COMMON MARKET LAW REVIEW

CONTENTS Vol. 55 No. 2 April 2018

Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Common Market Law Review is published bimonthly.
Subscription prices 2018 [Volume 55, 6 issues] including postage and handling:
2018 Print Subscription Price Starting at EUR 851/ USD 1,204/ GBP 607.
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at lnternational-sales@wolterskluwer.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International B.V., P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

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Printed on acid-free paper.

COMMON MARKET LAW REVIEW

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Common Market Law Review **55**: 569–588, 2018.

In defence of *Front Polisario*: The ECJ as a global *jus cogens* maker

Case C-104/16 P, *Council of the European Union* v. *Front Polisario*, Judgment of the Court (Grand Chamber), of 21 December 2016, EU:C:2016:973.

1. Factual and legal context

The decision in *Front Polisario* needs to be contextualized in the long and complex dispute on the self-determination of the population of Western Sahara, a large territory in the Maghreb region, between Morocco and Mauritania, included ever since 1963 in the list of the non-self-governing territories, under Article 73 of the United Nations (UN) Charter. A former Spanish colony, Western Sahara, was occupied by Morocco in 1976, after the unilateral disengagement by Spain and a brief armed confrontation with Mauritania. From then on, it has been *de facto* administered by Morocco, except for a small fraction under the control of the movement of national liberation, Front Polisario.

The legal status of Western Sahara has been determined by the Advisory Opinion given by the International Court of Justice (ICJ), at the request of the General Assembly, on 16 October 1975.[1] In response to the two questions asked by the General Assembly, the ICJ held that prior to the Spanish colonization of that territory, Western Sahara was not a *terra nullius*, due to the existence of a rudimentary form of governmental authority.[2] The ICJ went on to say that, in spite of the existence of some previous legal ties between the local population on one hand, and Morocco and Mauritania on the other, neither of these two States could lawfully claim sovereignty over it.[3] Therefore, Western Sahara was, and still is, a non-self-governing territory whose people possess the right to self-determination.[4] This legal status was upheld in a number of resolutions enacted over the years by the UN General

1. Advisory Opinion, *Western Sahara*, ICJ Reports [1975], para 12.
2. Ibid., paras. 81–83.
3. Ibid., paras. 105–108, 128–129, 150–152. See, also, para 162. The ICJ's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian State.
4. Ibid., para 162: "the Court has not found legal ties of such a nature as might affect the application of Resolution 1514(XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory".

Assembly recognizing Front Polisario as the representative of the Sahrawi people.[5]

In the trade relationship between the European Union and Morocco, the legal status of Western Sahara has been a constant source of tension. The EU has never formally recognized the sovereignty of Morocco and, in particular, its claim to include Western Sahara in the territorial scope of bilateral agreements. The issue proved to be a thorny one with regard to the determination of the territorial scope of the Association Agreement between the EU and Morocco, concluded in 2000, which applies, under its Article 94, to the "territory of the Kingdom of Morocco".[6] Similar problems arose with regard to the territorial scope of the Fishery Partnership Agreement that entered into force in 2006, under which Morocco issues fishing licences to EU vessels in the waters within its jurisdiction.[7]

In 2006, the Legal Service of the European Parliament delivered an Opinion "as to whether the Council Regulation concluding an agreement with Morocco that would allow EU vessels to fish in the waters of Western Sahara, is compatible with the principles of international law". After pointing out that the principle of self-determination imposes obligations on Morocco "*vis-à-vis* the people of Western Sahara", the Legal Service took the view that the consistency with international law of the EU Fishery Agreement depended on the implementation by the Moroccan authorities, and not on conduct by the EU institutions. While conceding that the EU may have the duty to oversee the implementation of the agreement – without specifying its legal basis – the Opinion concluded that a blatant breach of the obligations incumbent on Morocco pursuant to the principle of self-determination could entail the suspension of the agreement by the EU.[8]

On 8 March 2012, the Council adopted a decision concluding a bilateral agreement between the EU and Morocco on reciprocal liberalization

5. See also, UN General Assembly Resolutions A/RES/45/21, 20 Nov. 1990, A/RES/34/37 21 Nov. 1979 and A/RES/35/19 11 Nov.1980.

6. Council and Commission Decision 2000/204/EC, ECSC of 24 Jan. 2000 on the conclusion of 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 2000/204/EC, ECSC, O.J. 2000, L 70/1.

7. Council Regulation (EC) 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, O.J. 2006, L 141/1. See Milano, "The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing too South", (2006) *Anuario Espanol de Derecho Internacional*, 413–433.

8. See Legal Service of the European Parliament, Legal Opinion SJ-0085/06, D(2006)7352 of Feb. 2006.

measures on agricultural and fishery products.[9] The agreement was concluded in the framework of the Association Agreement; it also amended some provisions of the Association Agreement and its protocols. Therefore, the scope of the new agreement extends to the "territory of the Kingdom of Morocco" under the terms of Article 94 of the Association Agreement.

2. The proceedings before the General Court

On 19 November 2012, Front Polisario, acting in its capacity of representative of the Sahrawi people for the purposes of self-determination, brought an action for the annulment of the Council Decision concluding the liberalization agreement. In its view, the conclusion of this agreement, insofar as it applied to products originating from Western Sahara, was in breach of a number of rules and principles, mainly related to individual and collective rights possessed by the Sahrawi people under domestic EU law and under international law among which, pre-eminently, the principle of self-determination.[10]

The General Court dismissed the preliminary objections raised by the Council and by the Commission concerning the status of Front Polisario as a legal person under Article 263 TFEU. The decisive element, in this regard, was the actorship possessed by Front Polisario under international law. The General Court found that Front Polisario was taking part in the UN-led peace process concerning the fate of Western Sahara, and that it was considered by the UN as an essential actor in that process.[11]

Much more complex was the rejection of the preliminary objections raised by the Council and by the Commission on the lack of direct and individual concern by Front Polisario as a consequence of the contested decision.[12] To determine whether Front Polisario was directly and individually affected by

9. 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 liberalization 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 2012/497/EU, O.J. 2012, L 241/2.

10. Case T-512/12, *Front Polisario* v. *Council of the European Union*, EU:T:2015:953, para 115. See Kassoti, "The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspects of European Integration", (2017) EP 339–356, available at <www.europeanpapers.eu/en/europeanforum/the-front-polisario-v-council-case-general-court-and-volkerrechtsfreundlichkeit>.

11. Case T-512/12, *Front Polisario*, paras. 58–60.

12. Ibid., paras. 61–66.

the decision, the General Court needed to interpret Article 94 of the Association Agreement, applicable also to the liberalization agreement, which limits its scope to the "territory of the Kingdom of Morocco".[13] This provision was construed differently by the parties. According to Front Polisario, the actions by the Council and the Commission amounted to a tacit recognition of the Moroccan claim of sovereignty over the territory of Western Sahara.[14] While conceding that the Moroccan authorities applied the agreement to products originating from Western Sahara, the Council and the Commission firmly denied that this practice might have changed the EU position of non-recognition of the Moroccan claim over the disputed territory.[15]

In the interpretation of Article 94 of the Association Agreement, the General Court departed from *Brita*,[16] where the ECJ had interpreted a similar clause included in the Association Agreement between the EU and Israel in the sense that the agreement did *not* apply to the occupied Palestinian territories. The General Court noted that this interpretation was due to the existence of a parallel agreement with the Palestinian Liberation Organization (PLO), applicable to these territories; however, no agreement related to the trade of products originating from Western Sahara had been concluded by the EU, either with Front Polisario or with any other entity claiming to represent the people of Western Sahara.[17]

The territorial scope of the liberalization agreement was interpreted on the basis of the rules of interpretation laid down by Article 31 Vienna Convention on the Law of Treaties (VCLT) and, in particular, in the light of the practice followed by the parties in the implementation of the agreement, according to Article 31(3)(b) VCLT. The General Court noted that, albeit contesting in theory the sovereignty claim of Morocco over Western Sahara, the Council and the Commission were aware that Morocco applied the agreement to products originating from that territory and did not oppose that practice. The General Court concluded that the territorial scope of the agreement thus included the territory of Western Sahara and, therefore, that the decision concluding the agreement between the EU and Morocco concerned directly and individually Front Polisario.[18]

On the substance, the General Court noted that all the eleven pleas of law put forward by Front Polisario related to the same issue: whether the EU was prevented, under EU law or international law, from concluding an agreement

13. Ibid., para 73.
14. Ibid., paras. 77–80.
15. Ibid., paras. 81–87.
16. Case C-386/08, *Firma Brita GmbH* v. *Hauptzollamt Hamburg-Hafen*, EU:C:2010:91.
17. Case T-512/12, *Front Polisario,* paras. 89 et seq.
18. Ibid., paras. 99–103.

with a third State exercising *de facto* sovereign powers over a non-self-governing territory in the awareness that the agreement may be applied to that territory.[19] The General Court reviewed the eleven pleas and found no legal basis for such a prohibition in EU or in international law.[20] In particular, with regard to the principle of self-determination, the General Court relied on the opinion expressed by the UN top legal officer in a letter addressed to the Security Council concerning the legality of contracts concluded by Morocco with private foreign companies for the exploitation of the resources of Western Sahara.[21] In that letter, the legal counsel opined that these contracts were not in themselves contrary to international law; this finding was on condition, however, that the exploitation activities were pursued on behalf of the people of the non-self-governing territory, in their interest and according to their wishes. The conclusions of the letter were roughly summarized by the General Court in the following passage: "the UN Legal Counsel did not consider that the conclusion of an international agreement which may be applied to a disputed territory was, in all cases, prohibited by international law".[22]

This conclusion, however, did not settle the matter. In the final part of the judgment, the General Court gathered a number of argumentative fragments, dispersed over various of the pleas put forward by the applicant, and re-composed them into a unitary argument concerning the conditions for the conclusion of the agreement under EU law. This analysis, which was quite cursory, led the General Court to assume that the wide discretionary power possessed by the EU political institutions in shaping EU trade external relations is limited by the need to ensure that the exploitation of the resources of a non-self-governing territory "is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights" protected by the Charter of Fundamental Rights of the EU and by international law.[23]

This assumption, which appears to be a reductive and simplified version of the opinion of the UN legal counsel referred to above, ultimately prompted the General Court to conclude that the failure to conduct such a preliminary inquiry entailed that the Council had manifestly exceeded its margin of

19. Ibid., para 117.

20. Ibid., para 215: "it follows from all of the foregoing considerations that nothing in the applicant's pleas and arguments supports the finding that, under EU law or international law, the conclusion of an agreement with a third State which may be applied on a disputed territory is absolutely prohibited".

21. Letter dated 29 Jan. 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, available at <www.arso.org/Olaeng.pdf> (last visited 20 Sept. 2017).

22. Case T-512/12, *Front Polisario,* paras. 207–211.

23. Ibid., paras. 225–229, quotation from para 228.

discretion with regard to "whether it is appropriate to conclude an agreement with a non-member State which will be applied on a disputed territory".[24] On that basis, the contested decision was annulled.[25]

3. Opinion of the Advocate General

In a lengthy and detailed Opinion, Advocate General Wathelet suggested that the ECJ take a different path than that of the General Court. In his view, the action ought to have been declared inadmissible, since it was based on the erroneous premise that the liberalization agreement applied to the territory of Western Sahara.[26] In what turned out to be his main point, the Advocate General proposed that the Court reverse that premise, and interpret Article 94 of the Association Agreement as excluding the territory of Western Sahara from the scope of the liberalization agreement.[27]

The Advocate General's line of reasoning was based on the qualification of the territory of Western Sahara as a non-self-governing territory under Article 73 of the UN Charter. From this qualification, the Advocate General drew the consequence, based on a passage contained in the General Assembly Declaration on Friendly Relations among States,[28] that Western Sahara possessed a "distinct and separate status" from that of the *de facto* administering State. The logical inference of that principle was, in his view, that an agreement applicable to the "territory of the Kingdom of Morocco" cannot apply to Western Sahara.[29] This conclusion was further reinforced, in the Opinion, by the policy of non-recognition by the EU of the sovereignty of Morocco over the territory of Western Sahara. The Advocate General expressly rejected the idea of "application without recognition" submitted by the Council to explain the strange situation of accepting the application of the liberalization agreement to that territory by the Moroccan authorities, without assuming liability for such conduct.[30]

While recognizing that the Council and the Commission were aware of the *de facto* application of the agreement to the territory of Western Sahara, the Advocate General ruled out that this awareness amounted to a subsequent practice, to be used as a means of interpretation under Article 31(3)(b)VCLT. To override the clear terms of a treaty, the Advocate General added, the

24. Ibid., para 223.
25. Ibid., para 247.
26. See Opinion of A.G. Wathelet, EU:C:2016:677, paras. 113–114.
27. Ibid., paras. 68–82. In particular, see para 82.
28. UN General Assembly Resolution A/RES/25/2625 24 Oct.1970.
29. Opinion, paras. 75–76.
30. Ibid., para 86.

practice should be "known to and accepted by the parties and … sufficiently widespread and sufficiently long term to constitute a new agreement in itself". In the case at hand, the Advocate General concluded, these conditions were not fulfilled.[31]

Other parts of the Advocate General's Opinion deserve a certain amount of attention. While recognizing the broad discretion enjoyed by the EU political institutions in the field of external economic relations, the Advocate General upheld the view of the General Court, according to which such a wide discretion is matched by the need to assess all the relevant facts pertaining to its choice. Therefore, judicial review should determine whether the measures taken fall within this broad margin of discretion, and are not manifestly disproportionate or arbitrary.[32]

In the view of the Advocate General, the European courts are competent to review whether the EU political institutions have properly assessed the likely impact on human rights by measures in the field of external economic relations.[33] Interestingly, this duty was not based on the extraterritorial application of the EU Charter of Fundamental Rights,[34] but rather on international law and, in particular, peremptory rules of international law protecting basic human rights, including the principle of self-determination.[35] The implications of this holding are quite far-reaching, as they may entail that, contrary to what the ECJ said in *Kadi*,[36] the European judicature, when assessing the validity of EU domestic acts implementing international agreements, has preliminary competence to assess the validity of these agreements in light of *jus cogens.*

4. The judgment of the ECJ

In the judgment on the appeal – which had been lodged by the Council – the ECJ reversed the main argument made by the General Court, namely that the liberalization agreement applied to the territory of Western Sahara, and quashed its ruling.[37]

31. Ibid., para 96.
32. Ibid., paras. 220–224.
33. Ibid., paras. 230–236.
34. Ibid., paras. 270–271.
35. Ibid., paras. 256–259.
36. See Joined Cases C-402/05 & 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, para 287.
37. Judgment, paras. 126–127.

In its view, Article 94 of the Association Agreement should not be interpreted in the light of the subsequent practice of the parties, under Article 31(3)(b) VCLT, but rather in the context of the relevant rules of international law applicable in the relations between the parties, under its Article 31(3)(c). In particular, the Court contextualized the interpretation of Article 94 in the frame of the principle of self-determination, highlighting the peremptory nature and the *erga omnes* structure of the obligations flowing from that principle.[38] The Court concluded that, in order to ensure consistency with the principle of self-determination, Western Sahara must be excluded from the territorial scope of the Agreement.[39] This conclusion was buttressed by reference to other principles of international law: the principle of the relative authority of treaties and the principle of the relative effect of a treaty, respectively enshrined in Article 34 and Article 29 VCLT. In the view of the Court, these principles converge to limit the application of a treaty, in principle, to the area where the parties exercise the "fullness of the powers granted to sovereign entities by international law".[40]

The finding that the liberalization agreement does not apply to the territory of Western Sahara entails that Front Polisario was not directly and individually concerned by the conclusion of such agreement. This finding made it unnecessary for the Court to answer the question whether Front Polisario was a legal person under Article 263 TFEU and entitled to bring an action for annulment. A positive answer to that question, however, could be inferred by implication. In the logical order of the issues to be dealt with by the Court, the capacity of the claimant to bring a claim, indeed, precedes the assessment that the impugned act was of direct and individual concern for it. The Advocate General's Opinion identified a three-pronged argument for recognizing the capacity of Front Polisario to institute proceedings, namely: the implicit recognition of the Front as a negotiating partner of the UN; its capacity as the representative of the Sahrawi people for the purpose of the implementation of the principle of self-determination; its recognition as a National Liberation Movement by a significant part of the international community.[41] This argument tends to convey the idea that the legal capacity to institute proceedings under EU law could be based on the legal personality of an entity under international law. If one assumed that this argument has been implicitly accepted by the ECJ, international legal persons would possess under EU law the capacity to bring an action seeking the annulment of EU acts, including EU acts that conclude international agreements.

38. Ibid., paras. 86–88.
39. Ibid., para 92.
40. Ibid., paras. 94–107, quotation from para 95.
41. See Opinion paras. 138–146.

The ECJ deemed it proper not to remand the case to the General Court, but to give a final ruling on the dispute. On the basis of its previous analysis of the means of interpretation to be used to identify the territorial scope of the agreement, the Court easily declared the action brought by Front Polisario inadmissible, and ordered Front Polisario to cover its own costs and those of the Council.[42]

5. Comment

In spite of its modest and unassuming tone, *Front Polisario* will probably be regarded as a significant jurisprudential development. Although the Court's line of reasoning is apparently confined to the interpretation of the territorial scope of the liberalization agreement with Morocco, its implication is more general by far, and could silently contribute to the development of one of the most controversial doctrines in international law, namely *jus cogens*: a doctrine that is not even expressly mentioned in the decision.

The explanation of this apparent paradox requires one to enter into a technical discussion of problematic notions of international and EU law. For the sake of clarity, this discussion will be articulated along the following scheme: in the first section, attention will be turned towards the particular technique of interpretation adopted by the ECJ, namely contextual interpretation. In this section, it is argued that the reasoning of the Court, which granted priority to contextual interpretation over other competing means of interpretation, reveals that interpretation was used as a conflict-avoidance technique, to prevent a conflict between the liberalization agreement and the principle of self-determination. The second section explores the normative context in which the liberalization agreement was interpreted, and, in particular, the content and status of the principle of self-determination and the normative consequences of its violation. The third section assesses the effect of the interpretative decision adopted by the ECJ, comparing it with the effect of a possible decision of invalidity of the liberalization agreement. The last, conclusive, section, assesses the ultimate consequence of this decision in terms of judicial policy. In my view, this case can tacitly but decisively contribute to shaping a new role for *jus cogens* in the international legal order, more consistent with the overall values that must give guidance, under Article 21 TEU, to EU action in the international scene.

42. Ibid., paras. 128–134, 137.

5.1. *Contextual interpretation vs. subsequent practice*

The decision is quite reticent on the reasons that led the Court to grant priority to contextual interpretation over subsequent practice.[43]

The sole argument offered by the Court is that the conduct of the parties, in particular of the EU, was performed *de facto* and did not establish an agreement with regard to interpretation, as required by Article 31(3)(b)VCLT. It emerges from the ECJ's reasoning that the Court conceived of this agreement as a distinctive element, whose presence is necessary to bestow upon the conduct of the parties the capacity to influence the interpretation of the treaty.[44] Interestingly, the ECJ excluded the existence of such an "agreement" on the basis of a logical argument: consent on the part of the EU would be incompatible with the principle of self-determination and with the principle of the limited effect of the treaties, whilst the EU "repeatedly reiterated the need to comply with those principles".[45]

Suggestive as it may seem, this explanation is unconvincing. As evidenced by the studies undertaken by the International Law Commission on the role of subsequent practice in treaty interpretation, the existence of an "agreement between the parties" is not an additional requirement, whose existence must be distinctively demonstrated. It is, rather, implicit in the subsequent practice that, if consistently and coherently performed, reflects the existence of an understanding of the parties on the interpretation to be given to certain treaty provisions.[46] Otherwise, the distinction between subsequent agreement and subsequent practice, respectively governed by Article 31(3)(a) and (b) VCLT, would make little sense.

While chiding the General Court for excessively relying on one of the means of interpretation laid down by Article 31 VCLT, namely the factual context, to the detriment of another, the normative context, the ECJ has thus committed the same methodological error, albeit in the inverse way. It has given exclusive relevance to the normative context, thus imposing an interpretation in accordance with the principle of self-determination, leaving aside the factual context, which pointed in the opposite direction, namely that

43. Judgment, para 86.

44. Ibid., paras. 122–124.

45. Ibid., para 123: "the purported intention of the European Union, reflected in subsequent practice and consisting in considering the Association and Liberalization Agreements to be legally applicable to the territory of Western Sahara, would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties… even though the European Union repeatedly reiterated the need to comply with those principles".

46. See International Law Commission, *Second Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, by Georg Nolte, Special Rapporteur, 26 March 2014. A/CN.4/671, paras. 42 et seq.

the parties had consistently applied the agreement to products originating from the territory of Western Sahara.

Both findings seem to be based on the erroneous underlying belief that, in case of divergence between factual context and normative context, this conflict can be settled by giving priority to one of these means of interpretation over the other.[47] Beyond the theoretical suggestions raised by the tension between fact and law, one must frankly recognize that, in positive law, the conflict is an irresolvable one. The prevailing scholarly and judicial views tend to exclude the existence of rules designed to settle actual, or potential, conflicts among the various means and techniques of interpretation. It is rather their interaction that should ultimately produce the output of the interpretative process.[48]

Contrary to what the ECJ pointed out in para 124, this priority can hardly be traced back to the principle of good faith in treaty interpretation. Such a principle is not a conflict-settling rule and, indeed, it could equally well be invoked to support either one of the conflicting means of interpretation. Nor could the solution chosen by the Court be persuasively grounded on the principle of the relative effect of treaties, mentioned in para 123 of the judgment. Since the ECJ was called to interpret the notion of the "territory of Morocco", the principle of the relative effect of this provision does not help much to determine whether the "territory of Morocco" also extends to the Western Sahara.

Should one conclude, agnostically, that the distinct perspectives advocated by the two Courts are equally legitimate, with the surprising result that the final conclusion adopted by the ECJ has no higher authority that that deriving from the higher position of the court that pronounced it?

There is, in the view of the current writer, a line of reasoning that emerges, albeit implicitly, from the decision of the ECJ and which, appropriately developed, could significantly support the ECJ's conclusion in a more general and interesting theoretical perspective. As said above, in para 88 the Court

47. The erroneousness of this presumption emerges more clearly if one considers that the Vienna Convention refrained from making a choice between the philosophically antithetical conceptions reflected by these two methods, namely consensualism and objectivism. Both are part of the "crucible" of the Vienna Convention, and both contribute to composing the complex standard that leads to the interpretation of a treaty provision in a given case. On the domestic, EU, level, the solution adopted by the ECJ reveals the tendency of the ECJ to reduce the hold of the political institutions on treaty interpretation and to reserve a considerable leeway for judicial adjudication.

48. In particular, Villiger, "The rules on interpretation: misgivings, misunderstandings, miscarriage? The 'crucible' intended by the International Law Commission", in Cannizzaro (Ed.), *The Law of Treaties Beyond the Vienna Convention* (OUP, 2011), p. 485. Gardiner, *Treaty Interpretation* (OUP, 2015), p. 485; Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, 2015), p. 285 et seq.

insisted on the *erga omnes* structure of the principle of self-determination and on its peremptory nature. It follows that, within the normative context to be considered for interpretative purposes, there was a rule having higher rank than the agreement to be interpreted, and whose breach would have entailed its invalidity. The higher rank of self-determination provides an excellent reason for giving priority to the technique of contextual interpretation over the competing technique of subsequent practice. Arguably, if the territorial scope of the liberalization agreement had been interpreted on the basis of the subsequent practice of the parties in its implementation, the consequence would have been the invalidity of the agreement under international law[49].

This is the typical effect of the doctrine of consistent interpretation, whereby superior law permeates the interpretation of inferior rules so as to prevent a possible conflict from arising, and to recast harmony and consistency between apparently diverging rules.[50] This doctrine may thus be regarded as a special case of contextual interpretation, to be mandatorily used if recourse to a different means of interpretation would entail a conflict between the agreement to be interpreted and a peremptory rule of international law.[51]

49. The existence of this conceptual link has been indirectly upheld by A.G. Wathelet in his Opinion of 10 Jan. 2018 in Case C-266/16, *Western Sahara Campaign UK* v. *Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs,* EU:C:2018:1,concerning a request for a preliminary ruling from the High Court of Justice (England & Wales) on the interpretation of the territorial scope of the association agreement and on the validity of the Fisheries Partnership Agreement between the EU and Morocco, O.J. 2016, C 260/31. This case, still pending at the time of writing, presents some analogy with the one annotated here. However, this Opinion of the A.G. differs in one fundamental regard from the Opinion in *Front Polisario*. Whereas, in the latter case, A.G. Wathelet maintained that Art. 94 of the EU-Morocco Association Agreement could be interpreted as excluding Western Sahara from its territorial scope, in Case C-266/16, the A.G. reached the opposite conclusion. His analysis therefore went on to determine the consistency of the agreement with international law. The A.G. concluded that the Fisheries Partnership Agreement is inconsistent with the principle of self-determination since "the contested acts … do not correspond to either the *free* pursuit of its economic development or to the *free* disposal of its wealth and of its natural resources", nor with the obligation, codified in Art. 41 of the ASR, "not to recognize an illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination and not to render aid or assistance in maintaining that situation" (para 146; emphases in original). Having further noted that the agreement could not by justified by the duties of Morocco as an occupying power, the A.G. proposed that the ECJ should find that the EU acts concluding such an agreement are invalid.

50. Arguably, in the EU legal order, the doctrine of consistent interpretation may find its legal basis in Art. 3(5) and Art. 21(2) TEU. By including among the constitutional objectives of the Union, the "strict observance and the development of international law", these provisions express the *völkerrechtsfreundlich* nature of the European order.

51. Although not listed by the Vienna Convention, consistent interpretation has been used in international case law to bring "ordinary" international law in accordance with *jus cogens*. See International Court of Justice, *Oil Platforms (Islamic Republic of Iran* v. *United States of*

5.2. *The conflict between the liberalization agreement and the principle of self-determination*

The priority given to contextual interpretation seems thus to be based on the need to prevent a conflict between the liberalization agreement and *jus cogens*. But was there such a conflict? Or, in more general terms, is there a conflict between the principle of self-determination and an agreement between the administering power and a third State that regulates the exploitation of the resources of a non-self-governing territory?

In the 2006 opinion, mentioned above, the Legal Service of the European Parliament took the view that such a conflict did not exist, since the consistency with international law of a fishery agreement applicable in the waters under the jurisdiction of Morocco depended on the implementation of the agreement by the Moroccan authorities.[52] Along these lines, both the Council and the Commission maintained before the ECJ that a distinction ought to be made between the *de facto* tolerance and the *de jure* recognition of the conduct of Morocco in Western Sahara.[53] According to the suggestive formula employed by Advocate General Wathelet, these divergent views had been finally settled by an "agreement to disagree", according to which the EU accepted that the Agreement was implemented according to the interpretation

America), Judgment, 6 Nov. 2003, ICJ Reports [2003], p. 161 et seq., paras. 40–43. Separate Opinion of Judge Simma, ibid., at 324 et seq. On an analogous reasoning may rest the otherwise controversial finding of the ECJ in Case C-386/08, *Brita.* In that case, the ECJ referred to the Association Agreement between the EU and the PLO to interpret the scope of the agreement between the EU and Israel, although the former was certainly not a rule of international law applicable in the relations between the parties, according to Art. 31(3)(c) VCLT. One fails to see why Israel should accept its agreement with the EU to be interpreted in accordance with another agreement to which it is not a party. This shortcoming is avoided if one considers the two agreements as parts of a ternary normative relation, whose invisible third component is the principle of self-determination.

52. Opinion of EP Legal Service, cited *supra* note 8. In a further Opinion (document dated 13 June 2009), following the proclamation of the Exclusive Economic Zone by the Front Polisario in the waters off the coast of Western Sahara, the Legal Service, after dismissing the idea that this proclamation may have a legal effect on the implementation of the agreement, and after reasserting that it was for the Moroccan authorities to implement the agreement in accordance with international law, pointed out that "… [i]n the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Sahrawi people over their natural resources, principles which the Community is bound to respect, the Community should refrain from allowing vessels to fish in the waters off Western Sahara by requesting fishing licences only for fishing zones that are situated in the waters off Morocco" Legal Opinion regarding the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco by the European Parliament's Legal Service, 14 July 2009, SJ 0269/09, D(2009)37828.

53. Opinion of A.G. Wathelet, paras. 64 et seq.

adopted by Morocco, while preventing Morocco from using the EU acquiescence to enhance its claim of sovereignty over Western Sahara.[54]

Beyond its hypocrisy, this formula can hardly absolve the EU from the obligations flowing *erga omnes* from the principle of self-determination and, in particular, from the obligation not to cooperate in the exploitation of resources of a non-self-governing territory if not made on behalf, for the benefit and according to the wishes of its people, according to the tripartite condition set out by the UN legal counsel in 2002.[55]

Possibly referring to the first of these conditions, and following the suggestion of the Advocate General, the ECJ found that interpreting the territorial scope of the agreement in such a way as to include the territory of Western Sahara would be inconsistent with the obligation, incumbent upon all the actors of international law, to recognize a "separate and distinct status" for non-self-governing territories.[56] This holding appears to be a logical consequence of the principle of self-determination.[57] Including a non-self-governing territory within the scope of an agreement referring to the territory of Morocco is certainly not the best way to comply with that principle.[58]

54. Ibid., para 67.

55. Letter cited *supra*, note 21: "where resource exploitation activities are concluded in non-self-governing territories for the benefit of the peoples of these 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 General Assembly Resolutions and the principle of "permanent sovereignty over natural resources" enshrined there" (paras. 24–25).

56. Judgment, para 92. The autonomy and distinctiveness of the status of non-self-governing territories may be seen as the premise, at the primary level, of the obligation not to recognize the legality of situations created by a breach of *jus cogens*. In its 2004 *Wall* Opinion, the ICJ made it clear that this obligation is part of general international law "given to the character and the importance of the rights in question"; see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports [2004], p. 136, para 159.

57. Although contested by some writers (see Kassoti, "The *Council* v. *Front Polisario* Case: The Court of Justice's selective reliance on international rules on treaty interpretation (Second Part)", (2017) EP, 23–42), the idea that the principle of self-determination entails a distinct and separate territorial status appears to reconcile two apparently antithetical needs: to secure, in the *interim* period, the ordinary course of economic and social life in non-self-governing territories, on the one hand; to not affect the claim to self-determination by stabilizing the foreign administration, which must remain temporary by essence, on the other hand.

58. The Court abstained from going through the other two conditions, respectively referring to the interest and the wishes of the population. It emerges from the Opinion of A.G. Wathelet, paras. 293–299, however, that, in the case at hand, neither had been fulfilled. Arguably, the cumulative character of the three conditions under international law would make compliance with one or two of them immaterial. The existence of a duty to oversee the implementation of agreements having a potentially detrimental effect on human rights has been affirmed by the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/

The existence of this obligation explains why the principle of self-determination is violated by the mere conclusion, and not only by the implementation, of an agreement on the exploitation of resources of a non-self-governing territory. The identification of the principle of self-determination as the legal basis of such an obligation entails that the validity of a conflicting agreement must be assessed against the primary *jus cogens* rule; and not, or not only, against the secondary rules that establish the legal consequences of the breach.[59] This inference is not irrelevant, since the secondary consequences of a *jus cogens* breach, as enshrined in Article 41 of the Articles on State Responsibility, do not necessarily have peremptory character.

5.3. *The effect of the decision*

The effect of the interpretative decision enacted by the ECJ presents striking analogies with a declaration of invalidity. In particular, pursuant to the interpretation of the agreement provided by the Court, the EU Institutions and the Member States are prevented from accepting certificates of origin under the agreement with Morocco relating to products originating from the territory of Western Sahara.[60] Moreover, the decision applies retroactively, from the time of the conclusion of the agreement.

There is a major difference, though. A declaration of invalidity of the decision concluding the liberalization agreement, pronounced on the ground that the agreement conflicted with *jus cogens* on the international level, would

2016/MHZ, of 18 Jan. 2017, concerning the EU-Turkey Statement of 18 March 2016. Having found that "Regrettably, in this case, no human rights impact assessment was done before the Agreement was signed", the Ombudsman recommended that "The Commission should include, in its forthcoming reports on progress made in the implementation of the Agreement ('EU-Turkey Statement'), a separate section focusing on specific aspects of the implementation which carry significant risks for human rights compliance and on measures aimed at minimizing the negative impact on human rights". In its previous decision in Case 1409/2014/MHZ, concerning the EU-Vietnam free trade agreement, of 26 Feb. 2016, after finding that "the Commission failed to provide valid reasons for its refusal to carry out a prior human rights impact assessment for the EU Free Trade Agreement with Vietnam when negotiations on that agreement were still ongoing", the European Ombudsman concluded that this failure "constitutes maladministration".

59. Judgment, para 92.

60. In the line of reasoning of the decision, *de facto* tolerance and *de jure* recognition are two sides of one and the same coin. They simply represent two different ways to violate the principle of self-determination, in its active and in its passive dimension. The continuing tolerance by the EU of the Moroccan practice of issuing certificates of origin concerning products originating from Western Sahara would therefore amount to an unlawful conduct, to the effect that Front Polisario could bring an action for damages against the EU, under Art. 340(2) TFEU, as representative of the interests of the Sahrawi people.

have invalidated it in its entirety, under Article 44(5) VCLT. By using consistent interpretation as a technique to avoid conflict, the ECJ has escaped these straits and successfully managed to bring the liberalization agreement in line with *jus cogens*. Therefore, the liberalization agreement, as well as its ancestors – the Association Agreement and the Fishery Partnership Agreement – are, insofar as the EU is concerned, still valid and applicable in the relations with Morocco.

Obviously, the interpretation provided by the ECJ is not binding for Morocco under international law. The decision in *Front Polisario* has not been enacted by an international dispute settlement body, but rather by a domestic judge of one of the parties to the agreement. It creates a dispute rather than settling it.

Negotiations are, therefore, in course to settle the divergent interpretations given by the two parties, and to decide the fate of the various agreements concerned.[61] Due to the constitutional restraints imposed by that decision, however, the negotiations can certainly not envisage a return to the situation existing *de facto* prior to the enactment of the decision.[62]

61. The ECJ decision formally has the authority of *res judicata* only with regard to the liberalization agreement, in the sense that it states that its territorial scope does not extend to the territory of Western Sahara. However, the principles on which this finding is based have a broader scope and apply to all the agreements concluded between the EU and Morocco. Therefore, the decision also sets out the legal framework on the basis of which other cases concerning the legality of agreements on the exploitation of resources of non-self-governing territories must be assessed. The first litmus test will probably be two pending cases: namely Case T-180/14, *Front Polisario* v. *Council*, concerning the action for annulment brought by Front Polisario against the Council Decision 2013/785/EU of 16 Dec. 2013, which concluded the Protocol between the European Union and the Kingdom of Morocco on the fishing opportunities and financial contribution between the European Union and the Kingdom of Morocco, O.J. 2013, L 349/1; and the abovementioned Case C-266/16, *Western Sahara Campaign* concerning the validity of the Fisheries Partnership Agreement. Interestingly, in his Opinion, A.G. Wathelet refers to a possible solution that had allegedly been envisaged by the Council and the Commission in order to implement the judgment annotated here (*Front Polisario*). In the words of the A.G, such a solution "would be to extend its scope by agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco so that Western Sahara would be expressly covered" (para 144). If this contemplated solution were to be adopted, it would amount to a circumvention of the principles on which the decision in *Front Polisario* is grounded.

62. See Déclaration conjointe par Federica Mogherini et le Ministre des Affaires étrangères et de la coopération du royaume du Maroc Salahddine Mezouar, of 21 Dec. 2016, which seems to reveal the embarrassment of the EU. In the statement, both parties declared they "ont pris acte de l'arrêt rendu ce jour par la Cour de Justice de l'Union Européenne", and "examinent toutes les implications possibles du jugement de la Cour et travailleront de concert sur toute question ayant trait à son application". Subsequent meetings with the delegation of Morocco have been not easy for the EU. Cf. Kingdom of Morocco, Ministry of Culture and Communication, Department of Communication, "EU will take appropriate measures to secure agricultural agreement, preserve partnership with Morocco, Joint Statement", <www.maroc.ma/en/news/

Curiously enough, in *Front Polisario* the ECJ did not refer to the doctrine of the direct effect to dismiss an individual action aimed at invalidating an EU legal act allegedly conflicting with international law. This may be due to the fact that the action was only formally brought against an EU act, namely the decision concluding the liberalization agreement; substantially, it aimed at assessing the validity of the liberalization agreement. The ECJ may have assumed that the doctrine of direct effects does not apply to conflicts between two international rules, one of which, the superior rule, sets the standard of review for the other, inferior, one.[63] If this assumption were correct, the ECJ would have inaugurated a line of case law whereby *jus cogens* could be used in order to invalidate international rules, or their implementing domestic acts, within the EU legal order.

6. Concluding remarks

Front Polisario was not an obvious decision by any means. Its underlying rationale – namely that an agreement which regulates the consequences of a previous breach of *jus cogens* committed by one of its parties is, itself, in conflict with *jus cogens* and therefore null and void – is certainly not part of the prevailing scholarly view. Quite the contrary: as long as one remains in the traditional, Aristotelian, conception of "conflict" as something triggered by two contradictory obligations that cannot be simultaneous discharged,[64] it is

eu-will-take-appropriate-measures-secure-agricultural-agreement-preserve-partnership-morocco>. In the sense that the Court's ruling cannot fail to provoke important changes in the application of the liberalization agreement, see Dudley, <www.forbes.com/sites/dominicdudley/2016/12/21/european-court-dismisses-moroccos-claim-to-western-sahara-throwing-eu-trade-deal-into-doubt/#efff35f44931>.

63. There is thus a difference between *Front Polisario* and *Racke*. In *Front Polisario, jus cogens* was invoked as a standard of review of the agreement, and not, or not only, of the domestic EU act. The situation in *Racke* was logically reversed. The international rules on the suspension and termination of treaty relations were invoked as a standard of review of the EU act and not of the agreement suspended by that act. The Court found that the Regulation was adopted "pursuant to those rules" and, therefore, applied the *Nakajima* exception, to the effect that the international rules on the suspension and termination of the agreement were used as a standard of review regardless of their having direct effects (see para 48 of the judgment). See Wessel, "Reconsidering the relationship between international and EU Law: Towards a content-based approach?", in Cannizzaro, Palchetti and Wessel (Eds.), *International Law as Law of the European Union* (Martinus Nijhoff Publishers, 2011), pp. 7–34; Mendez, *The Legal Effects of EU Agreements* (OUP, 2013); Martines, "Direct effects of international agreements of the European Union", (2014) EJIL, 129–147.

64. This narrow notion of conflict is supported by the prevailing scholarly view. See, among the most recent contributions, Vidmar, "Rethinking *jus cogens* after *Germany* v. *Italy:* Back to Article 53?", (2013) NILR, 1–25; Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies", (2015) *Netherlands Yearbook of International Law*, 173–210. An

highly doubtful that the liberalization agreement, or some other twist in the EU-Morocco saga, is itself in direct conflict with the principle of self-determination.[65]

Based on that logic, the International Court of Justice dismissed, in *Jurisdictional Immunities*, the idea that the rules on State immunity were in conflict with the prohibition of mass murder, deportation and slavery of civilians and prisoners of war, on the grounds that the two sets of rules do not impose contradictory obligations. Admittedly, a State that directs its courts not to exercise jurisdiction in respect of another State alleged to have committed a serious breach of *jus cogens* rules, has in no way committed a breach of these rules.[66] If the same logic applied to the case at hand, one would be tempted to conclude that the EU, by agreeing to trade certain goods originating from the territory of Western Sahara, has not unlawfully occupied Western Sahara; nor has it denied the right of the Sahrawi people to self-determination.

It is therefore starting from a different conception that the ECJ, in *Front Polisario*, found that the principle of self-determination does not only address the State that unlawfully controls a non-self-governing territory, but also all the actors of the international community, imposing upon them the obligation to preserve the distinctiveness of the territorial status of that territory.[67] This innovative finding has far-reaching implications.

interesting point on the use of interpretation as a conflict settling technique is made by Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press, 2017), p. 69, according to whom indirect conflicts between treaties and *jus cogens* could be solved through recourse to "accepted interpretative canons". On that basis, the author concludes for a narrow interpretation of the notion of conflict. However, where the application of accepted canons of interpretation leads to a divergent solution, only the need to prevent a conflict with *jus cogens* may grant priority to one of these canons, namely *jus-cogens-konforme Auslegung*, over the others. In favour of a wider notion of conflict, see, recently, Dupuy, "Le jus cogens, les mots et les choses. Où en est le droit impératif devant la CIJ près d'un demi-siècle après sa proclamation?", in *The Present and Future of Jus Cogens* (Sapienza Università Editrice, 2015), available at <www.editricesapienza.it/node/7633>, pp. 99–132.

65. See Vranes, "The definition of 'norm conflict' in international law and legal theory", (2006) EJIL, 395–418.

66. *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening*), Judgment, ICJ Reports [2012], p. 99 et seq., para 93. An analogous argument is also the basis for the decision of the ECtHR, *Al-Adsani* v. *The United Kingdom*, Appl. No. 35763/97, judgment of 21 Nov. 2001 and the UK House of Lords in *Jones* v. *Saudi Arabia*, [2007] 1 Appeal Cases (AC) 270, ILR, Vol. 129, p. 629. For a general account, see Cannizzaro, "A higher law for treaties", in Cannizzaro, op. cit. *supra* note 48, pp. 425–442.

67. But even conceding that non-self-governing territories do not have a distinct territorial status, there would nonetheless be grounds for contending that the principle of self-determination is breached by treaties between the occupying power and third States that dispose of the natural resources of the territories. It is not unreasonable to assume that the principle of self-determination establishes not only *erga omnes* obligations but also *erga omnes*

From an international law perspective, *Front Polisario* further develops the idea that the prohibitory reach of *jus cogens* rules is not limited to conduct that directly infringes the interests protected by these rules, but it also invalidates, by virtue of the relevance of the interests protected,[68] all inferior rules that can affect its effectiveness. In itself, this is a valuable contribution by the ECJ to the development of the doctrine of *jus cogens.* From an EU constitutional law perspective, the decision has the non-negligible effect of putting *jus cogens* at the forefront of EU foreign relations. It is a reminder that, where fundamental interests of the international community are at stake, the guiding thread for the conduct of the EU political institutions comes from international law, not from the *raisons d'État*.

Enzo Cannizzaro*

rights. In particular, the non-self-determined entity has the right to freely determine the use of the natural resources of its territory. Such a right will be infringed by a treaty on the exploitation of the resources concluded by a third State with the occupying power, regardless of whether the treaty reserves a certain share of the revenues for the benefit of the population of that territory.

68. *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain) (New Application: 1962*), ICJ Reports 1970, p. 3 et seq., para 33.

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