the Decision. This territorial encroachment also affects the rights of these people over their natural resources. In other words, the Front POLISARIO has a legitimate interest in the proceedings, that is to say, it has *locus standi* (para. 97).

Therefore, the CJEU, following the GC argumentation, concluded that the Front POLISARIO is an

“entity in question was sufficiently representative of the persons whose rights derived from EU law it sought to defend and had the autonomy and liability necessary to act in the framework of legal relationships governed by EU law and, on the other hand, it had been recognised by the institutions as an interlocutor in negotiations relating to those rights” (para. 90).

Nevertheless, if one looks closely at this case, it can be concluded that the argument put forward by the Court is only applicable to this case because

<sup>71</sup> UNSC, S/RES/2703, *op. cit.*, para. 4.



of the controverted Council Decision (EU) 2019/441. This is one of the most important inconsistencies of the Court in relation to the EU-Morocco agreements, as this Decision effectively covers the geographical area which specifically includes the territory of Western Sahara. This is not so explicit in other agreements between the EU and Morocco<sup>72</sup>, as the terms used are more general and ambiguous. However, despite the ambiguity, the Court has always preferred to conclude that the Front POLISARIO had no standing to seek the annulment of the agreement in question, that the Saharawi territory was not affected by omitting the question of *occupation*<sup>73</sup>.

Thus, as discussed, the Western Sahara is a disputed territory over which a third State, Morocco, claims its sovereignty, in contrast to an organization representing the Saharawi people whose sovereignty has been legitimately recognized, the Front POLISARIO. This situation means that Morocco applies the agreements with the EU in the Saharawi territory, due to geographical inaccuracies of these, since it considers this territory as part of its own. Despite this situation, the Court nevertheless recognizes that the Front POLISARIO has legitimacy only in case the territory is directly and literally affected by the text of the agreement itself. This leads to a great lack of protection for the Saharawis in general, since they are not only excluded from the negotiating tables but also from their last resort to defend and protect their rights, that is, from the courts. In other words, the Court should have noted that the Front POLISARIO always has legal capacity with respect to these agreements, since Morocco's interpretation of its sovereignty over Western Sahara

<sup>72</sup> For instance: Council Decision 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. Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco; Euro-Mediterranean aviation agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part of 29 December 2006.

<sup>73</sup> CJEU, Case C-104/16 P, *op. cit.*; FERRER LLORET, J., *op. cit.*, p. 58; JIMÉNEZ SÁNCHEZ, C., *El conflicto del Sáhara Occidental: el papel del Frente POLISARIO*, Tirant Lo Blanch, Fundación Universitaria Andaluza, 2015.



will always affect that territory.

### C. The Conciliation of the Principle of Self-Determination and the Exploitation of an Occupying Power of a Non-Autonomous Territory

Finally, the present study will focus on the conciliation of the principle of self-determination and the exploitation of an Occupying Power of a Non-Autonomous Territory due to the questions that the Court has raised after this judgement. The Court understood that the consent of the third party affected by agreements concluded with another State must always be obtained. Since in case of being a sovereign third State, its sovereignty would be violated, whereas if it is a people with the right to self-determination, the implementation of the agreement on that territory would violate their right (para. 161). In consequence, the consent of this third party to be affected is always required, based on art. 34 of the VCLT: principle of relative effect of treaties.

At the present case, the Court first noted, as it has previously done, that the people of Western Sahara have right to self-determination, with a separate and distinct status from the Kingdom of Morocco, being the holder of the right to self-determination<sup>74</sup>. This means that it is considered a “*third party*” with respect to the principle of relative effects of treaties —art. 73 of the UN Charter—, requiring its consent (para. 154)<sup>75</sup>. Otherwise, the agreement in question would be contrary to the principle of self-determination and the principle of relative effect of treaties of the people of Western Sahara.

It appears at first sight that the absence of such consent implies the nullity of the said agreement, which violates the obligation to strictly respect and develop PIL and the principles of the UN Charter, art. 21.1 of the TEU (para. 162). However, this obligation has meant that when referring in a general and ambiguous manner to the territory of Morocco or to the territory under its sovereignty, the territory of Western Sahara is excluded. This has been determined by the Court in the case of *Western Sahara Campaign UK*<sup>76</sup>, despite the fact that, as stated above, Morocco considers this territory to be

<sup>74</sup> CJEU, Case C-104/16 P, *op. cit.*, paras. 105-107. Based on UNGA, A/RES/1514(XV), *op. cit.*; UNGA, A/RES/2229(XXI), *op. cit.*; and ICJ, *Western Sahara*, *op. cit.*

<sup>75</sup> CJEU, Case C-104/16 P, *op. cit.*, paras. 103 and 106.

<sup>76</sup> CJEU, *Western Sahara Campaign UK*, *op. cit.*



its own, which brings legal and factual realities into conflict.

The Court, contrary to the GC, did not consider that “the effect of that agreement was to impose an obligation on the people of Western Sahara by granting the authorities of the Kingdom of Morocco certain powers, to be exercised in the territory of Western Sahara” (para. 174). That is to say, “the fact that that agreement recognises those authorities as having certain administrative powers which are exercised in that territory does not, however, allow the finding that that agreement creates legal obligations for that people as a subject of international law” (para. 175). According to the Court, the contested Decision does not recognise the alleged sovereignty of the Kingdom of Morocco over Western Sahara on the one hand, but neither is the people of Western Sahara the addressee of the fishing authorisations or of the measures adopted by the EU (para. 176). The Court for that reason concluded that the GC erred in its interpretation that “the expression of the people of Western Sahara’s consent to the agreement at issue had to be explicit” (para. 177)<sup>77</sup>, since customary international law allows consent to be given implicitly also (para. 180).

The CJEU determined that the population of a Non-Self-Governing Territory can be presumed to have consented to an international agreement if two conditions are met: (1) the agreement in question should not give rise to obligations for that population; and (2) the agreement should provide that the peoples themselves, i.e., persons entitled to self-determination, not the population of the territory as established by the GC<sup>78</sup>, receive “tangible, substantial and verifiable benefit” from the exploitation of the natural resources of that territory proportionally to the extent of such exploitation. In addition, this benefit should be accompanied by guarantees that such exploitation will take place under conditions compatible with the principle of sustainable development to ensure that no renewable natural resources remain available in abundance and that the resources renewables are continuously replenished (para. 181). Finally, the agreement in question must also provide for a mechanism of periodic monitoring to verify whether the persons concerned are actually receiving the benefit granted under the agreement.

<sup>77</sup> Permanent Court of International Justice, Judgement of 7 June 1932, *Free Zones of Upper Savoy and the District of Gex* (France v. Switzerland), p. 148.

<sup>78</sup> CJEU, Joined Cases T-344/19 and T-356/19, *op. cit.*, para. 348. Also in CJEU, Joined Cases C-779/21 P and C-799/21 P, *op. cit.*, para. 193.



Compliance with these conditions is necessary to ensure that such agreement is compatible with art. 73 of the UN Charter as well as art. 21.1 of the TEU, being “the interests of the peoples of non-self-governing territories (...) paramount” (para. 182). On this point, although the legal and procedural capacity conferred by art. 263 of the TFEU, the Court noted that the fact that “a movement which presents itself as the legitimate representative of that people objects to that agreement cannot, as such, be sufficient to call in question the existence of such presumed consent” (para. 183). In other words, the opposition of the Front POLISARIO would not be sufficient to contradict the existence of such a supposed consent if the conditions of paragraph 181 are met, even if the status of the people of Western Sahara in the law of the Union with regard to the right to self-determination is changed (para. 185).

However, this presumption of consent may be revoked by the legitimate representatives of the people concerned if the conditions are not met (para. 184). This is the case here, the Court noted that the contested Decision does not create rights for the Saharawi people, but “any benefit for the people of Western Sahara” (para. 185), since it does not establish which part of the EU’s fishing rights is Morocco and which part is the territory of Western Sahara (para. 188)<sup>79</sup>. The Court therefore concludes that the “agreement does not provide for any financial contribution to be granted for the benefit, specifically, of the people of Western Sahara” (para. 191), i.e., “the people of Western Sahara cannot be presumed to have given its consent to the application of the agreement at issue with regard to the waters adjacent to that territory” (paras. 192-193).

Finally, the CJEU, taking as a basis the judgment of the GC, stated that the Front POLISARIO, being the representative of the Saharawi people, can demonstrate that the contested Decision infringes “clear, precise and unconditional obligations” on the right to self-determination and the relative effect of treaties (para. 201). Thereby, this is subject to validity study by the CJEU.

In conclusion, the CJEU held that while the right to self-determination is an inalienable right of the Saharawi people, the consent of the Saharawis can be explicit or implicit, whenever the territory of Western Sahara is explicitly affected by an agreement between the EU and Morocco. Nevertheless, the implied consent does not mean that the Front POLISARIO, the representa-

<sup>79</sup> CJEU, Joined Cases C-778/21 P and C-798/21 P, *op. cit.*, note 2. Opinion of the Advocate General, paras. 145 and 147.



tive recognised by the CJEU itself and other EU institutions of the Saharawi people, must be consulted, since it is sufficient that no obligations are created and that peoples benefit from such exploitation. In the end, the only power of that organization is to challenge agreements if they violate the right of self-determination and the principle of relative effect of treaties.

The CJEU “is navigating a difficult path”, because its aim is to make sure that EU contracts follow international law and consider the rights of the people of Western Sahara, while maintaining economic relations between the EU and Morocco<sup>80</sup>. This implied consent may have serious consequences for the future of the “question of Western Sahara”, since a simple presumption will lead to the expressed will of the Saharawi people being undermined. Thus, weakening its right to self-determination, by merely proving that the agreement in question offers so-called benefits that it is considered valid without direct consultation with the persons concerned. This implied consent and its requirements elaborated by the Court, without customary normative basis, resembles a “construct of any foundation in international practice”<sup>81</sup>. Furthermore, the Front POLISARIO is marginalized, despite being recognized as a representative of the Saharawi people, which has deprived them of their legitimacy and negotiating power, seriously affecting their role as legitimate interlocutor. Finally, it may also involve the abusive and uncontrolled exploitation of the natural resources of Western Sahara by Morocco.

#### **IV. FINAL REMARKS: THE IMPLICATIONS OF THE JUDGEMENT FOR WESTERN SAHARA**

The judgment of the CJEU of 4 October 2024 in Joined Cases C-778/21 P and C-798/21 P annulled Council Decision (EU) 2019/441 of 4 March 2019 on the fisheries agreement between the EU and Morocco relies on the lack of express consent, free and informed of the people of Western Sahara. Although it is apparently favourable to the Front POLISARIO and the Saharawi people, it is vague and inconsistent and may have negative consequences for the future of the “question of Western Sahara”.

<sup>80</sup> ODERMATT, J., *op. cit.*

<sup>81</sup> GONZÁLEZ VEGA, J.A., *op. cit.*, p. 19.



The CJEU's reasoning is based on the interpretation of the right to self-determination and the relative effects of treaties. It also rightly distinguishes between the concepts of "affected populations" and "people of Western Sahara" —"third party". Although once again the Court does not address the issue of Moroccan occupation or analyse the recurrent application of this and other agreements in Saharawi territory.

By this judgment, the CJEU has to some extent weakened the right of self-determination of the Saharawi people by allowing that an implied consent is sufficient for the territory of Western Sahara to be affected by the agreements between the EU and Morocco. It is true that this is only possible if no obligations are created for the Saharawi people and if the agreement grants them benefits, but it removes the Front POLISARIO from the equation since explicit consent of the Saharawi people is not needed. Thus, while the Court reaffirms the role of the Front POLISARIO as a legitimate interlocutor with the EU, it simultaneously turns this recognition into a dead letter, reducing its possibility of action.

The judgment highlights the inconsistency of EU foreign policy which, on the one hand, defends the right to self-determination but at the same time allows the exploitation of resources in an occupied territory without the explicit consent of its people. This has a clear and direct impact on the rights of these people, especially their inalienable right to self-determination and exploitation of their natural resources. Thus, it seems that a new era is awakening for the EU-Morocco agreements, and the people of Western Sahara will probably fear this new era, their consent being left to a broad interpretation.

The EU seems to be neglecting its founding obligations as a community of values before this international question, allowing a third State to continue to exploit with impunity and without consequences the territory which legitimately belongs to persons illegally expelled from that territory years ago by that third State. The lack of clarity and ambiguity in the reasoning of the CJEU perpetuates legal and political uncertainty and leaves the door open to the continued exploitation of Saharawi resources without the consent of its people, even if only for profit, in clear contradiction with the basic laws of occupation.

In conclusion, the CJEU judgment, although a partial victory for the Front POLISARIO, by not addressing the fundamental issues of the Western



Sahara conflict, will have negative consequences for the peaceful and legal settlement of this long-standing conflict. The reason is that this judgment allows and to some extent legitimizes the continued exploitation of this territory by Morocco. It is consequently less likely that the international community will take steps to ensure that any agreement affecting Western Sahara is carried out with the express, free and informed consent of the Saharawi people, fully respecting their right to self-determination.

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