

International Law versus Realpolitik? The European Union Court of Justice and the Western Sahara

by Federico Petrangeli

The European Council, during its meeting on 17-18 October, addressed numerous pressing challenges facing the Union, including the ongoing conflicts in Ukraine and the Middle East, as well as European Union policies regarding competitiveness and migration. The conclusions reiterated EU support for a “rules-based international order”. As the document states in paragraph 27, “In a time of heightened conflict and tension, alongside an *alarming trend of disregard for international law*, the European Council reaffirms its unwavering commitment to effective multilateralism and to the *rules-based international order with the United Nations at its core*, steadfastly upholding the UN Charter and the rules and principles enshrined in the UN Charter, including those of *sovereignty and territorial integrity, political independence and self-determination*”.¹

¹ European Council Conclusions, 17 October 2024, <https://europa.eu/ljvPyB3>.

Holding true to this fundamental commitment is however very challenging for the EU, as illustrated by two recent rulings by the Grand Chamber of the Court of Justice of the EU (CJEU), on 4 October (C-779/21 and 799/21 P; C-778/21 P and C-798/21 P).² In these decisions, the Court ruled that the Union’s trade agreements with Morocco violated international law, for what concerns their applicability to Western Sahara.³ This issue is highly sensitive both politically and institutionally, as Morocco is a key partner for the EU in North Africa, and

² CJEU, *Judgment of the Court (Grand Chamber) of 4 October 2024 in Joined Cases C-779/21 P and C-799/21 P: Commission v Front Polisario*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62021CJ0779>; and *Joined Cases C-778/21 P and C-798/21 P*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62021CJ0778>.

³ According to Jed Odermatt, “is the first time the CJEU has annulled an EU agreement for violating international law binding on the Union”. See Jed Odermatt, “Whose Consent? On the Joined Cases C-779/21 P. Commission v Front Polisario and C-799/21 P, Council v Front Polisario”, in *Verfassungsblog*, 5 October 2024, <https://verfassungsblog.de/?p=85773>.

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the subject involves an overlap between trade policy (an exclusive competence of the EU) and foreign policy (primarily the domain of member states).

The Western Sahara question

Western Sahara is a very sparsely populated territory, largely composed of desert flatlands. Long a Spanish colony, in 1963 Western Sahara was included by the UN General Assembly in the list of “non-self-governing territories”, a status it retains today. In 1973 the Polisario Front was constituted, beginning its struggle for independence of the land. In 1974, Spain announced plans to hold a referendum on the territory’s future, but the following year it withdrew from it, transferring control to Morocco and Mauritania. In 1976, the Polisario Front proclaimed the establishment of the Sahrawi Arab Democratic Republic, and was subsequently recognised by the UN General Assembly as the legitimate representative of the people of Western Sahara (1980). Mauritania renounced its claims in 1979, but Morocco soon occupied the territory evacuated by Nouakchott. The status of Western Sahara remains the subject of a long-stalled United Nations-mediated peace process.

Over the years, various UN bodies, such as the General Assembly, the Security Council and the International Court of Justice, have recognised and reaffirmed the inalienable right of the people of Western Sahara to self-determination. Meanwhile, Morocco’s occupation and the ongoing conflict with the Polisario Front have caused a large exodus of civilians, most of whom

fleeing to refugee camps in Algeria. In 1984, Western Sahara was admitted as a full member of the Organization of African Unity (OAU), a move that led Morocco to withdraw (Rabat joined the successor of OAU, the African Union, only in 2017).

In 1991, Morocco and the Polisario Front agreed “in principle” to a UN-mediated Settlement Plan, which included a ceasefire agreement and a proposed referendum on the future status of the land. However, despite the deployment of a dedicated UN mission (MINURSO), the referendum has never materialised, mainly due to disagreements over voters’ eligibility, exacerbated by Rabat’s policy of resettling large numbers of Moroccans in the territory. After the failure of two UN-proposed draft agreements in 2001 and 2003 (Baker Plan I and II), the Security Council shifted its approach, encouraging the parties to reach a mutually agreed plan.⁴ This move proved to be short-sighted, as Morocco’s new king Mohammed VI publicly ruled out independence for Western Sahara. In 2007, Morocco and the Polisario Front (the latter through South Africa) submitted their proposal to the UN: the Polisario Front advocated for a referendum that would include independence as one of the options, while Morocco proposed a plan for autonomy under Moroccan sovereignty.⁵

⁴ Hugh Lovatt and Jacob Mundy, “Free to Choose: A New Plan for Peace in Western Sahara”, in ECFR Policy Briefs, May 2021, <https://ecfr.eu/?p=72863>.

⁵ See the two plans in the UN Digital Library: *Letter dated 16 April 2007 from the Permanent Representatives of South Africa to the United Nations addressed to the President of the General Assembly*, <https://digitallibrary.un.org/>

In the following years, Morocco has increased its grip and administrative control over almost three quarters of the region, also thanks to the separation wall built to isolate Western Sahara from Mauritania and Algeria. In November 2020 the ceasefire broke down, as the government tried to open a road in the buffer zone near the border with Mauritania.

Meanwhile the diplomatic impasse was altered, when the United States recognised Moroccan sovereignty over Western Sahara, in exchange for Rabat's normalisation of relations with Israel under the Abraham Accords. Since then, some other States have made similar moves in favour of Rabat's claims, even if without a formal recognition of its sovereignty, including certain EU member states such as Germany, the Netherlands, Malta, Finland, Spain and, most recently, France. In the meantime, the armed conflict has resumed, although at low intensity.

EU-Morocco agreements and their implications

Under their Euro-Mediterranean Association Agreement (2000), the EU and Morocco have established several sectoral agreements, including those on sustainable fishing in 2006,⁶ and

record/598213; and *Letter dated 11 April 2007 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council*, <https://digitallibrary.un.org/record/597424>.

⁶ European Community and Morocco, *Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco – Protocol*, 26 July 2006, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:22006A0529\(01\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:22006A0529(01)).

the liberalisation of agricultural and fisheries products in 2010.⁷ Despite being formally limited to the “territory of the Kingdom of Morocco”, these agreements have been applied in practice to Western Sahara as well. The CJEU ruled this extension unlawful in 2016 and 2018 (cases C-104/16 P and C-266/16), asserting that, under Article 73 of the UN Charter, Western Sahara is a “non-self-governing territory” with a “separate and distinct” status from Morocco.⁸

In light of these rulings, the EU and Morocco negotiated new agreements in 2019, which explicitly included Western Sahara and its adjacent waters.⁹ These

⁷ Council of the European Union, *Council Decision 2012/496/EU of 2 December 2010 on the Signature of the 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, Fish and Fishery Products...*, <https://eur-lex.europa.eu/eli/dec/2012/496/oj>.

⁸ CJEU, Judgment of the Court (Grand Chamber) of 21 December 2016 in Case C-104/16 P: *Council v Front Polisario*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62016CJ0104>; and Judgment of the Court (Grand Chamber) of 27 February 2018 in Case C-266/16: *Western Sahara Campaign UK*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62016CJ0266>.

⁹ Council of the EU, *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*, <http://data.europa.eu/eli/dec/2019/441/oj>; and *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*

agreements were justified by the EU as: (a) they do not constitute EU recognition of Moroccan sovereignty over Western Sahara; (b) they are expected to yield socioeconomic benefits for Western Sahara, particularly in terms of employment and investment; and (c) they were agreed after the European Commission undertook extensive consultations in both Western Sahara and Morocco to ensure the involvement of the local population.

However, the Polisario Front challenged Council decisions, leading the Court to rule in September 2021 that they were unlawful (Joined Cases T-344/19 and T-356/19 and Case T-272/19), a decision which the Commission and the Council appealed.

Gran Chamber's 4 October ruling

On 4 October 2024, the Grand Chamber upheld the 2021 decision, reaffirming and expanding its previous jurisprudence. The ruling's primary focus was on the issue of "consent". The Court concluded that, under international law, the "people of Western Sahara" should be considered a "third party" in agreements between the EU and Morocco.¹⁰ As such, any such agreement could only be applied to the territory with the explicit or implied consent of the Sahrawi people. The Court emphasised that consent could only be implied if the agreement conferred "precise, tangible, substantial and verifiable" advantages to the people

Morocco, of the other part, <http://data.europa.eu/eli/dec/2019/217/oj>.

¹⁰ CJEU, *Judgment of the Court (Grand Chamber) of 4 October 2024 in Joined Cases C-779/21 P and C-799/21 P*, cit.

of Western Sahara, which, in this case, it found was not true.¹¹ Moreover, it clarified that the current *population* of Western Sahara could not give consent, as many of them are not part of the Sahrawi *people*, who are entitled to self-determination, but are largely displaced abroad. Therefore, the consultations conducted by the Commission, not involving the Polisario Front, are insufficient to claim the consent of the Sahrawi people.

This leads us to the second point: the role of the Polisario Front. While not being the "exclusive representative" of the Saharawi people, according to the Court, the Polisario Front has "sufficient legal existence" to contest, before the EU judicature, the legality of an act of the Union which directly affects the legal situation of the people of Western Sahara in its capacity as holder of the right to self-determination.¹² The Court not only reaffirms the Polisario Front's legal standing, but likewise its international and domestic role, also in the exploitation of Western Sahara's natural resources.

The third point is about international law. The Court underlines that it must consider international law

¹¹ Unlike its previous judgments, the Court conceded that this consent may be implied. This position will not be warmly welcomed by international law scholars, for it may likely weaken the right of self-determination.

¹² On the procedural aspects, see Katarzyna Szepelak, according to whom, with this decision the Court paved the way for non-State entities to access the EU's justice system. Katarzyna Szepelak, "Taking Locus Standi of International Actors Seriously. Joined Cases C-779/21 P and C-799/21 P (Front Polisario II)", in *Verfassungsblog*, 15 October 2024, <https://verfassungsblog.de/?p=86162>.

comprehensively (both treaty and customary law) in its decisions, going beyond the mere assessment of “manifest errors” in EU acts, as argued in the appeal by the Commission and Council.

The political fallout

Following the Court’s decision, EU officials, including President Ursula von der Leyen and High Representative Josep Borrell, reaffirmed the EU’s commitment to strengthening its partnership with Morocco.¹³ The aforementioned European Council’s conclusions from 17-18 October echoed this sentiment.¹⁴

The EU is Morocco’s leading trade partner, and Morocco is among the EU’s top trading partners in the Southern Neighbourhood. The EU-Morocco trade agreements provide mutual benefits, including to European fishermen and consumers. They also benefit the inhabitants of Western Sahara, including the remaining

Sahrawis, as the European Commission reported in 2021.¹⁵ For sure, the agreements strengthen political ties between Brussels and Rabat, a strategic asset, not only for cooperation in counterterrorism and migration control. Notwithstanding, EU policies are required to respect international law, as mandated by Article 7 of the Treaty on European Union (TEU). While this legal obligation may seem burdensome in certain contexts, it is a distinctive feature of the EU’s identity on the global stage and a source of its appeal beyond its borders. It is thus surprising that the Commission and the Council relied on a shift in the Court’s well-established position, despite the absence of any substantive change on the ground.

Looking ahead

The EU faces a complex challenge in navigating its trade relations with Morocco, balancing strategic and economic interests with its legal obligations. As Spanish Minister for Agriculture and Fisheries, Luis Planas, recently summarised: “We will respect the ruling, but we are politically very interested in deepening strategic relations with Morocco”.¹⁶ As the

¹³ European Commission and HR/VP, *Joint Statement by President von der Leyen and High Representative/Vice-President Borrell on the European Court of Justice Judgements relating to Morocco*, 4 October 2024, https://ec.europa.eu/commission/presscorner/detail/en/statement_24_5044.

¹⁴ See European Council Conclusions, 17 October 2024, cit., paragraph 51: “The European Council takes note of the European Court of Justice’s recent judgments relating to the 2019 EU-Morocco agreements. The European Council and the Council will continue to define foreign policy in accordance with the Treaties. The European Council reaffirms the high value the European Union attaches to its strategic partnership with Morocco and reiterates the need to preserve and continue strengthening close relations with Morocco in all areas of the Morocco-EU partnership.”

¹⁵ European Commission, *2021 Report on the Benefits for the People of Western Sahara on Extending Tariff Preferences to Products from Western Sahara* (SWD/2021/431), 22 December 2021, p. 11, https://taxation-customs.ec.europa.eu/node/1629_en.

¹⁶ Khadija Tachfine, “Spain’s Agriculture Minister Advocates Strengthening Ties with Morocco Despite ECJ Ruling”, in *HESPRESS English*, 22 October 2024, <https://en.hespress.com/?p=93768>; Council of the EU, *Agriculture and Fisheries Council - October 2024: Arrival and doorstep ES (Planas Puchades) - Part 3* (video), 21 October 2024, <https://newsroom>.

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Court's decision, the liberalisation agreement remains provisionally in effect for 12 months, to avoid serious negative consequences for EU external relations and to ensure stability in its international commitments. There is a temporary framework to maintain stability in EU-Morocco relations, tough, but there is no time to waste.

Rabat has successfully consolidated its control over Western Sahara and garnered international recognition for its claims, leveraging various strategic interests (exploitation of natural resources, migration control, relations with Israel, etc.). By a global point of view, the Gran Chamber's decision is probably not enough to restore the balance with the Polisario Front. For EU legal order, though, the Court's decision offers a framework for renewing negotiations. The only legal basis for the UE to have trade relation with Western Sahara is obtaining the consent of the Saharawi people, represented by the Polisario Front. The Court's ruling binds EU institutions but also member states, including those that supported the Commission and the Council in the judgment before the Court, led either by economic interests (Portugal), political support to Rabat (France and Spain) or to its American ally (Hungary and Slovakia). Now that the Court has had the last word, the member states should also be bound, together with the Commission and the Council, to leverage the Court's position to facilitate renewed negotiations between the parties. The path forward may involve finding a middle ground between

consilium.europa.eu/videos/shotlist/146361-3-arrival-and-doorstep-es-planas-puchades-part-3-20241021.

autonomy and independence, as the "free association" scheme scholars have recently outlined.¹⁷ Morocco should be convinced it can no longer pretend to be unconstrained by international law. Conversely, Polisario Front should be advised to seize the moment to secure the best representation and protection for the Sahrawi people. They both need to adjust their positions within the framework of international law, with a dose of *Realpolitik*.

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¹⁷ Hugh Lovatt and Jacob Mundy, "Free to Choose", cit.

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